

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNSYLVANIA STATE TROOPERS :
ASSOCIATION :
v. : Case No. PF-C-17-90-E
: :
COMMONWEALTH OF PENNSYLVANIA :
PENNSYLVANIA STATE POLICE :

PROPOSED DECISION AND ORDER

On October 27, 2017, the Pennsylvania State Troopers Association (Union or PSTA) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair labor practices, under the Pennsylvania Labor Relations Act (PLRA or Act), as read with Act 111, and therein alleged that the Commonwealth of Pennsylvania, Pennsylvania State Police (Commonwealth) violated Section 6(1)(a) of the PLRA on September 18, 2017, when Lieutenant William Donahue (Donahue) made statements to Union representative Corporal Bernie Mullen (Mullen) that were allegedly coercive and allegedly interfered with the exercise of Mullen's protected rights.

On November 22, 2017, the Acting Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on February 23, 2018, in Harrisburg, Pennsylvania. After two granted continuance requests, the hearing was scheduled for and held on Wednesday, August 22, 2018. During the hearing on that date, both parties in interest were afforded a full and fair opportunity to present testimonial and documentary evidence and to cross-examine witnesses. On October 16, 2018, the Union filed its post-hearing brief. On December 20, 2018, the Commonwealth filed its post-hearing brief.

The examiner, based upon witness testimony, admitted documents and all matters of record, makes the following:

FINDINGS OF FACT

1. The Commonwealth is a public employer pursuant to Act 111 and the PLRA. (N.T. 3-4)

2. The Union is a labor organization pursuant to Act 111 and the PLRA. (N.T. 3-4)

3. Corporal Todd McCurdy (McCurdy) is a Crime Supervisor at Troop J in Lancaster. He is on the Board of Directors of the PSTA, and he is the Vice President of the Fraternal Order of Police (FOP) Lodge 66. (N.T. 5-6)

4. The geographical area covered by Troop J includes Lancaster County and Chester County. It will soon include York County. The Embreeville Station is in the Troop J area. (N.T. 6)

5. Donahue is the station commander at Embreeville Station. There are multiple Union representatives at the Embreeville Station. In September

2017, Mullen was a Crime Supervisor and Union representative at Embreeville Station. As Crime Corporal, Mullen was in Donahue's direct chain of command. Mullen is now a Sergeant in the Patrol Section at York Station. (N.T. 6-7, 25-26, 48-52)

6. Mullen was an FOP representative at Embreeville for 3-4 years. Mullen had previously dealt with Donahue in his capacity as an FOP representative. (N.T. 27-28)

7. Throughout the summer of 2017, McCurdy received multiple complaints regarding the staffing of patrol shifts and zone coverage at Embreeville Station. The complaints expressed concerns over manpower shortages/scheduling of patrols which created an officer safety issue. (N.T. 7, 11-12)

8. Also during the summer of 2017, Mullen received multiple complaints in his capacity as FOP representative from Union members at various meetings that there were shifts without enough troopers because corporals were not taking zones. These members had attempted to go through their chain of command and had spoken with the scheduling sergeant, but the situation did not change. Mullen formally complained to McCurdy about the pattern of complaints he received about the manpower and safety concerns. (N.T. 11-12, 27, 37)

9. The safety/manpower shortage issue had occurred on multiple occasions for months and had been brought to the attention of the supervisors at Embreeville Station and had not been remedied. Troopers provided Mullen with photographs of certain schedules to prove that there was a manpower shortage and that corporals were not taking any zones. (N.T. 14-16, 39-41)

10. Before Troop J Commander Captain Tomlinson left, he met with all the scheduling sergeants about developing schedules that ensured sufficient manpower on the roads. (N.T. 23)

11. During this time Lieutenant Brandon Daniels (Daniels) was the Acting Troop J Commander. Early in September 2017, at a monthly meeting between the FOP and Daniels, McCurdy told Daniels that there were concerns regarding patrol staffing levels at Embreeville Station, specifically that some shifts had only three cars in the zones. (N.T. 7-8, 11, 19-20)

12. Two weeks after his meeting with McCurdy, Daniels held a Troop J supervisory staff meeting. There were approximately 8 people at the meeting including Donahue. Daniels told the supervisors about McCurdy's complaint that only three cars were scheduled on certain patrol shifts at Embreeville Station. (N.T. 20-21)

13. At the Troop J supervisory meeting, Donahue disagreed that there were only three cars in the zones during shifts and he became upset. Daniels told the group of supervisors that he learned about the staffing complaints through the FOP and McCurdy. At the meeting, Donahue was concerned that the complaints went to the FOP and not directly to him. He said: "This is bullshit" or "This is bullcrap." (N.T. 21-22, 58, 71)

14 After the meeting Donahue told McCurdy that he agreed that the minimum staffing is 4 people in the zones. (N.T. 18, 60)

15. On September 18, 2017, Donahue asked Mullen to come to his office. At this time, Donahue already knew that Mullen was an FOP representative. During the first five minutes of the meeting, Mullen updated Donahue on a couple of cases that Donahue asked him about. After the updates, Donahue asked Mullen: "Do you know why you're here?" Mullen responded: "No." Donahue proceeded to inform Mullen that he believed that Mullen undermined his and Sergeant Blauvelt's (Blauvelt) command by running to the FOP. Donahue told Mullen that he and Blauvelt were called out on the scheduling issue at the commander meeting. Donahue told Mullen that Mullen should have come to him first and that he and Blauvelt looked like "smacked asses." The meeting lasted approximately 2 hours. (N.T. 30-31, 77, 90-91)

16. During the meeting, Donahue appeared upset, and he raised his voice multiple times. Donahue repeatedly asked Mullen if he knew who his direct supervisor was. Donahue asked: "Who is your direct supervisor?" To which Mullen responded: "It's clear who my direct supervisor is." Donahue repeated the question: "Who is your direct supervisor?" To which Mullen responded: "It's you sir." At this point in the meeting, Mullen believed that he was in trouble with Donahue for going through the FOP regarding the manpower/scheduling issue. (N.T. 31-32, 46)

17. Donahue explained to Mullen that Mullen should be addressing issues with him first. Donahue said to Mullen: "There's a difference between an FOP rep and an FOP rat." He further told Mullen: "If anybody had pulled this stuff, I would have had them on midnights a longtime ago." Donahue told Mullen that he expected loyalty from Mullen because Donahue had previously gone to bat for Mullen regarding his schedule. Donahue also pointed out that if an exigency should arise, he could put Mullen in the patrol corporal rotation working different shifts. Donahue further stated: "If anybody else can't get in line, they could find somewhere else to work." (N.T. 32-33, 78-80)

18. Mullen explained multiple times during this meeting that he was acting as a Union representative when he brought the scheduling concerns to McCurdy. Mullen repeatedly told Donahue that he felt that Donahue was threatening him. (N.T. 33, 67, 87-89)

DISCUSSION

The Union argues that there is a conflict in testimony that should be resolved in favor of Mullen and McCurdy and that even the agreed-upon, corroborating testimony of both sides' witnesses establishes a violation of Section 6(1)(a). (Union's Post-hearing Brief at 5). The Union argues that Mullen was a known Union representative at the Embreeville Station engaged in protected workplace safety activities when Donahue summoned Mullen to his office for two hours to discuss the manner in which Mullen brought the safety issue to the Union rather than to Donahue. (Union's Post-hearing Brief at 5-6). Worse than being called into the Commander's office, contends the Union, during the meeting Donahue emphasized how he was protecting Mullen's work schedule with the Captain who wanted a supervisor on every shift and that Donahue resisted making Mullen work nights and weekends, implying that the benevolent Commander could stop being so benevolent. (Union's Brief at 6-7).

The Commonwealth argues that an evaluation of the chronological sequence of events reveals that Mullen and McCurdy waited an inordinate amount of time to bring their safety concerns to Donahue, the Embreeville

Station Commander, knowing that his mandate of four cars in the zones was not being followed for months. This delay, contends the Commonwealth, sheds doubt on the motives of Mullen and McCurdy and highlights their attempt to embarrass Donahue to make him look ineffective and incompetent.

(Commonwealth's Post-hearing Brief at 12-14). The Commonwealth also maintains that Mullen's and McCurdy's ulterior motives are further exposed by their concessions at the hearing that another matter brought to Donahue's attention was immediately resolved by Donahue. (Commonwealth's Post-hearing Brief at 13). The Commonwealth emphasizes that, once Donahue learned of the scheduling/manpower issue, he immediately resolved it with his scheduling Sergeant. (Commonwealth's Post-hearing Brief at 13-14).

The Commonwealth points out that the "primary purpose" of having the September 18, 2017 conversation with Mullen was to request that, in the future, Mullen bring issues of trooper safety directly to Donahue's attention so that he could address those issues. At no time during that conversation, the Commonwealth contends, did Donahue tell Mullen that he could not take his concerns through Union channels. (Commonwealth's Post-hearing Brief at 15). The Commonwealth further posits that, it was Mullen himself, who became defensive, accusing Donahue of threatening him, that prolonged the meeting causing Donahue to repeatedly deny Mullen's accusations, which also contributed to the length of the meeting. (Commonwealth's Post-hearing Brief at 16).

The Commonwealth argues that the testimony of Daniels, Mullen and McCurdy should not be credited over the testimony of Donahue because they could not explain why they waited weeks and perhaps months to address legitimate threats to trooper safety. (Commonwealth's Post-hearing Brief at 17). The Commonwealth claims that the lack of explanation and lack of urgency to report unsafe working conditions indicates that Mullen and McCurdy had "bad motives" and therefore should not be assessed as credible. (Commonwealth's Post-hearing Brief at 18). Additionally, the Commonwealth argues that Donahue had a legitimate business reason which, on balance, outweighs any coercive effect his statements or his meeting with Mullen had on Mullen's protected activities. Donahue's legitimate goal was to ensure that safety issues are urgently and immediately addressed with management. (Commonwealth's Post-hearing Brief at 19-21).

The Board will find an independent violation of Section 6(1)(a) of the PLRA if the actions of the employer, in light of the totality of the circumstances in which the particular act occurred, tend to be coercive, regardless of whether employees have been shown in fact to have been coerced. Bellefonte Police Officers Ass'n v. Bellefonte Borough, 27 PPER ¶ 27183 (Proposed Decision and Order, 1996) (*citing Northwestern Education Ass'n v. Northwestern School District*, 16 PPER ¶ 16092 (Final Order, 1985)). Improper motivation need not be established; even an inadvertent act may constitute an independent violation of Section 6(1)(a). Northwestern School District, supra. However, an employer does not violate the PLRA or PERA where, on balance, its legitimate reasons justifiably outweigh concerns over the interference with employee rights. Ringgold Educ. Ass'n v. Ringgold Sch. Dist., 26 PPER ¶ 26155 (Final Order, 1995).

More relevant to this case, "'[t]he test for determining whether an employer has violated Section [6(1)(a)] is whether the employer's questions, threats, or statements tend to be coercive, not whether the employees are in fact coerced.'" Pennsylvania State Troopers Ass'n v. Commonwealth of Pennsylvania, Pennsylvania State Police, 30 PPER ¶ 30132 at 287 (Proposed

Decision and Order, 1999) (quoting TRW-United Greenfield Division v. NLRB, 637 F.2d 410, 415 (5th Cir. 1981)). The assessment "must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former [employees], because of the relationship, to pick up intended implications of the latter [employer] that might be more readily dismissed by a more disinterested ear." Id. at 287 (quoting NLRB v. Gissel Packing Company, 395 U.S. 575, 617 (1969)).

This case turns on the statements and circumstances at the meeting between Donahue and Mullen on September 18, 2017, in Donahue's office. I credit the account of what transpired as conveyed by Mullen based on his certainty in recalling the statements and events as well as his demeanor on the witness stand, given the difficulty of confronting his former supervisor who was also present at the hearing. Also, I have credited and considered Donahue's laudable concerns and business reasons that addressing safety issues in an expeditious manner is of paramount concern. However, those reasons do not justify or outweigh the coercive manner in which Donahue treated Mullen. Moreover, the alleged nefarious motivations of Mullen and McCurdy to deliberately delay and embarrass Donahue, claimed by the Commonwealth, are unsubstantiated and irrelevant to the inquiry under Section 6(1)(a).

Regardless of whether remediating the manpower/scheduling problem would have been more effective and immediate by going directly to Donahue, Mullen was entitled to take his safety concerns to the FOP. Also, notwithstanding the reasons why Donahue was upset that Mullen went to the FOP first instead of him, Donahue made coercive statements to Mullen for his Union activities, while Mullen was captive in Donahue's office. Donahue could have simply told Mullen that it would be more efficient to bring time-sensitive safety issues directly to him. As stated in Pennsylvania State Troopers, 30 PPER at 287, the assessment of Donahue's remarks, while Mullen was trapped in his office for two hours, must take into account Mullen's dependence on Donahue for the quality of his work life and, because of that relationship, the reasonable implications and inferences that Mullen perceived from Donahue's statements.

Although Donahue denies knowing that Mullen was an FOP representative at the start of the September 18, 2017 meeting in his office, I credit McCurdy's rebuttal testimony that Donahue did in fact know that Mullen was a Union representative prior to the meeting. After dispensing with preliminaries, Donahue informed Mullen that Mullen undermined his and Sergeant Blauvelt's command by going to the Union first with the manpower/safety issue, placing Mullen's Union activities front and center for what was to come next. Donahue continued to explain that he and Blauvelt were embarrassed because they were called out at the command staff meeting with Daniels. Donahue stated that Mullen made him and Blauvelt look like "smacked asses." Donahue's accusing Mullen of causing him (as commanding officer) embarrassment by going to the Union with the manpower/scheduling issue would have an identifiable chilling effect on a reasonable person in Mullen's position for exercising the right to engage in Union activities regarding safety. Donahue's remarks attempted to coerce Mullen into bypassing his Union first regarding safety concerns in the hopes that management will address those safety concerns better than the Union. Although Donahue rectified the manpower/scheduling issue promptly, that does not change the fact that Mullen has the right to seek the mutual aid and protection of his Union first on matters relating to safety and working conditions.

The Commonwealth argues that Mullen caused the meeting to be prolonged because he became defensive requiring Donahue to spend time defending himself. Mullen did become defensive, but only after Donahue began talking about how the Captain wanted supervisors placed in the rotating schedule and how Donahue defended Mullen's fixed schedule, thereby implying that Donahue's protection could be withdrawn and that Mullen owes his fixed schedule to Donahue. In this context, Donahue told Mullen that he expected loyalty from him, implying loyalty to Donahue should be exalted over loyalty to Union endeavors. Also in this context, Donahue told Mullen that, if anybody else had pulled this stuff, he would have had them working midnights a long time ago and that if an exigency should arise, he could require Mullen to cover a different shift. The threat here was clear enough to a reasonable person in Mullen's position: Come to me first instead of your Union or you will lose the privilege of your fixed daytime schedule.

Moreover, Donahue was visibly and demonstrably upset during the September 18, 2017 meeting with Mullen. Donahue repeatedly asked Mullen if Mullen knew who his direct supervisor was until Mullen gave him the desired answer. Also, there is the statement that Donahue denies making, but I have credited Mullen's account that Donahue made the statement, based on the uniqueness of the statement itself and Mullen's credibility. Donahue stated: "There's a difference between an FOP rep and an FOP rat." The clear implication of this statement to a reasonable person in Mullen's position is that a Union representative exercising his/her right to seek the mutual aid and protection of the Union regarding a safety issue, before addressing it with management, is acting like a dirty rodent. Donahue's extreme displeasure and choice terminology coupled with the fact that Donahue has the managerial power to effectuate his implied threat of changing Mullen's shift assignments make Donahue's statements threatening and coercive. Dormont Police Ass'n v. Dormont Borough, 32 PPER ¶ 32119 (Proposed Decision and Order, 2001); Reading Educ. Ass'n v. Reading School District, 43 PPER 117 (Proposed Decision and Order, 2012).

Accordingly, under the totality of the circumstances, Donahue's statements were coercive and threatened to interfere with the rights of Mullen in the exercise of his protected Union activities.

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 a public employer within the meaning of the PLRA as read in pari materia with Act 111.
2. The Union is a labor organization within the meaning of the PLRA as read in pari materia with Act 111.
3. The Board has jurisdiction over the parties hereto.
4. The Commonwealth has committed unfair labor practices within the meaning of Section 6(1)(a) 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 and Act 111, the hearing examiner

HEREBY ORDERS AND DIRECTS

that the Commonwealth shall

1. Cease and desist from interfering, restraining or coercing employes in the exercise of the rights guaranteed in the PLRA and Act 111.
2. Take the following affirmative action, which the hearing examiner finds necessary to effectuate the policies of Act 111 as read in pari materia with the PLRA:
 - (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 decision and 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 and become final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this tenth day of January, 2019.

PENNSYLVANIA LABOR RELATIONS BOARD

JACK E. MARINO
Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNSYLVANIA STATE TROOPERS :
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AFFIDAVIT OF COMPLIANCE

The Commonwealth hereby certifies that it has ceased and desisted from its violations of Section 6(1)(a) of the Pennsylvania Labor Relations Act as read in pari materia with Act 111; that it has posted a copy of the proposed decision and order in the manner prescribed therein; and that it has served a copy of this affidavit on the Union at its principal place of business.

Signature/Date

Title

SWORN AND SUBSCRIBED TO before me
the day and year first aforesaid.

Signature of Notary Public