

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNSYLVANIA STATE TROOPERS ASSOCIATION :
 :
 v. : Case No. PF-C-10-128-E
 :
 COMMONWEALTH OF PENNSYLVANIA :
 PENNSYLVANIA STATE POLICE :

PROPOSED DECISION AND ORDER

On August 20, 2010, 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) and (e) of the Pennsylvania Labor Relations Act (PLRA) as read in pari materia with Act 111 of 1968 (Act 111) "by keeping [members of the bargaining unit] from conferring with their known and designated PSTA representatives." On September 1, 2010, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on December 21, 2010. On November 10, 2010, the hearing examiner, upon the request of the Commonwealth and over the objection of the PSTA, continued the hearing. On January 11, 2011, the hearing examiner held the hearing and afforded both parties a full opportunity to present testimony and to cross-examine witnesses. At the outset of the hearing, the Commonwealth moved to dismiss the charge under section 6(1)(e) for failure to state a cause of action (N.T. 6). The hearing examiner granted the motion over the PSTA's objection (N.T. 7). At the conclusion of the PSTA's case-in-chief, the Commonwealth moved to dismiss the charge under section 6(1)(a) for failure to present a prima facie case (N.T. 72). The hearing examiner denied the motion. Id.¹ On February 28, 2010, each party filed a brief.

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

FINDINGS OF FACT

1. The Commonwealth employs sworn members of the Pennsylvania State Police (PSP) who are members of a bargaining unit represented by the PSTA. (N.T. 57-61)
2. On June 30, 2010, the patrol section commander at Troop B, Washington Headquarters (Lt. Eric S. Hermick), bear-hugged a crime unit supervisor at Troop B, Washington Headquarters (Cpl. Louis Reda). (N.T. 10-12, 22, 42-43)
3. The PSP began an internal affairs investigation of Lt. Hermick for having bear-hugged Cpl. Reda. (N.T. 12; PSTA Exhibit 1)
4. The PSP routinely places members of the PSP on restricted duty status while it investigates allegations of serious misconduct against them. The PSP's department disciplinary officer (Maj. Lisa S. Christie) reviews the propriety of any such placements. (N.T. 44, 46-47, 76-79)
5. Upon the request of the area commander for Troop B (Maj. Terry L. Seilhamer), Maj. Christie approved placing Lt. Heckman in restricted duty status in order to preserve the integrity of the internal affairs investigation by keeping Lt. Heckman from discussing the matter with any potential witness. She thought that his rank gave him influence over 90% of the personnel at Troop B, Washington Headquarters, (N.T. 79-80, 82-83, 97-98)
6. On July 12, 2010, the acting troop commander for Troop B (Lt. David J. Heckman) placed Lt. Hermick in restricted duty status subject to a number of conditions. One condition was that Lt. Hermick "shall not . . . have contact with personnel assigned to Troop B, Washington Headquarters, without the consent of the Commanding Officer, Troop B, or their designee." Another condition was that Lt. Hermick

¹ The notes of testimony erroneously reflect that the hearing examiner took the motion under advisement.

"cease any and all contact and communication with Troop B, Washington Headquarters personnel. Communication or contact includes, but is not limited to, the following: verbal, physical, telephonic, mail, electronic, or any other means. There shall be no third party contact or communication with Troop B, Washington Headquarters personnel for any reason. If any inadvertent contact or communication with Troop B, Washington Headquarters personnel should occur or you are contacted by any Troop B, Washington Headquarters personnel, you shall immediately notify an immediate supervisor or the Officer of the Day with an explanation of the circumstances of the contact or communication. The contact or communication shall then be immediately documented on Department correspondence, Form SP 3-201, directed to me through channels."

(N.T. 13-16; PSTA Exhibit 2)

7. The president of FOP Lodge 47 (Cpl. David M. Bova), the vice president of FOP Lodge 47 (Cpl. Robert Copechal) and the president of FOP Lodge 47's home association (Tpr. Joe Christy) were the PSTA's station representatives at Troop B, Washington Headquarters, at the time. (N.T. 9, 23, 29-31)

8. Lt. Heckman advised President Bova that Lt. Hermick was not allowed to speak with President Bova or the other two PSTA station representatives. (N.T. 33-34)

9. Later in the day on July 12, 2010, Lt. Heckman emailed Lt. Hermick and President Bova as follows:

"Lt. Hermick,

I contacted Major Seilhamer and you may converse with the Lodge President, but only as it relates to your case.

I spoke to Cpl. BOVA today and he is aware of the no contact clause in your restriction.

I would remind you to strictly adhere to the no contact clause and everything outlined in the paperwork that you received today. I am available for any questions or concerns you have until Captain Epstein returns from his vacation."

Lt. Heckman followed up with a phone call to President Bova telling him the same thing. (N.T. 15-17, 23-24, 35; PSTA Exhibit 3)

10. President Bova asked the commanding officer of Troop B (Capt. Sheldon A. Epstein) if Lt. Hermick could speak with either of the other two PSTA station representatives. Capt. Epstein said that President Bova would be the only "point of contact" for Lt. Hermick. (N.T. 35-36, 44-45)

11. While the investigation of Lt. Hermick was on-going, the PSP began an internal affairs investigation of Sgt. James S. Martsolf for allegedly "telling Corporal REDA to contact Harrisburg and/or Major (Lisa) Christie to tell her to lift the restriction order on Lieutenant HERMICK because the investigation on him is bullshit." (N.T. 37, 42, 47-48; Commonwealth Exhibit 1)

12. Upon the request of Maj. Seilhamer, Maj. Christie approved placing Sgt. Martsolf in restricted duty status in order to maintain the integrity of the internal affairs investigation of Lt. Heckman. She thought that Sgt. Martsolf had put undue pressure on Cpl. Reda to resolve the matter. (N.T. 80-81, 83)

13. By memorandum dated July 19, 2010, Capt. Epstein placed Sgt. Martsolf in restricted duty status subject to a number of conditions. One condition was that Sgt. Martsolf "shall not . . . have contact with personnel assigned to Troop B Headquarters, without the consent of the Commanding Officer, Troop B, or their designee." Another condition was that Sgt. Martsolf

"cease any and all contact and communication with members of Troop B Headquarters or Lieutenant Eric HERMICK or Corporal Louis REDA. Communication or contact includes, but is not limited to, the following: verbal, physical, telephonic, mail, electronic, or any other means. There shall be no third party contact or

communication with members of Troop B Headquarters or Lieutenant Eric HERMICK or Corporal Louis REDA for any reason. If an inadvertent contact or communication with the aforementioned individuals should occur or you are contacted by Lieutenant Eric Hermick or Corporal Louis REDA, you shall immediately notify an immediate supervisor or the Officer of the Day with an explanation of the circumstances of the contact or communication. The contact or communication shall then be immediately documented on Department correspondence, Form SP 3-201, directed to me through channels."

(N.T. 36-37; PSTA Exhibit 6)

14. By memorandum dated September 1, 2010, Capt. Epstein rescinded the July 19, 2010, memorandum and reinstated Sgt. Martsolf to full duty. (N.T. 39, 54-55, 88; Commonwealth Exhibit 2)

15. On December 14, 2010, Maj. Seilhamer rescinded the condition that Lt. Hermick not contact or communicate with personnel at Troop B, Washington Headquarters. (N.T. 18-19, 38-40, 81, 102-103)

DISCUSSION

The PSTA has charged that the Commonwealth committed unfair labor practices under section 6(1)(a) of the PLRA as read in pari materia with Act 111 "by keeping [members of the bargaining unit] from conferring with their known and designated PSTA representatives." The PSTA filed the charge after the Commonwealth placed Lt. Hermick and Sgt. Martsolf in restricted duty status while the PSP conducted internal affairs investigations of them. Under the terms of their restricted duty status, without the Commonwealth's permission, Lt. Hermick and Sgt. Martsolf were prohibited from any and all contact with personnel at Troop B, Washington Headquarters (findings of fact 6 and 13), including the three PSTA station representatives there at the time (finding of fact 7). Although the Commonwealth subsequently granted permission to Lt. Hermick to speak with one of the PSTA's station representatives (President Bova) "as it relates to your case" (finding of fact 9), the PSTA contends that the Commonwealth should be found in violation of section 6(1)(a) because the restrictions it placed on Lt. Hermick and Sgt. Martsolf were coercive of their right to access their PSTA station representatives unconditionally.

The Commonwealth contends that the charge should be dismissed because the PSTA did not present a prima facie case during its case-in-chief. According to the Commonwealth, the PSTA failed to establish that under the totality of circumstances the restrictions had a tendency to coerce a reasonable employe in the exercise of their right to union representation. The Commonwealth also contends that even if the PSTA presented a prima facie case during its case-in-chief the charge nevertheless should be dismissed because the Commonwealth had a legitimate interest for imposing the restrictions on Lt. Heckman and Sgt. Martsolf that outweighs any coercive effect the restrictions may have had on them in the exercise of their right to access their PSTA station representatives unconditionally.

In City of Butler, 41 PPER 116 (Final Order 2010), the Board explained that it

"will find that an independent violation of Section 6(1)(a) has occurred where, in light of the totality of the circumstances, the employer's action has a tendency to coerce a reasonable employe 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)."

Id. at 391.

If, however, the employer presents a legitimate basis for its conduct that outweighs any coercive effect the conduct may have on employes in the exercise of protected rights, then no violation of section 6(1)(a) may be found. Commonwealth of Pennsylvania, Pennsylvania State Police, 41 PPER 44 (Proposed Decision and Order 2010). But if the employer presents no legitimate basis for its conduct that otherwise is coercive, then a violation of section 6(1)(a) must be found. Ringgold School District, 26 PPER ¶ 26155 (Final Order 1995) (construing the analogous provision of the Public Employe Relations Act (PERA)).

The PSTA presented a prima facie case by showing that the restrictions the Commonwealth imposed on Lt. Heckman and Sgt. Martsolf prevented them from accessing their PSTA station representatives unconditionally. Indeed, the restrictions were absolute, admitting of no exceptions (findings of fact 6 and 13). As such, they were coercive as charged.² See SEPTA, 17 PPER ¶ 17038 (Final Order 1986), where the Board in construing the PERA's counterpart to section 6(1)(a) found that an employer coerced employees in the exercise of their right to union representation by prohibiting them from speaking with anyone, including their union representatives, about any accidents in which the employees may have been involved despite the employer's interest in keeping information about accidents in-house.

The record shows that the Commonwealth subsequently allowed Lt. Hermick to speak with one PSTA station representative (President Bova) "as it relates to your case" (finding of fact 9), but the permission granted was too little, too late as Lt. Hermick had the right not only to contact the PSTA station representatives unconditionally but also to contact a PSTA station representative of his own choosing. See City of Philadelphia, 28 PPER ¶ 28243 (Proposed Decision and Order 1997), where former Hearing Examiner Thomas G. McConnell found that an employer coerced employees in the exercise of their right to select their own union representatives when it dictated who their union representative would be.

No merit is found in the Commonwealth's contention that it had a legitimate interest in imposing the restrictions on Lt. Heckman and Sgt. Martsolf that outweighs the coercive effect of the restrictions on them in the exercise of their right to access their PSTA station representatives unconditionally. According to the Commonwealth, the restrictions preserved the integrity of on-going internal affairs investigations of Lt. Heckman and Sgt. Martsolf by keeping them from speaking with any potential witness as to what they did or might have said, especially since Lt. Heckman's rank gave him influence over 90% of the personnel at Troop B, Washington Headquarters, and thus were legitimate. Notably, however, as noted above, the Commonwealth subsequently allowed Lt. Hermick to contact President Bova, albeit on a limited basis, so the Commonwealth's own conduct shows that the restrictions were broader than needed to serve its interests. Under the circumstances, there is no basis for finding that the legitimacy of the Commonwealth's interest in imposing the restrictions on Lt. Hermick and Sgt. Martsolf outweighs the coercive effect of the restrictions on their right to access their PSTA station representatives unconditionally.

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 committed an unfair labor practice under section 6(1)(a) of the PLRA as read in pari materia with Act 111.
5. The Commonwealth has not committed an unfair labor practice under section 6(1)(e) 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

² Hence the denial of the Commonwealth's motion to dismiss the charge for failure to present a prima facie case.

HEREBY ORDERS AND DIRECTS

that the Commonwealth shall:

1. Cease and desist from interfering with, restraining or coercing employes in the exercise of their rights guaranteed in the PLRA as read in pari materia with Act 111.

2. Take the following affirmative action which the hearing examiner finds necessary to effectuate the policies of the PLRA as read in pari materia with Act 111:

(a) Post a copy of this decision and order within five (5) days from the effective date hereof in a conspicuous place readily accessible to its employes and have the same remain so posted for a period of ten (10) consecutive days; and

(b) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this order by completion and filing of the attached affidavit of compliance.

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 sixteenth day of March 2011.

PENNSYLVANIA LABOR RELATIONS BOARD

Donald A. Wallace, Hearing Examiner