

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNSYLVANIA STATE TROOPERS	:	
ASSOCIATION	:	
	:	
v.	:	Case Nos. PF-C-09-95-E
	:	PF-C-09-129-E
COMMONWEALTH OF PENNSYLVANIA	:	
PENNSYLVANIA STATE POLICE	:	

FINAL ORDER

The Pennsylvania State Troopers Association (PSTA) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on February 16, 2011, to a Proposed Decision and Order (PDO) issued on January 27, 2011. In the PDO, the Board Hearing Examiner dismissed PSTA's charges of unfair labor practices filed at Case Nos. PF-C-09-95-E and PF-C-09-129-E, alleging that the Commonwealth of Pennsylvania, Pennsylvania State Police (Commonwealth or PSP) violated Section 6(1)(a), (c), (d) and (e) of the Pennsylvania Labor Relations Act (PLRA), as read in *pari materia* with Act 111 of 1968 (Act 111). The Commonwealth filed a timely brief in response to the exceptions on March 9, 2011.

The facts of this case can be summarized as follows. In late April or early May 2009, Trooper Gregory W. Metz provided PSTA President Bruce Edwards with a letter complaining about "retaliatory measures taken by [Sergeant Christopher] KARNES" against members of the bargaining unit at Troop A Greensburg, including Troopers Metz, Donald J. Shirey and John C. Kukich, Jr., during the previous two years. In May 2009, President Edwards brought the letter to the attention of the Colonel who was the Commissioner of the PSP.

Thereafter, on June 20, 2009, Trooper Metz emailed the PSP Commissioner as follows:

"Sirs,

I recently forwarded a 9 page letter concerning matters at PSP Greensburg including retaliation for union activity as well as a hostile work environment. I typed my letter and forwarded it to Bruce EDWARDS. He in turn forwarded to your office. I was wondering if my complaint is being addressed. I hope that you do not take this e-mail as being disrespectful but your latest e-mail stated that we could contact you regarding matters of mutual interest."

On that same day, the Executive Officer to the Commissioner (Major Lynn E. Hess) emailed Trooper Metz in response, as follows:

"I will be happy to look into this. As I understand without checking, this may be in the grievance process and if so I won't be in a position to release much information, but can at least provide you with a status."

On June 26, 2009,¹ Major Hess emailed Trooper Metz as follows:

"Greg,

It appears some, but not all, of your concerns are incorporated in a grievance filed by Trooper Donald Shirey, with an outcome still to be determined. To properly address the outstanding issues I would urge you to request a meeting with Lieutenant Clifford Jobe and Captain George Kuzilla, who are in the best position to assess the situation. Many, if not all, of your concerns can possibly be addressed in this manner. Should that not be the case, the grievance process remains as a viable option."

On August 4, 2009, the PSTA filed a charge of unfair labor practices with the Board, docketed at Case No. PF-C-09-95-E, alleging that Major Hess's June 26, 2009 email,

¹ Although Finding of Fact 6 in the PDO states that the email from Major Hess was sent on May 26, 2009, the record reflects that the email was issued on June 26, 2009. (Association Exhibit 14; N.T. 278-279). Accordingly, Finding of Fact 6 is amended herein to reflect the date of June 26, 2009 as the date on which Major Hess sent the email to Trooper Metz.

telling Metz to meet with Lieutenant Jobe and Captain Kuzilla concerning his complaints, violated the PLRA. In this respect, the PSTA asserted as follows:

The June 26, 2009 email from Hess confirms that the PSP command staff embraces and endorses the retaliation against Troopers Metz, Shirey and Kukich for engaging in union activity. The command staff's indifference and refusal to act to correct the unlawful behavior speaks louder than words; referring Metz back to the individuals who not only refused to help but actually affirmed the anti union sentiment, communicates to the PSTA that retaliation for union activism will not only be tolerated but will be embraced. It communicates that a Sergeant who punishes a Trooper for union activity is permitted to directly compensate himself for that action through self assigning overtime that would otherwise go to the union activist. It communicates that the Commissioner's office embraces limiting a Trooper's career opportunities by downgrading employee performance reviews of those that solicit the PSTA to challenge supervisory actions.

The charge also alleged that the Commonwealth violated the PLRA by retaliating against Troopers Metz, Shirey and Kukich for having engaged in protected activity. The alleged retaliation included the following acts discussed in Metz's May 2009 letter: (1) "order[ing] Cpl. Brown to change Trooper Metz's schedule to 'mess with him'" in late August or early September 2008, (2) "direct[ing] Trooper Kirkland not to provide [Motor Carrier Safety Assistance Program (MCSAP) overtime] to Trooper Metz and Trooper Kukich" in September/October 2008, (3) subjecting Trooper Metz and Trooper Shirey to "ride-a-longs" in mid to late October 2008, (4) "arrang[ing] for Trooper Metz and Trooper Shirey to be assigned well known high call zones" and "bann[ing] them from working slower call zones" in mid to late October 2008, (5) "refus[ing] to provide [MCSAP] overtime to Metz or Shirey" in November 2008, (6) "revers[ing] station policy by precluding Trooper Shirey from filling in as MCSAP Inspector while Trooper Kirkland was on vacation" in February 2009, (7) "questioning [Trooper Metz] leaving patrol zones to use the station rest room facilities," (8) "unfairly downgrading Employee Performance Reviews," (9) "advis[ing] Cpl. Brown [on April 26, 2009] not to schedule Troopers Metz, Shirey or Kukich for school bus inspections" and (10) "hand[ing] Trooper Shirey] two negative supervisor's notations" on May 9, 2009.

On August 26, 2009, the Secretary of the Board declined to issue a complaint on the charge filed at PF-C-09-95-E. The Secretary reasoned that the allegations in the charge regarding the discriminatory conduct of Sergeant Karnes were untimely filed because it referenced events occurring more than six weeks before the charge was filed. The Secretary further noted that the charge as it related to Major Hess' email of June 26, 2009, did not state a cause of action under the PLRA. On September 15, 2009, the PSTA filed exceptions to the Secretary's decision not to issue a complaint. In its exceptions, the PSTA asserted as follows:

Although some of the actions adverse to the PSTA's members occurred outside of the six-week statute of limitations, the PSTA's complaints about that treatment to the Pennsylvania State Police sought an administrative investigation and informal resolution of the matter. The PSTA awaited the outcome of an administrative investigation to determine whether the PSP intended to remedy the adverse treatment. PSP notified the PSTA on June 26, 2009 that it intended to take no formal action to correct the adverse treatment. This refusal to act to correct anti-union treatment of PSTA members constitutes an endorsement of anti-union discrimination in violation of Act 111 and the PLRA. This action also falls within the six-week statute of limitations period and makes the action timely.

Thereafter, on September 30, 2009, Trooper Metz asked Sergeant Karnes for approval to change shifts with another trooper to work a MCSAP detail on October 2, 2009. Sergeant Karnes denied Trooper Metz's request because it was made thirty minutes after the end of his workday as he was leaving in his truck, and because Trooper Metz had not availed himself of a number of opportunities earlier that day to make his request.

On October 30, 2009, Trooper Metz asked Sergeant Karnes to approve a schedule change to work a MCSAP detail on November 4, 2009. Sergeant Karnes denied the request because Trooper Metz was transferring from Troop A Greensburg two days after Thanksgiving and he wanted Trooper Metz to have any outstanding cases completed before transferring.

On November 12, 2009, the PSTA filed a charge of unfair labor practices, docketed at Case No. PF-C-09-129-E, alleging that the Commonwealth committed additional unfair labor practices by, *inter alia*, denying Trooper Metz's requests for schedule changes on October 2, 2009 and November 4, 2009. On December 10, 2009, the Secretary issued a complaint on the charge at Case No. PF-C-09-129-E.

On December 15, 2009, the Board issued an Order Directing Remand to the Secretary for Further Proceedings in Case No. PF-C-09-95-E. In remanding for further proceedings, the Board did not pass on the merits, and cautioned that "[t]his order directing remand shall not be construed by the parties as a determination that the August 26, 2009 decision of the Secretary was in error." On December 24, 2009, the Secretary issued a complaint on the charge filed in Case No. PF-C-09-95-E.

On February 22, 2010, the Hearing Examiner consolidated the charges at Case Nos. PF-C-09-95-E and PF-C-09-129-E for hearing. Following three days of hearing, during which both parties presented testimony and documentary evidence, the Hearing Examiner issued a PDO dismissing the PSTA's charges of unfair labor practices. In the PDO, the Hearing Examiner determined that the only timely claim in Case No. PF-C-09-95-E was the PSTA allegation that the email sent by Major Hess on June 26, 2009 violated Section 6(1)(a), (c) and (d) of the PLRA. Finding that the June 26, 2009 email would not have a tendency to coerce bargaining unit employees in the exercise of protected rights, and that the PSTA failed to establish that Major Hess harbored an unlawful discriminatory motive, the Hearing Examiner dismissed the charge at Case No. PF-C-09-95-E.

With regard to the charge filed at Case No. PF-C-09-129-E, the Hearing Examiner found that the PSTA established a *prima facie* case that Sergeant Karnes harbored an unlawful discriminatory motive. However, the Hearing Examiner credited Sergeant Karnes' non-discriminatory reason for denying Trooper Metz's requests for schedule changes on October 2, 2009 and November 4, 2009. Thus, the Hearing Examiner concluded that the Commonwealth had established a successful defense to the charge of unfair labor practices.

The PSTA argues on exceptions that the Hearing Examiner erred in determining that the only claims of discrimination before him in Case No. PF-C-09-95-E involved the June 26, 2009 email from Major Hess. In this regard, the PSTA argues that Major Hess's email of June 26, 2009 was the culmination of a continuing course of discriminatory conduct by the Commonwealth. PSTA asserts that by bringing the prior acts of discrimination to the attention of the Commissioner, the PSTA expected an investigation and remedial action. Instead, the PSTA claims that Major Hess's June 26, 2009 email was an official endorsement of past discriminatory conduct in violation of Section 6(1)(a), (c) and (d) of the PLRA.

Initially, we note that the Hearing Examiner did not disregard the PSTA's evidence of alleged past discriminatory conduct of Sergeant Karnes. Indeed, the PSTA was permitted to introduce this evidence, and offered extensive testimony concerning the alleged past discrimination. However, this evidence of occurrences outside of the statute of limitations period may only be used to support a finding of a discriminatory motive for events that have occurred within the statute of limitations, which may be, in and of themselves, an unfair labor practice. Camp Hill Borough Police Association v. Camp Hill Borough, 16 PPER ¶16054 (Final Order, 1985). Thus, earlier events may only be used to shed light on the true character of matters that have occurred within the limitations period. *Id.*²

² To hold, as the PSTA suggests, that the employer's response to allegations of past discrimination is itself an unfair labor practice, thwarts the statute of limitations in Section 9(e) of the PLRA. Indeed, under the PSTA's rationale, untimely unfair labor practices could easily be revived simply by filing an informal complaint with the employer over past conduct and awaiting an alleged unfavorable response from the employer. As noted by the Commonwealth Court in PLRB v. Rizzo, 344 A.2d 744 (Pa. Cmwlth. 1975), such side-stepping of the statute of limitations cannot be countenanced.

For similar reasons we reject the PSTA's reading of AFSCME, Local No. 1971 v. Philadelphia Housing Development Corporation, 34 PPER 145 (Final Order, 2003). In that case, the Board did not, as the PSTA claims, endorse the notion that an unfair labor practice is committed anew whenever the employer fails to take corrective measures in response to allegations of past unfair labor practices. Philadelphia Housing Development Corporation, stands only for the proposition that where there is a timely unfair labor practice that has been charged before the Board, an employer may possibly avoid a Board imposed remedy by proving that it implemented prompt remedial make-whole relief to admit liability for, and rectify, the unfair labor practice. *Id.* (adopting Passavant Memorial Area Hospital, 237 NLRB 138 (1978)).

The only conduct of the Commonwealth alleged to be an unfair labor practice that occurred within the statute of limitations period is Major Hess's issuance of the June 26, 2009 email. To support a charge that Major Hess's email of June 26, 2009 was discriminatory, the PSTA had to establish that one of its members engaged in activity protected by the PLRA, and that with knowledge of that activity, the employer took adverse action against the employee because of union animus. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977).³ It is the motive for the adverse action that creates the offense under Section 6(1)(c) and (d) of the PLRA. PLRB v. Ficon, 434 Pa. 383, 254 A.2d 3 (1969).

Here, referring to PSTA's evidence of alleged past discriminatory conduct, the Hearing Examiner recognized that there is indeed evidence of union animus by Sergeant Karnes. However, the Hearing Examiner determined that the record is devoid of any evidence to support a finding that Major Hess, who sent the alleged discriminatory email, was motivated by anti-union animus. (PDO at 5). We have reviewed the entire record and agree with the Hearing Examiner. Other than the fact that Major Hess may have been aware of Trooper Metz's complaints through his May 2009 letter, there is no substantial competent evidence to support a finding that Major Hess harbored an unlawful motive in sending the June 26, 2009 email.⁴ Accordingly, the Hearing Examiner did not err in finding that the PSTA failed to sustain its burden of proving that the Commonwealth violated Section 6(1)(c) and (d) of the PLRA.

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 employee 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). As noted by the Hearing Examiner, grievances are a protected right of employees and a time-honored means to address issues in the workplace. PLRB v. Bald Eagle Area School District, 499 Pa. 62, 451 A.2d 671 (1982). As the contractual grievance process is a protected means to redress workplace issues, the Board has consistently recognized that an employer's suggestion that employees utilize the grievance procedure is not coercive and does not interfere with the employees' right to file grievances. AFSCME, District Council 85, Local 3530 v. Millcreek Township, 31 PPER ¶31056 (Final order, 2000); Fink v. Clarion County, 32 PPER ¶ 32165 (Final Order, 2001).

Similarly, Major Hess's suggestion to Trooper Metz to first attempt to address his concerns through the chain-of-command with his immediate supervisors, Lieutenant Jobe and Captain Kuzilla, would not interfere with or coerce a reasonable employee from filing a grievance. Indeed, even if Trooper Metz or the PSTA felt that discussing the matter with Lieutenant Jobe and Captain Kuzilla would be futile, Trooper Metz and the PSTA still retained the unfettered right to file a grievance as suggested in Major Hess's email. Nothing in Major Hess's June 26, 2009 email would, in any way, tend to coerce or interfere with the filing or processing of a grievance. Here, Major Hess's suggestion to Trooper Metz to pursue the grievance process defeats PSTA's claim of an independent violation of Section 6(1)(a) of the PLRA in Case No. PF-C-09-95-E.

With regard to the exceptions to the dismissal of its charge docketed at Case No. PF-C-09-129-E, the PSTA asserts that the Hearing Examiner correctly found that the PSTA proved a *prima facie* case of discrimination against Sergeant Karnes. PSTA argues, however, that the Hearing Examiner erred in accepting the explanations given by Sergeant Karnes for denying Trooper Metz's requests for schedule changes on October 2, 2009 and November 4, 2009, as a defense to the claims under Section 6(1)(a), (c) and (d) of the PLRA.

Generally, even where the charging party offers evidence that supports a finding of a discriminatory motive, the employer may nevertheless prevail in a defense to the charge of unfair labor practices by demonstrating that it had a credible, non-discriminatory

³ An employer commits an unfair labor practice under section 6(1)(d) by discriminating against an employee for having filed a charge with the Board. City of Philadelphia, 38 PPER 184 (Final Order 2007). The analysis under Section 6(1)(d) mirrors the analysis of a charge under Section 6(1)(c). Id.

⁴ Likewise, there is no evidence to support a finding that Major Hess sent his June 26, 2009 email as retaliation for prior charges of unfair labor practices filed by the PSTA.

reason for its action. Duryea Borough Police Department v. PLRB, 862 A.2d 122 (Pa. Cmwlth. 2004); Lakeland Educational Support Professionals v. Lakeland School District, 40 PPER 120 (Final Order, 2009); see Wright Line, Inc., 251 NLRB 150, 105 LRRM 1169 (1980).

The PSTA's exceptions in Case No. PF-C-09-129-E are simply a challenge to the Hearing Examiner's credibility determinations. However, the Board has recognized that determinations regarding the credibility of witnesses, including whether to credit the employer's asserted reasons and motives for its actions, is the function of the Hearing Examiner, not the Board. Mt. Lebanon Education Association v. Mt. Lebanon School District, 35 PPER 98 (Final Order, 2004).

In accepting Sergeant Karnes' alleged non-discriminatory reasons for denying Trooper Metz's requests for schedule changes on October 2, 2009 and November 4, 2009, the Hearing Examiner stated as follow:

In rebuttal to the PSTA's prima facie case of discrimination, however, the Commonwealth presented testimony by Sergeant Karnes that he denied Trooper Metz's request for a shift change to work the MCSAP detail on October 2, 2009, because he would have had to return to work to make the change and because Trooper Metz had not availed himself of a number of opportunities earlier that day to timely make his request (finding of fact 7) and that he denied Trooper Metz the opportunity to work the MCSAP detail on November 4, 2009, because Trooper Metz was transferring from Troop A Greensburg two days after Thanksgiving and he wanted Trooper Metz to complete any outstanding cases before transferring (finding of fact 8). Both explanations are plausible in that a supervisor may reasonably refuse to accommodate an employee's dilatory request for a shift change and may reasonably expect a transferring employee to complete their assigned work before transferring. The hearing examiner has credited Sergeant Karnes's testimony accordingly. There is, therefore, no basis for finding that the Commonwealth violated sections 6(1)(a), (c) and (d). See Duryea Borough Police Department, 862 A.2d 122 (Pa. Cmwlth. 2004) (a valid non-discriminatory reason for an employer's action may rebut any inference that the employer was discriminatorily motivated). Thus, the charge under those sections must be dismissed for lack of proof.

(PDO at 6-7).

Upon review of the record, there are no compelling reasons of record to reverse the Hearing Examiner's credibility determinations. As such, the Hearing Examiner did not err in accepting Sergeant Karnes' offer of his non-discriminatory reasons for denying Trooper Metz's requested schedule changes on October 2, 2009 and November 4, 2009. Having accepted as credible Sergeant Karnes' non-discriminatory reasons for denying the scheduling changes on October 2, 2009 and November 4, 2009, the Hearing Examiner did not err in dismissing the PSTA's charge of unfair labor practices under Section 6(1)(a), (c) and (d) of the PLRA, filed in Case No. PF-C-09-129-E. Lakeland School District, *supra*.

After a thorough review of the exceptions and all matters of record, the Hearing Examiner did not err in dismissing the PSTA's charges of unfair labor practices filed in Case Nos. PF-C-09-95-E and PF-C-09-129-E, against the Commonwealth for alleged violations of Section 6(1)(a), (c) and (d) of the PLRA,⁵ as read in *pari materia* with Act 111. Accordingly, the PSTA's exceptions to the PDO are dismissed, and the Hearing Examiner's January 27, 2011 PDO shall be made 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

⁵ The PSTA has not filed exceptions to the Hearing Examiner's dismissal of its claims under Section 6(1)(e) of the PLRA.

HEREBY ORDERS AND DIRECTS

that the exceptions filed by Pennsylvania State Troopers Association are hereby dismissed, and the January 27, 2011 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, and James M. Darby, Member, this twenty-sixth day of April, 2011. 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.