

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNSYLVANIA STATE TROOPERS ASSOCIATION :
:
v. : Case No. PF-C-09-84-E
:
COMMONWEALTH OF PENNSYLVANIA :
PENNSYLVANIA STATE POLICE :

PROPOSED DECISION AND ORDER

On June 19, 2009, 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), 6(1)(b) and 6(1)(c) of the Pennsylvania Labor Relations Act (PLRA) as read in pari materia with Act 111 of 1968 (Act 111) when it subjected Cpl. Edmond Fret to an internal affairs investigation. On June 30, 2009, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on November 4, 2009. On October 23, 2009, the hearing examiner, upon the request of the PSTA and without objection by the Commonwealth, continued the hearing. On February 24, 2010, the hearing examiner held the hearing and afforded the parties a full opportunity to present evidence and to cross-examine witnesses. On March 30, 2010, the PSTA filed a brief by deposit in the U.S. Mail. On March 31, 2010, the Commonwealth filed a brief by hand-delivery.

The hearing examiner, on the basis of the evidence presented at the hearing, makes the following:

FINDINGS OF FACT

1. The PSTA represents employes of the Commonwealth who are members of the Pennsylvania State Police (PSP). (N.T. 129-130)

2. In March 2009, the special projects supervisor for Troop R Dunmore (Sgt. Thomas Skrutski) scheduled two members of the vehicle fraud investigation unit, one of whom was Cpl. William J. Hartshorn, Jr., to work overtime during the St. Patrick's Day weekend. (N.T. 10, 66-70, 115-116, 137, 144)

3. Patrol unit troopers at Troop R Dunmore complained to the secretary (Cpl. Fret) of Fraternal Order of Police Lodge 46 (Lodge 46) that they should have worked the overtime as per a field regulation (FR 5-1) governing the assignment of overtime. (N.T. 7-9, 106-108, 112)

4. On March 18 or 19, 2009, Cpl. Fret met with Sgt. Skrutski to discuss the overtime complaints of the patrol unit troopers. Cpl. Fret said that he was there as their FOP representative. He also said, "Look, you know, this has been going on too long. The Patrol Unit is being treated like a bunch of Fucking Assholes, and we're tired of it, and I'm tired of it." (N.T. 10-12, 16-17, 97, 99)

5. On March 23, 2009, Sgt. Skrutski told Cpl. Hartshorn that Cpl. Fret had asked, "Why are you giving these Fucking Assholes overtime?" (N.T. 70-71, 146-149)

6. Cpl. Hartshorn sought out Cpl. Fret and asked, "Did you call me a Fucking Asshole?" Cpl. Fret said, "No, I didn't; I never did." (N.T. 20-22, 72-73, 124-125)

7. Cpl. Fret and Cpl. Hartshorn sought out Sgt. Skrutski to verify whether or not Cpl. Fret had called Cpl. Hartshorn a "Fucking Asshole." All three met in Sgt. Skrutski's office. The door was closed. A heated argument, which became loud, ensued. During the heated argument, Sgt. Skrutski asked Cpl. Fret to leave. (N.T. 22-27, 74-77, 92-93, 100-102, 139-142, 150)

8. Meeting behind the closed door of an office 35 feet from Sgt. Skrutski's, Lt. James E. Degnan and Lt. Raymond Whittaker heard the heated argument. Thinking that somebody in custody or in the public area of the building was causing a ruckus, Lt. Degnan opened the door and left the office to investigate. Lt. Whittaker, thinking much the same, followed. Upon arriving at Sgt. Skrutski's office, Lt. Degnan heard vulgarities exchanged, opened the door and told everyone, "Outside." (N.T. 24, 26-27, 77-78, 102, 142-143, 158-160, 163-164, 172-174, 183-185)

9. As Cpl. Fret went outside, he "smacked" open a door with both hands. (N.T. 24, 28-30, 160, 174)

10. Afterwards, Lt. Whittaker reported to Lt. Degnan that the door had been broken, and Sgt. Skrutski reported to Lt. Degnan that he had advised Cpl. Fret to leave. (N.T. 178, 180)

11. A day or two later, Lt. Degnan initiated an internal affairs investigation of Cpl. Fret and Cpl. Hartshorn because "you can't have two Supervisors having a screamfest." Lt. Degnan alleged as follows:

"On Monday, March 23, 2009 at approximately 0830 Hours Corporal FRET and Corporal HARTSHORN beca[me] engaged in a verbal altercation while on duty and present within the office of Sgt. Thomas SKRUTSKI.

Throughout this engagement, loud and derogatory language was utilized and overheard throughout the first floor area of the building.

During the engagement, Cpl. FRET was advised by Sgt. SKRUTSKI to leave the office area in an attempt to defuse the situation to which Cpl. FRET refused.

Upon entry into the office area by this writer, all present were ordered to desist from actions and exit the building and report to the parking lot area. While being escorted from the building Cpl. FRET physically damaged a door within the building by striking it in a violent manner."

(N.T. 35, 176-180, 189; Commonwealth Exhibit 1)

12. Lt. Degnan did not initiate an internal affairs investigation of Sgt. Skrutski because he thought that "the two Corporals took the fight to [Sgt. Skrutski's] office" and because Sgt. Skrutski had reported that he "tried to [defuse] the situation." (N.T. 156, 189)

DISCUSSION

The PSTA has charged that the Commonwealth committed unfair labor practices under sections 6(1)(a), 6(1)(b) and 6(1)(c) of the PLRA as read in pari materia with Act 111 when it subjected Cpl. Fret to an internal affairs investigation. According to the FOP, in subjecting Cpl. Fret to the internal affairs investigation, the Commonwealth retaliated against him for having engaged in protected activity: being the secretary of Lodge 46 and representing employes in an overtime dispute. As set forth in the specification of charges, the PSTA alleges that "[t]he discriminatory and retaliatory action taken by the PSP has interfered, restrained or coerced all members of the bargaining unit" in violation of section 6(1)(a), that "[i]nitiating an internal affairs investigation after a FOP officer discusses union matters while on station constitutes domination and interference in the administration of the union's rights" in violation of section 6(1)(b) and that "[t]he retaliatory action taken by the PSP was motivated by anti-union animus in reaction to the protected activities of the bargaining unit member.

The Commonwealth contends that the charge under sections 6(1)(a) and (c) should be dismissed because it subjected Corporal Fret to the internal affairs investigation for engaging in an activity that was not protected: being part of heated argument with another bargaining unit member (Cpl. Hartshorn) over a personal dispute that escalated to the point that station operations were disrupted. The Commonwealth contends that the charge under section 6(1)(b) should be dismissed because it does not state a cause of action.

The charge under section 6(1)(a)

In Commonwealth of Pennsylvania, Pennsylvania State Police, 36 PPER 121 (Final Order 2005), the Board explained that an independent violation of section 6(1)(a)

"occurs where, based on the totality of the circumstances, the employer's actions would have the tendency to coerce or interfere with the protected activities of a reasonable bargaining unit employee, regardless of whether any one particular employee was actually coerced."

Id. at n. 9.

As the Board explained in SEPTA, 28 PPER ¶ 28025 (Final Order 1996), "employees act within their statutory rights when they assert their contractual rights even if they do so in a loud and insistent manner." Id. at 59. Thus, in Commonwealth of Pennsylvania (Department of Public Welfare, Somerset State Hospital), 27 PPER ¶ 27086 (Final Order, 1996), the Board found that an employee who had a heated exchange with a supervisor during a labor relations meeting off the shop floor was engaged in a protected activity despite the heated nature of the exchange. The hearing examiner reached the same result in Port Authority of Allegheny County, 28 PPER ¶ 28242 (Proposed Decision and Order 1997), where a steward verbally harangued a supervisor during the discussion of a labor matter in her office even after she told him to leave.

As the Board explained in Millcreek Township School District, 31 PPER ¶ 31056 (Final Order 2000), however,

"union representatives do not have an absolute privilege to behave in a manner that transcends protected activity in the grievance context. SEPTA. As the court recognized in Mobil Exploration and Producing U.S., Inc. v. NLRB, 200 F.3d 230, 243 (5th Cir. 1999), an employee's right to engage in concerted activity permits 'some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect.' Behavior of a union representative, whether that person be a steward or the local president, that is so obnoxious or violent as to render that representative unfit for service is not protected. SEPTA."

Id. at 138.

Thus, in Commonwealth of Pennsylvania Department of Corrections, Fayette SCI, 40 PPER 70 (Proposed Decision and Order 2009), Hearing Examiner Jack E. Marino found that a union secretary/steward who mocked his supervisor on the shop floor was not engaged in a protected activity. Similarly, in Reading School District, 25 PPER ¶ 25181 (Proposed Decision and Order 1994), the hearing examiner found that a union president who used profanity toward a supervisor on the shop floor was not engaged in a protected activity.

As set forth more fully in the findings of fact, the record shows that Cpl. Fret and Cpl. Hartshorn engaged in a heated argument over whether or not Cpl. Fret had called Cpl. Hartshorn a "Fucking Asshole," that the heated argument was heard 35 feet away by two lieutenants, one of whom was Lt. Degnan and both of whom left what they were doing to investigate the matter, and that Lt. Degnan initiated an internal affairs investigation of Cpl. Fret (and Cpl. Hartshorn) because "you can't have two Supervisors having a screamfest."

Given the personal nature of the heated argument and the adverse impact it had on station operations, there is no basis for finding that Cpl. Fret was engaged in a protected activity at the time. Thus, by subjecting Lt. Fret to an internal affairs investigation for having engaged in the heated argument, the Commonwealth did not interfere, restrain or coerce employees in the exercise of a protected activity. Accordingly, the charge under section 6(1)(a) must be dismissed.

In arguing for a contrary result, the PSTA would have the Board find that Cpl. Fret engaged in protected activity by being the secretary of Lodge 46 and by representing members of the bargaining unit in an overtime dispute with the Commonwealth. The PSTA overlooks, however, that what prompted Lt. Degnan to initiate the internal affairs

investigation of Cpl. Fret was the heated argument. Whether or not Cpl. Fret engaged in protected activity by being the secretary of Lodge 46 and by representing members of the bargaining unit in the overtime dispute with the Commonwealth is, therefore, irrelevant.

The PSTA also relies on Commonwealth of Pennsylvania, Pennsylvania State Police, Case No. PF-C-09-154-E (Final Order, March 16, 2010), where the Board found that an employe engaged in a protected activity when he sent emails referring to commissioned officers of the PSP as a "classless, good-ole boy network." As the Board explained, the "e-mails, while arguably 'intemperate, inflammatory and insulting' in their reference to commissioned officers, were not 'offensive, defamatory or opprobrious.'" Slip opinion at 3. The Commonwealth did not subject Cpl. Fret to the internal affairs investigation for being critical of the PSP, however. Thus, Commonwealth of Pennsylvania, Pennsylvania State Police, supra, is distinguishable on the facts, and the PSTA's reliance on it is misplaced.

In addition, the PSTA points out that Lt. Degnan, in initiating the internal affairs investigation, alleged not only that Cpl. Fret engaged in the heated argument but also that Cpl. Fret refused to leave Sgt. Skutski's office during the heated argument and damaged a door as he exited the building after the heated argument. The PSTA points out that Cpl. Fret testified that he was never ordered by Sgt. Skrutski to leave (N.T. 27) and that the door was problematic before he went through it (N.T. 30). Notably, however, Lt. Degnan alleged not that Cpl. Fret was ordered to leave but that he was advised to leave (finding of fact 11). Moreover, there was no showing that the door was damaged immediately before Cpl. Fret went through it. Lt. Degnan's additional allegations are unexceptional under the circumstances.

The charge under section 6(1)(b)

In Commonwealth of Pennsylvania, Pennsylvania State Police, 40 PPER 119 (Proposed Decision and Order 2009), affirmed on other grounds, Case No. PF-C-08-154-E (Final Order, March 16, 2010), Hearing Examiner Thomas P. Leonard cogently restated the law under section 6(1)(b) as follows:

"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 employes 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)."

40 PPER at 406.

A close review of the charge does not show that the PSTA alleged that the Commonwealth created a "company union" when it subjected Cpl. Fret to the internal affairs investigation. The PSTA does not contend otherwise in its brief. Accordingly, the charge as filed under section 6(1)(b) must be dismissed for failure to state a cause of action.

The charge under section 6(1)(c)

In Duryea Borough Police Department v. PLRB, 862 A.2d 122 (Pa. Cmwlth. 2004), the court held that a violation of section 6(1)(a) occurs when an employer discriminates against an employe for having engaged in a protected activity. As noted above, there is no basis for finding that Cpl. Fret's heated argument with Cpl. Hartshorn was a protected activity. Thus, there also is no basis for finding that the Commonwealth's initiation of the internal affairs investigation of Cpl. Fret for having engaged in that activity was discriminatory. Accordingly, the charge under section 6(1)(c) must be dismissed.

Again, in arguing for a contrary result, the PSTA would have the Board find that Cpl. Fret engaged in protected activity by being the secretary of Lodge 46 and by representing members of the bargaining unit in the overtime dispute with the Commonwealth. As noted above, however, the PSTA overlooks that what prompted the Commonwealth to subject Cpl. Fret to the internal affairs investigation was the heated argument, which was not a protected activity. Thus, whether or not Cpl. Fret engaged in protected activity by being the secretary of Lodge 46 and by representing members of the bargaining unit in the overtime dispute with the Commonwealth is irrelevant.

The PSTA also argues at length that evidence of anti-union animus on the part of the Commonwealth may be found in its disparate treatment of Cpl. Fret, in the inadequacy of its internal affairs investigation and in its discrimination against other representatives of the PSTA. Given, however, that what prompted the Commonwealth to subject Cpl. Fret to the internal affairs investigation was the heated argument, which was not a protected activity, and that engaging in a protected activity is a necessary element of a charge under section 6(1)(c), Duryea Borough Police Department, supra, no violation of that section may be found.

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 is an employer under section 3(c) of the PLRA as read in pari materia with Act 111.
2. The PSTA 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 Commonwealth has not committed unfair labor practices under sections 6(1)(a), 6(1)(b) and 6(1)(c) 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 charge is dismissed and the complaint rescinded.

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 twenty-eighth day of April 2010.

PENNSYLVANIA LABOR RELATIONS BOARD

Donald A. Wallace, Hearing Examiner