COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE, LODGE NO. 5	:	
v.	:	Case No. PF-C-06-63-E
CITY OF PHILADELPHIA	:	

FINAL ORDER

The Fraternal Order of Police, Lodge No. 5 (Union) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) on April 2, 2007.[1] The exceptions were accompanied by a request for an extension of time to file a brief in support of the exceptions. The request was granted and the Union filed a brief in support of its exceptions on May 16, 2007. The Union's exceptions challenge a March 12, 2007 Proposed Decision and Order (PDO) finding that the City of Philadelphia (City) did not violate Section 6(1)(a), (c) and (e) of the Pennsylvania Labor Relations Act (PLRA) and Act 111 of 1968 (Act 111). After requesting and receiving an extension of time, the City filed a brief in opposition to the exceptions on June 18, 2007.

The Union filed its Charge of Unfair Labor Practices with the Board on April 28, 2006. A complaint was issued and a hearing was held on August 10, 2006. A second day of hearing was held on September 18, 2006. The parties did not make opening statements or closing arguments at the hearing, but instead filed post-hearing briefs. In its post-hearing brief, the Union argued that the City violated Police Officer Theresa Brooks' right to union representation under National Labor Relations Board v. Weingarten, Inc., 420 U.S. 251, 95 S.Ct. 959 (1975). In the March 12, 2007 PDO, the Hearing Examiner found that the City did not violate Officer Brooks' Weingarten rights because the meeting at which Officer Brooks asked for union representation was not an investigatory interview and Officer Brooks did not have a reasonable belief that the meeting might result in discipline. Therefore, the Hearing Examiner dismissed the Union's charge.

The Hearing Examiner's Findings of Fact are summarized as follows. On April 20, 2006, Officer Brooks received a notice from the City of Philadelphia Solicitor's office directing her to appear at the office the next day. Officer Brooks was under the impression that the notice was only for a preparation session for a deposition in a civil case filed against the City and Officer Brooks. However, the notice was actually for both a preparation session and the deposition itself. This distinction is important because the day in question was Officer Brooks' regularly scheduled day off and a police department policy disallows police officers from working overtime solely to attend preparation sessions on their days off. Accordingly, Brooks was instructed by a supervisor not to go to the Solicitor's office. A police sergeant who supervises Brooks called the Solicitor's office and left a message that she was unavailable on April 21, 2006.

On the morning of April 21, 2006, Sergeant Edward Hayes received a phone call from Divisional Deputy City Solicitor Kenneth Butensky, who told Hayes that the notice that Brooks received was not merely for a preparation session. Butensky also stated that if Brooks did not appear, the City would not defend her in the civil matter. Hayes then called Brooks, who was already on paid status to attend two criminal court proceedings, and directed her to go to the Solicitor's office after those proceedings were concluded. Brooks attempted to contact the Union for advice over these conflicting instructions, but no Union representative was available.

[1] The Union's exceptions are timely because April 1, 2007, the twentieth day following issuance of the Hearing Examiner's proposed decision, was a Sunday and is therefore excluded from computation of the twenty-day period for filing exceptions. 34 Pa. Code § 95.100(b).

After lunch on April 21, 2006, Brooks arrived at the Solicitor's office. Upon her arrival, Brooks saw Captain Gerard Levins pass through the waiting room area. Captain Levins and Brooks did not have an amicable relationship. Brooks was informed by Assistant City Solicitor Christina Spalding that the City would represent her in the civil matter and that her appearance that day was for both the preparation and the actual taking of the deposition. However, despite these assurances, Brooks still had concerns. Brooks asked for union representation and demanded to speak with Deputy Solicitor Butensky, who was Spalding's supervisor.

Butensky set up a meeting in his office with Brooks and elicited the help of Captain Levins. Brooks' supervisor, Captain James Kelly, also participated in the meeting by speakerphone. Kelly assured Brooks that she was correct in proceeding to the Solicitor's office and was properly in overtime status. At some point after Brooks was given this assurance by Captain Kelly, she stated that she was going to call the Union. When Brooks took out her personal cell phone and started to make a call, Levins grabbed the phone from her hand. Brooks and Levins then began shouting at each other and had a physical altercation.

In its exceptions, the Union challenges the Hearing Examiner's findings and credibility determinations regarding what occurred during the April 21, 2006 meeting. Findings of a Board Hearing Examiner will be sustained if they are supported by substantial evidence. Substantial evidence is such "`relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" PLRB v. Kaufman Department Stores, 345 Pa. 398, 29 A.2d 90 (1942) (quoting Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197, 229, 59 S. Ct. 206, 217 (1938)). In making relevant findings of fact, the Hearing Examiner may choose to credit or discredit any testimony or evidence, in whole or in part. Pennsylvania State Corrections Officers Association v. Commonwealth, Department of Corrections Pittsburgh SCI, 34 PPER ¶ 134 (Final Order, 2003). Absent compelling reasons, the Board will not disturb the credibility determinations of its Hearing Examiners, who are able to observe the manner and demeanor of the witnesses during their testimony. Fraternal Order of Police, Lodge No. 85 v. Commonwealth of Pennsylvania, 18 PPER ¶18093 (Final Order, 1987).

Upon review of the record, we find that the Hearing Examiner's findings are supported by substantial evidence. Moreover, the Union presents no compelling reason to reverse the Hearing Examiner's credibility determinations, but merely urges the Board to credit Brooks' testimony regarding the April 21, 2006 meeting. Therefore, we must dismiss the Union's exceptions to the Hearing Examiner's findings of fact.

The Union also argues that the Hearing Examiner erred as a matter of law by failing to conclude that the City violated Officer Brooks' Weingarten rights during the meeting on April 21, 2006. In Weingarten, supra, the United States Supreme Court recognized a right of employes to request union representation at investigatory interviews, provided that the employe reasonably believes that the investigation may result in disciplinary action. It is well settled that public employes in Pennsylvania have Weingarten rights. See, e.g., Office of Administration v. PLRB, 591 Pa. 176, 916 A.2d 541 (2007); Duryea Borough Police Department v. PLRB, 862 A.2d 122 (Pa. Cmwlth. 2004); AFSCME, Council 13 v. PLRB, 514 A.2d 255 (Pa. Cmwlth. 1986); PLRB v. Conneaut School District, 10 PPER ¶ 10092 (Nisi Decision and Order, 1979), affirmed, 12 PPER ¶ 12155 (Final Order, 1981); PLRB v. Township of Shaler, 11 PPER ¶ 11347 (Nisi Decision and Order, 1980).

However, Weingarten rights only arise when the employer is investigating employe conduct that may form the basis for discipline. AFSCME, Council 13. In Township of Shaler, the Board explained that three elements must be met in order to establish a violation of Weingarten rights:

> First, the Complainant must demonstrate that [s]he reasonably believed that the interview might result in disciplinary action. Second, the Complainant must request that a union representative be present and . . . such request must be denied. Finally . . . subsequent to the employer's denial of representation, the employer must compel the employe to continue with the interview.

Township of Shaler, 11 PPER at 559.

The Hearing Examiner concluded that Weingarten rights did not attach during the April 21, 2006 meeting because it was not an investigatory interview, and Brooks did not have a reasonable belief that the meeting might result in disciplinary action. The Hearing Examiner reached the latter conclusion because Brooks' supervisor, Captain Kelly, assured her during the meeting that she was correct in proceeding to the Solicitor's office and was properly in overtime status. In Pennsylvania Nurses Association v. Western Psychiatric Institute and Clinic, 17 PPER ¶ 17225 (Proposed Decision and Order, 1986), the Hearing Examiner stated that:

> An employer can effectively rebut employe claims that they believed that discipline might result from a meeting with the employer by demonstrating that the employes were assured that no discipline would result from the meeting. Where, however, the assurances are less than convincing, the right to union representation still obtains.

Id. at 618 (citations omitted). The Western Psychiatric standard has been adopted and applied by the Board. Pennsylvania State Corrections Officers Association v. Commonwealth of Pennsylvania, 34 PPER ¶ 34021 (Final Order, 2003).

At no point during the April 21, 2006 meeting was discipline ever mentioned. Moreover, Kelly assured Brooks, prior to her request for Union representation, that she was properly at the Solicitor's office and was properly in overtime status. Given this assurance, Brooks could not have reasonably feared the imposition of discipline when she announced her intention to contact the Union.

Further, the meeting was not an investigatory interview. Brooks was not under investigation for misconduct, but rather was called to the City Solicitor's office to prepare for and give a deposition in a civil case filed against the City and Brooks. The meeting at issue between Brooks, the deputy city solicitor, Captain Levins and Brooks' supervisor (participating by speakerphone) was set up in response to Brooks' concerns about receiving conflicting instructions on whether she should appear at the Solicitor's office and whether she would receive overtime pay. Because the meeting was not investigatory in nature and Brooks did not have a reasonable belief that discipline might be imposed, the Hearing Examiner correctly found that she did not have a right to union representation pursuant to Weingarten at the April 21, 2006 meeting.

To prevail on a charge of discrimination, the complainant must prove that the employe engaged in protected activity, that the employer was aware of this activity, and that the employer took adverse action against the employe because of a discriminatory motive or anti-union animus. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). To prevail on a charge of interference with employe rights, the complainant must also make a threshold showing that the employe was engaged in protected activity. Pennsylvania State Corrections Officers Association v. Department of Corrections, Fayette SCI, 38 PPER 4 (Final Order, 2007).

The Hearing Examiner found that Brooks did not have a protected right to union representation at the April 21, 2006 meeting because the meeting did not meet the criteria set forth in Weingarten. Thus, the Hearing Examiner determined that the Union failed to meet its burden of proving that Brooks engaged in protected activity, which precludes a finding that the City interfered with Brooks' rights under Section 6(1)(a) of the PLRA, or discriminated against Brooks under Section 6(1)(c). Because the Union did not establish that Officer Brooks had the right to union representation at the April 21, 2006 meeting, we must uphold the Hearing Examiner's dismissal of the Union's charge under Section 6(1)(a) and (c) of the PLRA.

The Union argues in its brief in support of exceptions that even if the April 21, 2006 meeting did not meet the criteria set forth in Weingarten, Officer Brooks still had a protected right to seek union representation and Captain Levins interfered with that right. However, the Board has held that employes do not have the right to union representation at meetings with employer representatives that are not part of a disciplinary process. AFSCME, Council 13 v. PLRB, 514 A.2d 255 (Pa. Cmwlth. 1986).

Moreover, the issue of whether Officer Brooks was properly on overtime status was resolved in her favor by Captain Kelly before she sought to call the Union on her cell phone. Accordingly, Brooks had no immediate need to contact the Union for mutual aid and protection and her attempt to do so was not activity protected by the PLRA.[2]

We agree with the Hearing Examiner that Captain Levins' act of grabbing Officer Brooks' cell phone was thoughtless and provocative (PDO at 5). However, while we do not condone, and in fact condemn Captain Levins' conduct, he did not commit an unfair labor practice because Officer Brooks had no right under the PLRA and Act 111 to interrupt the meeting and attempt to contact the Union under the particular facts of this case. Thus, we must dismiss the Union's exceptions to the PDO for failure to prove that Officer Brooks engaged in protected activity or that the City interfered with protected rights. Our decision is based upon the unique facts of this case and is not to be read to preclude the finding of a Section 6(1)(a) violation in a different factual setting where an employer's actions may tend to coerce employes in the exercise of protected rights.

After a thorough review of the exceptions and all matters of record, the Board shall dismiss the exceptions and affirm the Hearing Examiner's conclusion that the City did not commit unfair labor practices in violation of Section 6(1)(a), (c) and (e) of the PLRA.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the exceptions filed by the Union are hereby dismissed, and the March 12, 2007 Proposed Decision and Order be and hereby is made absolute and final.

SEALED, DATED and MAILED 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 eighteenth day of December, 2007. 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.

BOARD MEMBER JAMES M. DARBY DISSENTS IN PART.

I would conclude, based on the totality of the circumstances of this case, that Captain Levins' actions regarding the cell phone rose to the level of a violation of Section 6(1)(a) of the Pennsylvania Labor Relations Act.

[2] The Union's reliance upon AFSCME, Local No. 1971 v. Philadelphia Housing Development Corporation, 34 PPER 145 (Final Order, 2003) is misplaced. In that case, the union president engaged in protected activity by representing the union's interests in a labor management meeting when an employer representative precipitated a physical altercation with the Union president. Unlike the union president in that case, Brooks was not engaging in protected activity when the altercation occurred.