

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE :
CHRISTINA LODGE NO. 84 :
 : Case No. PF-C-10-137-E
 v. :
 :
FREELAND BOROUGH :

FINAL ORDER

The Fraternal Order of Police, Christina Lodge 84 (FOP) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on October 26, 2011, challenging a Proposed Decision and Order (PDO) issued on October 6, 2011. In the PDO, the Board's Hearing Examiner dismissed the FOP's Charge of Unfair Labor Practices alleging that Freeland Borough (Borough) violated Section 6(1)(a), (c) and (e) of the Pennsylvania Labor Relations Act (PLRA), as read in *pari materia* with Act 111 of 1968. The Borough filed a response to the exceptions on November 15, 2011. The Hearing Examiner's Findings of Fact, relevant to the exceptions, are summarized as follows.

The Board has not certified the FOP as the exclusive representative of the police officers of the Borough. Also, the Borough and the FOP are not parties to a collective bargaining agreement for the police officers of the Borough. Instead, Officers Robert P. Maholik and Scott Michalesko each have their own separate, individual written employment contracts with the Borough.

On August 12, 2010, Borough Solicitor Donald Karpowich, Borough Manager Lynn Falatko, and Chief of Police Nadine Sist, called Maholik and Michalesko to a meeting to answer allegations made by Officer Stephen Demko that Maholik and Michalesko had created a hostile work environment. Michalesko was the first officer called into the meeting. Solicitor Karpowich started off the meeting by stating that Officer Demko accused Michalesko and Maholik of creating a hostile work environment for him. Michalesko then said, "I'd like Rob [Maholik] to come in here."¹ One of the Borough officials said, "You don't need him." The interviewers told Michalesko that Maholik could not come in because he was the subject of the investigation, and that they were interviewing the employees separately.

Maholik then met with the same Borough officials. The officials advised Maholik that the purpose of the meeting was to investigate Demko's complaint. Maholik told them that if there was a chance of discipline, he wanted union representation. Attorney Karpowich said that if Maholik did not do anything wrong, he did not need a union. The meeting continued, and lasted for 20 to 30 minutes.

On August 18, 2010, Borough Manager Falatko informed the officers of the resolution of the Demko allegation, stating, in relevant part,

"An investigation was immediately conducted and it is the Borough's hope that this matter is resolved and that no such conduct will occur in the future. The minutes from this meeting along with a copy of this letter will be placed in your file."

The Hearing Examiner found that because the FOP was not the exclusive collective bargaining representative for the Borough police officers, the Borough could not have

¹ Michalesko thought that Maholik could be his union representative, but he did not use the specific words "union representative" when he stated that he would like Maholik to be present at the meeting.

violated the Weingarten rights of Officers Maholik and Michalesko.² Accordingly, the Hearing Examiner dismissed the FOP's claim that the Borough violated Section 6(1)(a) of the PLRA.³

The FOP limits its exceptions to the Hearing Examiner's determination that the FOP is not the exclusive collective bargaining representative for the Borough police officers. Act 111, providing collective bargaining for police officers and fire fighters is read in *pari materia* with the PLRA. Philadelphia Fire Officers Association v. Pennsylvania Labor Relations Board, 470 Pa. 550, 369 A.2d 259 (1977). Under the PLRA, the two methods by which an exclusive representative may be established is through certification by the Board or recognition by the employer as the employees' collective bargaining representative. Girard Borough Police Bargaining Committee v. Girard Borough, 15 PPER ¶15033 (Proposed Decision and Order, 1984).

In finding that the FOP was not the exclusive representative of the Borough police officers, the Hearing Examiner found as follows:

There is no evidence that the Borough has recognized the union through a collective bargaining agreement. Rather, the officers have individual employment agreements with the Borough. Also, there is no evidence of a PLRB certification of the FOP. My search of the Board records for such a certification showed nothing.

(PDO at 6).

The FOP argues on exceptions that the Hearing Examiner erred in finding that recognition can only be established by a collective bargaining agreement between the union and the employer. However, in the absence of a Board certification, a collective bargaining agreement, establishing a bargaining history between the employer and union, may be conclusive evidence of recognition of an exclusive collective bargaining representative. Jefferson-Penn Police Department v. Jefferson-Penn Police Commission, 19 PPER ¶19158 (Final Order, 1988). In the absence of either certification or a collective bargaining agreement, it remains the burden of the complainant to prove through substantial, competent evidence each element of the charge, including, where applicable, the element of an exclusive collective bargaining representative. St. Joseph's Hospital v. Pennsylvania Labor Relations Board, 473 Pa. 101, 373 A.2d 1069 (1977).

Upon review of the record, we agree with the Hearing Examiner that the record is devoid of substantial and competent testimony or documentary evidence to support a finding that the FOP is the exclusive collective bargaining representative for the Borough police officers. The only matters of record are statements made by counsel for the Borough in opening and closing arguments that suggest that the FOP is the officers' union. However, arguments by counsel are not testimony or evidence upon which the Board

² The Board has recognized that an employer commits an unfair labor practice under Section 6(1)(a) of the PLRA if it denies an employe requested union representation at an investigatory interview that the employe reasonably believes may result in the imposition of discipline, as set forth in NLRB v. J. Weingarten, Inc., 420 U.S. 251, 88 LRRM 2689 (1975). Weingarten was adopted by the Board in Township of Shaler, 11 PPER 11347 (Nisi Decision and Order, 1980), and was endorsed by the Pennsylvania Supreme Court in Commonwealth of Pennsylvania, Office of Administration v. PLRB, 591 Pa. 176, 916 A.2d 541 (2007). There is no challenge on exceptions to the Hearing Examiner's determination that the Weingarten right exist only where there is an exclusive collective bargaining representative. IBM, 341 NLRB 1288 (2004); see Office of Administration, *supra*.

³ The Hearing Examiner also dismissed the FOP's claim under Section 6(1)(c) that the Borough retaliated against Officers Maholik and Michalesko for the exercise of Weingarten rights. With regard to the challenged reprimands, the Hearing Examiner accepted the testimony of Borough Council Vice President Robert Quinn that the Borough had separate, legitimate non-discriminatory business reasons to reprimand Officers Maholik and Michalesko. Accordingly, the Hearing Examiner dismissed the FOP's claim of retaliation under Section 6(1)(c) of the PLRA. Lakeland Educational Support Professionals v. Lakeland School District, 40 PPER 120 (Final Order, 2009). The Hearing Examiner also dismissed the FOP's Charge insofar as it alleged a bargaining violation under Section 6(1)(e) of the PLRA. The Hearing Examiner noted that in addition to the fact that there was no exclusive collective bargaining representative, and thus there was no bargaining obligation, see Jessup Borough Police Department Employees v. Jessup Borough, 33 PPER ¶33176 (Final Order, 2002), there was no evidence concerning a bargaining violation presented by the FOP during the hearing. The Hearing Examiner further dismissed the FOP's assertion that Maholik's ten day suspension violated the PLRA, noting that the suspension was not alleged in the specification of the Charge of Unfair Labor Practices. Independent State Store Union v. PLRB, 18 A.3d 367 (Pa. Cmwlth. 2011). The FOP has not excepted to the dismissal of its charge on these bases.

may base a finding of fact. Good Tire Service v. WCAB (Wolfe), 978 A.2d 1043, 1048 n.3 (Pa. Cmwlth, 2009), *petition for allowance of appeal denied*, 607 Pa. 692, 3 A.3d 672 (2010) ("counsel's assertions and arguments do not constitute evidence"). Indeed, the fact that the police officers each have individual contracts of employment with the Borough is compelling evidence that the FOP is not the exclusive collective bargaining representative of these employees.

After a thorough review of the exceptions and all matters of record, the Hearing Examiner did not err in concluding that the FOP failed to prove by substantial, competent evidence that it is the exclusive collective bargaining representative for the Borough police officers. Accordingly, the FOP's exceptions are dismissed and the 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

HEREBY ORDERS AND DIRECTS

that the exceptions filed by the Fraternal Order of Police, Christina Lodge 84 are hereby dismissed, and the October 6, 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 seventeenth day of January 2012. 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.