COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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

FINAL ORDER

On June 24, 2009, the Fraternal Order of Police, E.B. Jermyn Lodge 2 (FOP) and the City of Scranton (City) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) to a June 4, 2009 Proposed Decision and Order (PDO). In the PDO, the Board Hearing Examiner concluded that the City did not commit an unfair labor practice by denying a request for union representation for two officers during a meeting with the City. The Hearing Examiner also concluded that the City did commit an unfair labor practice by making statements to the officers during the meeting that would tend to coerce them in their exercise of protected rights.

In its exceptions, the FOP asserts that the Hearing Examiner erred in failing to find that the City committed an unfair labor practice under Section 6(1)(a) of the Pennsylvania Labor Relations Act (PLRA) by violating the officers' rights to union representation at an investigatory interview under National Labor Relations Board v. J. Weingarten, Inc., 420 U.S. 251, 95 S. Ct. 959 (1975). The City asserts in its exceptions that the Hearing Examiner erred in finding that it violated Section 6(1)(a) of the PLRA by making statements that would tend to coerce employes in the exercise of protected rights. After the Secretary of the Board granted the parties' requests for extensions of time to file briefs, the FOP and the City both filed briefs in support of their respective exceptions on September 8, 2009.[1] The FOP filed a brief in response to the City's exceptions on September 25, 2009.

The parties' exceptions pertain to the Hearing Examiner's findings and conclusions concerning what transpired during an August 26, 2008 meeting between Raymond T. Hayes, the City's Public Safety Director, Lisa Moran, the City's Human Resources Director, and Officers Melissa Forsette and Jill Foley regarding a sexual harassment grievance filed by the FOP on behalf of the officers. Finding of Fact 8 in the PDO sets forth the Hearing Examiner's version of that meeting as follows:

> 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 [Chief Elliot's secretary] from Chief Elliott's office to City Hall a few days after she related that he referred to

[1] The FOP requested an extension of time until September, 8, 2009 to file its brief, whereas the City only requested an extension until September 4, 2009. The City faxed a copy of its brief to the Board on September 4, 2009, and a hard copy, appearing by a private postage meter mark to have been mailed September 4, 2009, was received by the Board on September 8, 2009. The Board, however, does not accept filings by fax. Pennsylvania State Corrections Officers Association v. Commonwealth of Pennsylvania, 34 PPER 2 (Final Order, 2002). Nor is a private postage meter mark evidence of timely filing. Northwest Area Education Association v. Northwest Area School District, 38 PPER 147 (Final Order, 2007). Accordingly, the City's brief in support of its exceptions, filed when received on September 8, 2009, is untimely. However, the City's brief was couched as a brief in support of its exceptions and in opposition to the exceptions of the FOP. Because the City's response to the FOP's exceptions would not have been due until twenty days after receipt of the FOP's brief, 34 Pa. Code §95.98 (c), the City's brief has been reviewed to the extent that it is responsive to the FOP's exceptions.

> 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.

(PDO at 2-3).

The FOP does not challenge Finding of Fact 8, but argues on exceptions that the Hearing Examiner erred in concluding that the August 26, 2008 meeting did not qualify as an investigatory interview for purposes of Weingarten, supra. Under the Board's adoption of Weingarten, an employe is entitled to the assistance of a union representative when the employe is in an investigatory meeting with the employer and the employe holds a reasonable fear of being disciplined as a result of the employer's questioning. Commonwealth of Pennsylvania, Office of Administration v. PLRB, 591 Pa. 176, 916 A.2d 541 (2007). The Board has recognized, however, that where the employer gives the employe reasonable assurances that they will not be disciplined as a result of their answering the employer's questions, generally the employe should rely on that representation and not have any fear of discipline. In that case, there would be no right to a Weingarten representative.

However, what may start out as a non-investigatory interview without the intent of imposing discipline, may in fact turn into an investigation of the employe being questioned. AFSCME v. Commonwealth of Pennsylvania, Pennsylvania Emergency Management Agency (PEMA), 31 PPER ¶ 31034 (Final Order, 2000), affirmed, 768 A.2d 1201 (Pa. Cmwlth. 2001). Indeed, where the employe has a reasonable fear of discipline and has made a request for union assistance, the employe does not need to make repeated demands for representation at every permutation of the investigation. New Jersey Bell Telephone Company, 300 NLRB 42 (1990) (rejecting the employer's claim that an employe must wait until the employer explains purpose of the interview before a timely request for union representation can be made). Thus, at any time during a meeting where the employer's assurances are, or become, less than convincing, the employe retains a right to union assistance. Sayre Area Education Association v. Sayre Area School District, 36 PPER 54 (Final Order, 2005). Accordingly, an employe's Weingarten right to union assistance arises any time the employe comes to reasonably believe that unfavorable responses to the employer's questions may lead to discipline. Amalgamated Transit Union, Local 85 v. Port Authority of Allegheny County, 22 PPER ¶22010 (Final Order, 1990).

Here, the meeting with Mr. Hayes started out innocently enough. It is undisputed that at the start of the August 26, 2008 meeting, Mr. Hayes stated to Officers Forsette and Foley that he wanted to tell them of the outcome of the grievance against Chief Elliot in which they were the victims, and that neither of them were the object of any discipline. However, after explaining the discipline that was issued to Chief Elliot, the subject and purpose of the meeting with Officers Forsette and Foley changed. As the Hearing Examiner found, "[Mr. Hayes] next asked [Officers Forsette and Foley] to name the officers who they told him had been joking about Chief Elliot's reference to them as 'whores'". (Finding of Fact 8; emphasis added). Notably, Officers Forsette and Foley were aware that the City had transferred Ms. Pugliese, the Chief's secretary, after she told the City about the Chief's statements regarding Officers Forsette and Foley. Given that understanding, Officers Forsette and Foley could reasonably believe that their answers may lead to a similar change in working conditions, or possibly discipline. Indeed, when Mr. Hayes began questioning

Officers Forsette and Foley about the other officers who were allegedly making jokes, Officers Forsette and Foley made a second request for union representation.

When Mr. Hayes was not satisfied with the response that Officers Forsette and Foley were unable to tell him who had been making the jokes, the tenor and subject of the investigation changed yet again -- this time directed at Officers Forsette and Foley. Mr. Hayes became accusatory, repeating his questions and suggesting that Officers Forsette and Foley were being uncooperative and less than forthright. Officers Foley and Forsette insisted that they were being truthful about not knowing who had been making the jokes. While Mr. Hayes stated that he was not calling them liars, he also stated that he found their statement hard to believe given that they are trained police officers.

While employer investigations of an alleged hostile work environment are difficult and often involve 'hard' questioning of witnesses, a line must be drawn when the investigation becomes accusatory of the employe being questioned. It is beyond cavil that a reasonable employe would understand that they could be disciplined by the employer if they were thought to be lying to a supervisor. At the point the employe reasonably believes that the employer is accusing him or her of wrongdoing or lying during an interview and there is the potential for discipline, the employe clearly has the right to union assistance in accordance with Weingarten.

Accordingly, once Mr. Hayes began to question the responses given by Officers Forsette and Foley and suggested that they were being untruthful with him, the officers then had a right to their requested union representation. This is so notwithstanding Mr. Hayes' prior assurances that were given at the start of the meeting. At the point of the investigation when Mr. Hayes became accusatory and began questioning the veracity of the answers that were being provided by Officers Foley and Forsette, it is then that the City had an obligation to either reassure the officers that they would not be disciplined, or to honor the officers' request for union representation. On these particular facts, having done neither, the City violated the Weingarten rights of Officers Foley and Forsette. Accordingly, we shall sustain the FOP's exceptions and find a violation of Section 6(1)(a) of the PLRA.

The City excepts in part to Finding of Fact 8, and also excepts to the Hearing Examiner's conclusion that Mr. Hayes violated Section 6(1)(a) of the PLRA by stating that a nearby flag pole had more of a right to be at the meeting than did the FOP's president or lawyer. The City asserts that Finding of Fact 8 is incomplete because Mr. Hayes did not make the comment three times in succession, but rather made the comment at three separate times during the meeting in response to Officer Foley's requests for union representation. The City's clarification, however, is irrelevant to the Hearing Examiner's finding of an unfair labor practice. International Brotherhood of Painters and Allied Trades Local Union 1968 v. Erie City School District, 40 PPER 12 (Final Order, 2009) (a hearing examiner need not make a finding of fact that would be irrelevant to the outcome). An employer's statement, even if innocently made, may constitute an independent violation of Section 6(1)(a) of the PLRA where it would have a tendency to coerce employes in the exercise of protected rights. Fraternal Order of Police, E.B. Jermyn Lodge 2 v. City of Scranton, 38 PPER 104 (Final Order, 2007). As determined by the Hearing Examiner, even if said just once, Mr. Hayes' comment, subordinating the FOP to a lesser position then a flagpole for purposes of dealing with the City, would tend to coerce employes in seeking the assistance of the FOP, given Hayes' implication that such an effort would be futile. See Id. Accordingly, we agree with, and adopt herein, the Hearing Examiner's findings, discussion, and conclusion that under the totality of the circumstances, Mr. Hayes' comment to Officer Foley violated Section 6(1)(a) of the PLRA.

After a thorough review of the exceptions and all matters of record, the Board shall sustain the exceptions filed by the FOP, dismiss the City's exceptions, and reverse the Proposed Decision and Order in part consistent with the above discussion.

ORDER

In view of the foregoing and in order to effectuate the policies of Act 111 and the Pennsylvania Labor Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed by the Fraternal Order of Police, E.B. Jermyn Lodge 2 are sustained, and the exceptions filed by the City of Scranton are hereby dismissed. The June 4, 2009 Proposed Decision and Order, be and hereby is made absolute and final as amended herein.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, Anne E. Covey, Member, and James M. Darby, Member, this fifteenth day of December, 2009. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within order.

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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AFFIDAVIT OF COMPLIANCE

The City of Scranton hereby certifies that it has ceased and desisted from its violation of Section 6(1)(a) of the Pennsylvania Labor Relations Act; that it has posted a copy of the proposed decision and order and final order as directed; and that it has served an executed copy of this affidavit on the Fraternal Order of Police, E.B. Jermyn Lodge 2 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