# COMMONWEALTH OF PENNSYLVANIA Pennsylvania Labor Relations Board

PENNSYLVANIA STATE TROOPERS
ASSOCIATION :

:

v. : Case No. PF-C-08-154-E

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COMMONWEALTH OF PENNSYLVANIA : PENNSYLVANIA STATE POLICE :

### FINAL ORDER

On December 7, 2009, the Commonwealth of Pennsylvania, Pennsylvania State Police (PSP) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) to a Proposed Decision and Order (PDO) of a Board Hearing Examiner issued on November 17, 2009. In the PDO, the Hearing Examiner sustained the Charge of Unfair Labor Practices filed by the Pennsylvania State Troopers Association (PSTA), and found that the PSP violated Section 6(1)(a) and (c) of the Pennsylvania Labor Relations Act (PLRA), as read in pari materia with Act 111 of 1968, by conducting an internal affairs investigation of Corporal Gerald Williams. The Secretary granted the PSP an extension of time to file a brief in support of the exceptions, and the PSP timely filed its brief on January 6, 2010. The PSTA filed a timely brief in opposition to the exceptions on January 26, 2010.

The facts relevant to the Charge of Unfair Labor Practices, and the exceptions, are summarized as follows. The collective bargaining agreement between the PSP and the PSTA expired on June 30, 2008. Unable to resolve their disputes to reach a successor agreement, the parties proceeded to binding interest arbitration under Act 111. Corporal Gerald Williams is assigned to Troop P, Wyoming, and is both the Vice President of the PSTA's Fraternal Order of Police Lodge No. 43, and a member of the PSTA's contract negotiation committee.

In the interest arbitration, the PSTA made a proposal concerning creditable leave and salaries for union officials. Numerous e-mails were circulated among PSTA members criticizing the proposal. Also, numerous questions about the proposal were addressed to Corporal Williams in his capacity as a PSTA official.

On September 10, 2008, while off-duty and using his home computer, Corporal Williams responded to one of the inquiries via his PSP e-mail account. In his response to Sergeant Jeffrey Balut, Corporal Williams defended the PSTA leadership and the contract proposal, and was critical of the PSP leadership. In relevant part, Corporal Williams wrote as follows:

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.

Later that evening, while still off-duty and using his home computer, Corporal Williams wrote a second e-mail to Corporal Thomas Wall in which he discussed the contract proposal and stated, in relevant part, that:

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.

Corporal Williams' e-mails to Balut and Wall were circulated to other members of the PSP, including numerous commissioned officers. Lieutenant Colonel John Brown, the PSP's Deputy Commissioner of Administration and Professional Responsibility, eventually received Corporal Williams' e-mails from a Captain in Internal Affairs. Lieutenant Colonel Brown believed that Corporal Williams may have violated PSP regulations, and on October 6, 2008, filed a complaint with the PSP's Bureau of Integrity and Professional Standards (BIPS). The complaint stated, in relevant part, that Corporal 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." Thereafter, Captain Donald Peters, Corporal Williams' Troop P Commander at the time, notified Corporal 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.

The Hearing Examiner determined that Corporal Williams was engaged in protected activity in writing the September 10, 2008 e-mails, and that by subjecting him to an internal affairs investigation because of those e-mails, the PSP violated both Section 6(1)(a) and (c) of the PLRA. An employer commits an unfair labor practice under Section 6(1)(c) of the PLRA if it discriminates against an employe for engaging in protected concerted activity. To support a charge of discrimination, the complainant must establish that the employe engaged in activity protected by the PLRA, that the employer had knowledge of that 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). The employer's motive creates the offense under Section 6(1)(c) of the PLRA. PLRB v. Ficon, 434 Pa. 383, 254 A.2d 3 (1969). However, the employer's motive is irrelevant for an alleged independent violation of Section 6(1)(a) of the PLRA. An employer commits an independent violation of Section 6(1)(a) where, in light of the totality of the circumstances, the employer's action has a tendency to coerce a reasonable employe in the exercise of protected rights. E.B. Jermyn Lodge No. 2 of the Fraternal Order of Police v. City of Scranton, 38 PPER 104 (Final Order, 2007).

The PSP argues on exceptions that Corporal Williams lost the protections of the PLRA when he engaged in insubordinate conduct by referring to commissioned officers in his emails as a "classless, good-ole boy network" and by encouraging those receiving his e-mails to disseminate them to "whomever you see fit, including commissioned officers." Relying on Pennsylvania State Corrections Officers Association v. Commonwealth of Pennsylvania, Fayette SCI, 40 PPER 70 (Proposed Decision and Order, 2009) (Fayette SCI), the PSP argues that Corporal Williams' insubordinate conduct toward the commissioned officers lost the protection of the act for purposes of Section 6(1)(a) and (c) of the PLRA.

As the Hearing Examiner correctly pointed out, under Board law, an employe's criticism of the employer will lose the protection of the act 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); see also, AFSCME, District Council 85, Local 3530 v. Millcreek Township, 31 PPER ¶31056 (Final Order, 2000) (employe's conduct will lose protection of the act where is it so obnoxious or violent as to render the employe unfit for service).

Contrary to the PSP's assertion, Corporal Williams' comments made in his e-mails are distinguishable from those in <a href="#Fayette SCI">Fayette SCI</a>. In <a href="Fayette SCI">Fayette SCI</a>, the shift commander, Captain Nose, gave a directive to a corrections officer, Sergeant Harvey, about being last to arrive for work. Harvey informed his shop steward, Sergeant Sheetz, about the warning he was given by the Captain. While Sheetz, Harvey and Nose were in line in the

<sup>&</sup>lt;sup>1</sup> The PSP has recognized the PSTA as the exclusive representative for a bargaining unit of law enforcement officers which includes troopers through commissioned officers holding the rank of major. Lieutenant Colonel is the lowest non-bargaining unit rank in the PSP.

<sup>&</sup>lt;sup>2</sup> We note that generally the Board is not bound by a hearing examiner's decision in a proposed decision and order. AFSCME, Council 13 v. PLRB, 5289 A.2d 1188 (Pa. Cmwlth. 1987).

cafeteria, and with inmates present, Sheetz in a loud voice, began to mock Captain Nose in issuing the directive about arriving late. Again, while seated in the cafeteria, with inmates who could overhear, Sheetz continued to mock the Captain and his directives. As the Hearing Examiner correctly noted, <u>Fayette SCI</u> is distinguishable because in that case the union steward publicly mocked a superior officer and his work directives, and did so while on duty in the presence of inmates. Here, Corporal Williams' e-mails were sent while he was off-duty, were disseminated only to employes and not to members of the public, and allegedly insulted commissioned officers generally.

Indeed, Corporal Williams' e-mails were more akin to the communications in <u>Washington County</u>, which were found to be protected union activity. In <u>Washington County</u>, the chief union steward, Mr. Underwood, authored three "chief steward reports" that he made available to employes, who would copy and post them at their offices. The County argued there that by referring to his supervisor, the Director of Children and Youth Services, as "thoroughly inept at communicating," as making "bizarre ranting diatribes," as reminiscent of "a deranged King Lear wailing uncontrollably because his world is going awry," having "a fragile sense of identity," being "devoid of insight," exhibiting "immature and boorish behavior," "peculiar behavior" and "craven and dishonest behavior", having a "dark and vindictive personality" and being "intemperate, vituperative, contradictory, and incoherent," Mr. Underwood lost the protections of the act. The Hearing Examiner and Board disagreed, noting that the County misapprehended the reach of the act, and that "intemperate, inflammatory or insulting" language does not lose the protections of the act.

We agree with the Hearing Examiner that the same result must apply here. Corporal Williams' statements in the September 10, 2008 e-mails, while arguably "intemperate, inflammatory and insulting" in their reference to commissioned officers, were not "offensive, defamatory or opprobrious." While critical of management in general, Corporal Williams' e-mails discussed his support for the proposals that were being made by the PSTA in the interest arbitration. Furthermore, Corporal Williams' suggestion to employes to engage in concerted activity by disseminating the e-mails for informational purposes does not cross the line and lose the protections of the PLRA. Accordingly, Corporal Williams' issuance of the September 10, 2008 e-mails was protected union activity.

Even if Corporal Williams' issuance of the e-mails constituted protected activity, the PSP argues that the Hearing Examiner erred in failing to find that it had a legitimate, non-discriminatory reason to commence an investigation into Corporal Williams' alleged inappropriate use of the PSP computer system. The PSP asserts that Lieutenant Colonel Brown initiated the complaint with BIPS because he suspected that Corporal Williams had misused the PSP e-mail system, including sending the e-mails while on-duty. The PSP exceptions in this regard are nothing less than a challenge to the Hearing Examiner's credibility findings.

Generally, it is the function of the hearing examiner, who is able to view the witnesses' testimony first-hand, to determine the credibility of the witnesses and to weigh the probative value of the evidence presented. Mt. Lebanon Education Association v. Mt. Lebanon School District, 35 PPER 98 (Final Order, 2004). The hearing examiner may accept or reject the testimony of any witness in whole or in part. Pennsylvania State Corrections Officers Association v. Commonwealth of Pennsylvania (Department of Corrections Pittsburgh SCI), 34 PPER 134 (Final Order, 2003). The Board will not disturb the hearing examiner's credibility determinations absent the most compelling of circumstances. Hand v. Falls Township, 19 PPER ¶ 19012 (Final Order, 1987); AFSCME District Council 84 v. Department of Public Welfare, 18 PPER ¶ 18028 (Final Order, 1986).

Here, the Hearing Examiner rejected testimony of Lieutenant Colonel Brown that the investigation of Corporal Williams was for reasons other than the content of the September 10, 2008 e-mails. Indeed, Lieutenant Colonel Brown testified that he contacted Internal Affairs to prepare a complaint form ("Use of Force or Complaint Reception and Processing Worksheet") for his signature, and it was that complaint form which triggered the internal investigation of Corporal Williams. (N.T. 92). Lieutenant Colonel Brown also testified that the complaint form, which initiated the internal affairs investigation, made no allegation of any wrongdoing relating to the misuse of the PSP computers or e-mail system. (N.T. 91). Upon review of Lieutenant Colonel Brown's testimony, and the record as a whole, there are

no compelling circumstances warranting review of the Hearing Examiner's credibility determination that on October 6, 2008, Lieutenant Colonel Brown filed a complaint with the BIPS that stated, in relevant part, that Corporal 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" (FF 15), which had initiated the internal affairs investigation.

Accordingly, the Hearing Examiner did not err in finding that the PSP commenced its investigation because of the content of the September 10, 2008 e-mails, and by rejecting the PSP's assertion of a legitimate business reason for investigating Corporal Williams. The PSP's action of instituting an internal affairs investigation of Corporal Williams because of those e-mails, which were found above to be protected union activity, violated Section 6(1)(c) of the PLRA. Washington County, supra; see also Mt. Lebanon Education Association v. Mt. Lebanon School District, 35 PPER 98 (Final Order, 2004) (employer's reference to protected union activity as justification for its actions supports an inference of an unlawful motive).

The PSP also challenges the Hearing Examiner's finding of an independent violation of Section 6(1)(a) of the PLRA. The PSP asserts that the Hearing Examiner failed to appreciate the totality of the circumstances. Specifically, the PSP asserts that the Hearing Examiner erred in failing to balance Corporal Williams' rights in issuing the emails against the disruption those e-mails caused to the routine of the workplace and the paramilitary operations of the PSP. We disagree that the Hearing Examiner failed to properly consider the totality of the circumstances, or the paramilitary structure of the PSP. The Hearing Examiner noted as follows:

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. Lieutenant Colonel 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.

(PDO at 4). As discussed above, Corporal Williams' September 10, 2008 e-mails do not advocate disobedience in the performance of law enforcement duties, nor is there an alleged violation of the PSP's computer use policy. Instead, Corporal Williams' messages were sent while off-duty, and while the e-mails included perceived disparaging or insulting remarks and encouraged dissemination of the e-mails, the messages were focused on discussing the PSTA's bargaining proposals with fellow officers. Under the totality of circumstances, subjecting Corporal Williams, a union negotiating team member, to a disciplinary investigation because of e-mails discussing bargaining proposals, would have a tendency to coerce employes in the exercise of this protected right. City of Scranton, supra. Accordingly, the Hearing Examiner did not err in finding that the Commonwealth committed an independent violation of Section 6(1)(a) of the PLRA.

The PSP argues that even if the Hearing Examiner correctly found that it committed unfair labor practices, the Examiner erred in directing make whole relief. The PSP asserts that Corporal Williams' offered no evidence that he had lost pay or benefits because of the internal affairs investigation, and therefore make whole relief is

<sup>&</sup>lt;sup>3</sup> Where the hearing examiner rejects the employer's proffered non-discriminatory reason for its actions, the Wright Line, or "mixed-motive" analysis does not apply. <u>Teamsters Local 312 v. Upland Borough</u>, 25 PPER ¶25195 (Final Order, 1994).

inappropriate. However, as the Commonwealth Court stated in <u>Plumstead Township v. PLRB</u>, 713 A.2d 730 (Pa. Cmwlth. 1998):

the Township contends that the PLRB's order to make all bargaining unit members whole for any monetary losses suffered is improper and has no sound remedial purpose because the PLRB did not find that the police officers suffered any pecuniary losses that are rationally related to their police duties. However, the fact that the Union has not proved economic loss due to unfair labor practices is of no consequence; the PLRB concedes that if, in fact, the police officers suffered no monetary losses, then the Township's liability will be limited to reinstatement of the ... policy and collective bargaining over the matter.

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In sum, the Township's challenge to the PLRB's "make whole" directive is unwarranted. The PLRB's order that the Township "make all bargaining unit members whole for any monetary losses suffered" is in the purest sense remedial and not punitive. See [Appeal of Cumberland Valley School District, 483 Pa. 134, 394 A.2d 946 (1978)]. In fact, the PLRB's final order directs no more than the usual and customary remedy .... Accordingly, we conclude that the PLRB's order is proper in that it is reasonable, remedial in nature and furthers the PLRA's policy of promoting mutual resolution of labor disputes.

 $\underline{\mathrm{Id}}$ . at 736-737. As the Commonwealth Court recognized, having established that the PSP violated Section 6(1)(a) and (c) of the PLRA warranting a Board remedy, a make-whole award is appropriate remedial relief for what may be, at the time of the hearing, unquantifiable losses, if any.

After a thorough review of the exceptions and all matters of record, the Hearing Examiner did not err in concluding that the PSP violated Section 6(1)(a) and (c) of the PLRA by initiating an internal affairs investigation of Corporal Williams because of his protected union e-mails, and by directing that the investigation and Internal Affairs records be expunged, and that Corporal Williams be made whole for any lost pay and benefits attributable to the BIPS investigation. Accordingly, we shall dismiss the PSP's exceptions and make the PDO final.

#### 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 Commonwealth of Pennsylvania, Pennsylvania State Police are hereby dismissed, and the November 17, 2009 Proposed Decision and Order, be and hereby is made absolute and final.

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 sixteenth day of March, 2010. 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

PENNSYLVANIA STATE TROOPERS
ASSOCIATION

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v. : Case No. PF-C-08-154-E

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COMMONWEALTH OF PENNSYLVANIA : PENNSYLVANIA STATE POLICE :

### AFFIDAVIT OF COMPLIANCE

The Commonwealth of Pennsylvania, Pennsylvania State Police 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 expunged any reference to the BIPS investigation and IAD 2008-0723 from Corporal Gerald Williams' personnel file and from the Internal Affairs 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 and the Final Order as directed; and that it has served an executed copy of this affidavit on the Pennsylvania State Troopers Association at its principal place of business.

	Signature / Date
	Title
	TILLE
SWORN AND SUBSCRIBED TO before me	
the day and year aforesaid.	

Signature of Notary Public