

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

WILLIAM C PLOUFFE JR :
 :
 v. : Case No. PERA-C-09-459-E
 :
 STATE SYSTEM OF HIGHER EDUCATION :
 KUTZTOWN UNIVERSITY :
 F JAVIER CEVALLOS ET AL¹ :

PROPOSED DECISION AND ORDER

On November 6, 2009, Wm. C. Plouffe, Jr. (Professor Plouffe), filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair practices alleging that Kutztown University, F. Javier Ceballos (President Cevallos), Sharon Picus and Ann Zayaitz (Dean Zayaitz) violated sections 1201(a)(1), (2) and (4) of the Public Employee Relations Act (PERA) by denying him requested union representation at a meeting with Dean Zayaitz on July 17, 2009. On December 16, 2009, the Secretary of the Board, construing the charge as having been filed against the State System of Higher Education (SSHE), Kutztown University and the named individuals,² issued a complaint and notice of hearing directing that a hearing be held on March 22, 2010. The hearing examiner held the hearing as scheduled and afforded each party a full opportunity to present evidence³ and to cross-examine witnesses.⁴ On April 29, 2010, each party filed a brief by hand delivery.⁵

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

FINDINGS OF FACT

1. In 2008, SSHE hired Professor Plouffe as a faculty member in the department of criminal justice at Kutztown University. (N.T. 8, 66)

2. In the spring of 2009, Professor Plouffe filed with the provost at Kutztown University (Dr. Carlos Vargas-Aburto) a complaint about a hiring matter within the

¹ The caption appears as amended by the hearing examiner to reflect the correct name of President Cevallos (N.T. 3-4).

² Professor Plouffe alleges that the named individuals are representatives of Kutztown University. They would not be personally liable for any unfair practices they may have committed as representatives of Kutztown University, however. See Lancaster County, 30 PPER ¶ 30180 (Final Order, 1999), aff'd on another ground sub nom. Teamsters Local 771 v. PLRB, 760 A.2d 496 (Pa. Cmwlth. 2000) (the principal is liable for any unfair practices committed by its representatives). Thus, the hearing examiner has construed the charge as having been filed against their principal - SSHE.

³ During the hearing, Professor Plouffe requested that the record be left open for the introduction into evidence of emails relating to his course assignments for the fall of 2009 (N.T. 91-96). SSHE objected on relevancy grounds (N.T. 91-92). The hearing examiner granted the request, gave Professor Plouffe seven days to submit the emails and gave SSHE seven days after its receipt of the emails to request an additional day of hearing as to the emails or to further object to them (N.T. 96-97, 104). On March 29, 2010, Professor Plouffe submitted the emails. On April 29, 2010, SSHE filed a brief without requesting an additional day of hearing or further objecting to the emails. Accordingly, the emails are hereby admitted into evidence as Complainant Exhibit 7.

⁴ On April 26, 2010, Professor Plouffe filed a motion to correct/clarify the record. He alleges that as a result of "mis-speaking or a transcription error" and a misunderstanding on his part there are errors in the transcript as to when he was notified of a decision by the office of social equity and as to the name of an individual who responded to a related grievance. On April 27, 2010, the hearing examiner gave SSHE ten days to respond to the motion. On May 7, 2010, SSHE filed a response opposing the motion. None of the alleged errors is material to the dispositive issue of whether or not Professor Plouffe requested union representation. Given the disposition of that issue as set forth below, the motion to correct/clarify the record is moot and therefore need not be addressed.

⁵ In his brief at ¶ 93, Professor Plouffe "respectfully renews his motion for default judgment, orally raised at the hearing, against the Respondents who failed to appear for this hearing: Picus and Cevallos." The hearing examiner denied the motion at the hearing, explaining that respondents are under no obligation to appear at a hearing (N.T. 16-17). Professor Plouffe has cited no authority to the contrary, so his renewed motion is hereby denied.

department of criminal justice. The provost referred him to the office of social equity. (N.T. 8, 25, 45, 79)

3. By July 2009, the office of social equity upheld Professor Plouffe's complaint, and there were "rumors" on campus that the department of criminal justice was going to try to get Professor Plouffe fired. Professor Plouffe heard the rumors. A "number of professors" also told him as much. (N.T. 8-10, 25, 45-47)

4. In July 2009, the chair of the department of criminal justice asked the acting dean of the college of liberal arts and sciences (Dean Zayaitz) to meet with all of the faculty members of the department except for Professor Plouffe. After denying the chair's request as unfair to Professor Plouffe and consulting with the director of human relations (Ms. Picus), Dean Zayaitz decided to meet with each faculty member of the department, including Professor Plouffe, to find out what was going on in the department. (N.T. 28, 39, 63, 67-69)

5. On July 14, 2009, the administrative assistant to the dean of the college of liberal arts and sciences (Anne Imschweiler) emailed Professor Plouffe as follows:

"Will,

Dr. Zayaitz would like to meet with you at 12 noon on either Thursday, 7/16 or Friday, 7/17 in our office.

Please confirm which would suit your schedule."

(N.T. 19, 65; Complainant Exhibit 1)

6. Upon receiving the email, Professor Plouffe consulted with the local president (Dr. Paul Quinn, Sr.) and local grievance chair (Dr. Ruth Perkins) of the exclusive representative of the faculty at Kutztown University (APSCUF), who advised him to find out what the meeting was about to make sure it was not disciplinary in nature. (N.T. 11, 34, 38, 47)

7. Professor Plouffe emailed Ms. Imschweiler as follows:

"Hi Anne,

Thursday would probably be better. What is it about? Should I bring any material? Thanks."

(Complainant Exhibit 1)

8. On July 15, 2009, Ms. Imschweiler emailed Professor Plouffe as follows:

"Will,

Dr. Zayaitz has been very busy and hopes to have time to look at your Prof. Dev. Application and give it to you when you come in tomorrow at noon."

(Complainant Exhibit 1)

9. Professor Plouffe verified with Dean Zayaitz's "office staff" that the meeting would be about his professional development application and so informed President Quinn and Grievance Chair Perkins. (N.T. 11)

10. Professor Plouffe emailed Ms. Imschweiler as follows:

"Hi Anne,

Thanks. Can we swi[tc]h i[t] to Friday? I am probably going to be on an important tel call tomorrow. Thanks."

(Complainant Exhibit 1)

11. Ms. Imschweiler emailed Professor Plouffe as follows:

"Fri., 7-17 at noon is fine :)"

(Complainant Exhibit 1)

12. On July 16, 2009, Ms. Imschweiler emailed Professor Plouffe as follows:

"Will,

For the meeting tomorrow at noon Dr. Zayaitz would like to discuss: 1) your Professional Development proposal; and 2) your perceptions of what is going on in your department."

(Complainant Exhibit 2)

13. On July 17, 2009, Dean Zayaitz met with Professor Plouffe. He had yet to read Ms. Imschweiler's email from the day before. Dean Zayaitz and he discussed his professional development application, how to proceed with a disabled student and problems in the department of criminal justice. He did not request union representation. (N.T. 12-14, 23-24, 28, 69-76; Respondent Exhibit 1)

14. On October 9, 2009, SSHE terminated Professor Plouffe. (N.T. 8, 19, 100)

DISCUSSION

Professor Plouffe has charged that SSHE committed unfair practices under sections 1201(a)(1), (2) and (4) of the PERA by denying him requested union representation at a meeting with Dean Zayaitz on July 17, 2009. According to Professor Plouffe, he was entitled to union representation at the meeting because the meeting was an investigatory interview that he reasonably believed might result in the imposition of discipline against him. He contends that he should be made whole because SSHE terminated him based on information it obtained from him at the meeting.

SSHE contends that the charge should be dismissed because Professor Plouffe did not request union representation at the meeting and because the meeting was not an investigatory interview that he reasonably believed might result in the imposition of discipline against him.

The charge as filed under section 1201(a)(1)

An employer commits an unfair practice under section 1201(a)(1) if it denies an employe requested union representation at an investigatory interview that the employe reasonably believes may result in the imposition of discipline. Commonwealth of Pennsylvania, Office of Administration v. PLRB, 591 Pa. 176, 916 A.2d 541 (2007), citing NLRB v. J. Weingarten, Inc., 420 U.S. 251, 88 LRRM 2689 (1975). If, however, the employe does not request union representation, the right to union representation is waived, and no violation of section 1201(a)(1) may be found. Commonwealth of Pennsylvania, Office of Inspector General, 20 PPER ¶ 20024 (Final Order 1988). If an employer conducts an investigatory interview in violation of the employe's right to union representation, the employe is to be made whole unless the employer shows that it did not discipline the employe based on information obtained from the employe during the interview. Duryea Borough Police Department v. PLRB, 862 A.2d 122 (Pa. Cmwlth. 2004).

As reflected in finding of fact 13, Dean Zayaitz credibly testified that Professor Plouffe did not request union representation when he met with her on July 17, 2009 (N.T. 72, 79, 86). Thus, regardless of whether or not the meeting was an investigatory interview that Professor Plouffe reasonably believed might result in the imposition of discipline against him, no violation of section 1201(a)(1) may be found.

In arguing for a contrary result, Professor Plouffe relies on his own testimony that he requested union representation three times when he met with Dean Zayaitz (N.T.

12, 14, 105). He submits that his testimony should be credited over hers for 39 separately enumerated reasons, broadly including (1) "indirect evidence" that he knew that he might face disciplinary action for having complained about a hiring matter in the department of criminal justice, that he contacted his union representatives before he met with her, that he was unaware that the meeting might be disciplinary in nature, that after the meeting he told his union representatives, including APSCUF's local president (Dr. Quinn), that she had denied his requests for union representation, that she admitted that he had "mentioned the Union" during the meeting, that he repeatedly asserted during the processing of a grievance that she had denied his requests for union representation, that he is a civil rights attorney and that she admitted that her notes of the meeting, which do not reference a request for union representation by him, are not all inclusive; (2) her lack of candor, especially in answering a question as to whether or not she had discussed with anyone other than counsel whether or not he had requested union representation, and her demeanor; and (3) his candor, his demeanor and the credibility of Dr. Quinn, who testified that Professor Plouffe told him after the meeting that Dr. Zayaitz had denied his requests for union representation (N.T. 47-48).

In making a credibility judgment, a hearing examiner is guided by a number of considerations. Hearing Examiner Timothy Tietze summarized them in Douglass Township, 34 PPER 131 (Proposed Decision and Order 2003), as follows:

"Credibility judgments are based upon a witness's appearance, general bearing, conduct on the stand, demeanor, manner of testifying (e.g. candor, frankness, clearness of statements), and certainty of the witness with respect to the facts. Ross Township, 23 PPER ¶ 23175 (Proposed Decision and Order, 1992)(citing In Re Gaston's Estate, 361 Pa. 105, 62 A.2d 904 (1949)). The demeanor of a witness is the touchstone of credibility. Robinson v. Robinson, 183 Pa. Super. 574, 133 A.2d 259 (1957). Additionally, the Board has stated that an examiner may simply choose to believe one witness over another without further explanation. Upper South Hampton Township, PLRB Case. No. PERA-C-90-60-E (Order Directing Remand to Hearing Examiner for Further Proceedings, 1991)(not reported in PPER)."

34 PPER at 402-403.

Notably, Dr. Quinn, whose credibility is not in dispute, testified not only that Professor Plouffe told him that Dean Zayaitz had denied his requests for union representation but also that Dean Zayaitz told him that Professor Plouffe had never requested union representation (N.T. 51, 56-57). Thus, Dr. Quinn's testimony supports Dean Zayaitz's version of events as much as it does Professor Plouffe's. Moreover, nothing in the record suggests that Dean Zayaitz had a stake in the outcome of her meeting with Professor Plouffe as he did or that she had any reason to deny any request for union representation he may have made. Indeed, Dr. Quinn testified that Dean Zayaitz has always been respectful in dealing with him as APSCUF's president (N.T. 55). Furthermore, her testimony that she only discussed with counsel whether or not Professor Plouffe had requested union representation (N.T. 31, 42) was creditworthy. According to Professor Plouffe, because Dr. Vargas-Aburto in denying a related grievance wrote in an October 16, 2009, letter that "The Dean of Liberal Arts and Sciences reviewed her notes and could find no reference to the faculty member asking for APSCUF representation" (Complainant Exhibit 4), it is apparent that she must have spoken with someone other than counsel. A close review of Dr. Vargas-Aburto's letter, however, shows that it is silent as to whether or not he or anyone other than counsel spoke with her about her notes. The hearing examiner has credited her testimony over Professor Plouffe's accordingly.

The charge as filed under section 1201(a)(2)

Individual members of a bargaining unit have no standing to file a charge under section 1201(a)(2). Pittsburgh Board of Public Education, 34 PPER 38 (Final Order 2003). Professor Plouffe filed the charge under section 1201(a)(2) as an individual member of the bargaining unit. Thus, the charge under section 1201(a)(2) must be dismissed for lack of standing by Professor Plouffe.

The charge as filed under section 1201(a)(4)

In Eastern Lancaster County School District, 40 PPER 11 (Final Order 2009), the Board explained that a violation of section 1201(a)(4) occurs "where an employe is discriminated against by his or her employer for filing affidavits, petitions or complaints with the Board or providing information or testimony in a Board proceeding." Id. at 38.

Professor Plouffe has neither alleged nor shown that SSHE discriminated against him for filing an affidavit, petition or complaint with the Board or for providing information or testimony in a Board proceeding. Thus, the charge under section 1201(a)(4) must be dismissed because it does not state a cause of action cognizable before the Board.

CONCLUSIONS

The hearing examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds:

1. SSHE is a public employer under section 301(1) of the PERA.
2. Professor Plouffe is an employe under section 301(2) of the PERA.
3. The Board has jurisdiction over the parties.
4. SSHE has not committed an unfair practice under section 1201(a)(1) of the PERA.
5. Professor Plouffe has no standing to file the charge under section 1201(a)(2) of the PERA.
6. The charge does not state a cause of action under section 1201(a)(4) of the PERA.

ORDER

In view of the foregoing and in order to effectuate the policies of the PERA, the hearing examiner

HEREBY ORDERS AND DIRECTS

that the complaint is rescinded and the charge dismissed

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-first day of May 2010.

PENNSYLVANIA LABOR RELATIONS BOARD

Donald A. Wallace, Hearing Examiner