

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	:	

PROPOSED DECISION AND ORDER

On September 17, 2010, the Fraternal Order of Police, Christina Lodge 84, (Complainant or FOP) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) alleging that Freeland Borough (Respondent or Borough) violated Sections 6(1)(a), (c) and (e) of the Pennsylvania Labor Relations Act (PLRA) as read in pari materia with Act 111.

On September 30, 2010 the Secretary of the Board issued a complaint and notice of hearing assigning the case to a conciliator to resolve the matters in dispute by mutual agreement of the parties and setting a hearing for December 13, 2010, in Harrisburg, if necessary.

The hearing was necessary, but was continued to February 11, 2011, on the Borough's motion without objection from the FOP. The hearing was again continued to March 22, 2011 on the Borough's motion without objection from the FOP. The hearing was continued a third time to June 6, 2011 on the FOP's motion without objection from the Borough.

The hearing was held on the rescheduled date, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence.

The examiner, on the basis of the testimony and exhibits presented at the hearing and from all other matters and documents of record, makes the following:

FINDINGS OF FACT

1. The Fraternal Order of Police, Christina Lodge 84, is a labor organization within the meaning of the PLRA as read in pari materia with Act 111 of 1968 (Act 111). (N.T. 6)
2. Freeland Borough is an employer within the meaning of the PLRA as read in pari materia with Act 111. (N.T. 6)
3. The Borough does not have a collective bargaining agreement with the Fraternal Order of Police Christina Lodge 84 for the police officers of the Borough. (N.T. 92)
4. The Board has not certified the Fraternal Order of Police Christina Lodge 84 as the exclusive representative of the police officers of the Borough.
5. The Borough employs Robert P. Maholik as an officer in the police department. On September 7, 2010, the Borough Council demoted Maholik from sergeant to officer. The Borough and Maholik are parties to an individual written employment agreement, covering the period of May 30, 2008 to May 29, 2011. (N.T. 58, 117, Respondent Exhibit 9)
6. The Borough employs Scott Michalesko as an officer in the police department. The Borough and Michalesko are parties to an individual written employment agreement for

the period March 3, 2009 to December 31, 2011. (N.T. 8, 31, 117, Respondent Exhibit 10)

7. The individual employment agreements have a provision at Section 10 for binding arbitration as the only step in the grievance procedure. (N.T. 31, 33, 58, 89-90, 117, Respondent's Exhibits 9 and 10)

8. On August 12, 2010, the Borough officials called Maholik and Michalesko to a meeting to answer allegations made by Officer Stephen Demko on August 11, that Maholik and Michalesko had created a hostile work environment. (N.T. 8, 9, 36-37, 38-38)

9. Michalesko was the first officer called into the meeting. The following officials were seated around a table: Borough Solicitor Donald Karpowich; Borough Manager Lynn Falatco and Chief of Police Nadine Sist. (N.T. 9)

10. Solicitor Karpovich started off the meeting by stating that officer Demko accused Michalesko and Maholik of creating a hostile work environment for him. (N.T. 10)

11. Michalesko then said, "I'd like Rob [Maholik] to come in here." (N.T. 12)

12. One of the Borough officials said, "You don't need him." (N.T. 12)

13. The interviewers told Michalesko that Maholik could not come in because he was the subject of the investigation. The borough officials told Michalesko that they were interviewing the employees separately. (N.T. 34)

14. Michalesko was thinking that Maholik could be his union representative, but he did not use the specific words "union representative." (N.T. 19-20)

15. The meeting with Michalesko lasted approximately 15 or 20 minutes. Michalesko was then told to return to duty. (N.T. 18)

16. Maholik then met with the same Borough officials. (N.T. 38-39)

17. The officials advised Maholik that the purpose of the meeting was to investigate Demko's complaint. (N.T. 39)

18. Maholik told them that if there was a chance of discipline he wanted union representation. (N.T. 40)

19. Attorney Karpowich said that if Maholik did not do anything wrong, he did not need a union. (N.T. 41)

20. The meeting with Maholik lasted 20 to 30 minutes. (N.T. 43)

21. On August 18, 2010, Borough Manager Lynn 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."

(N.T. 70, 117, Respondent Exhibit 3(c))

22. Robert J. Quinn is Vice President of Borough Council. He has been a member of Council for five years. He began serving as chairman of the Council's police committee in January, 2010. (N.T. 68-69, 94)

23. On August 17, 2010, Quinn, wrote a letter to Maholik and Michalesko notifying them that they had violated the Employee Handbook, Section 9.8 Use of Borough Vehicles and Equipment, by using a police vehicle to attend a gang class on July 20 in Hazleton while they were off duty and out of uniform. The letter was placed in their personnel files with the warning that another similar violation of this policy could "result in suspension and/or termination." (N.T. 49, 117, FOP Exhibit 1)

24. On August 19, 2010, Quinn wrote this memorandum to Maholik:

THE ATTACHED LETTERS HAVE BEEN REVIEWED AND APPROVED BY BOROUGH COUNCIL AND WILL BE PLACED IN YOUR PERSONNEL FILE. YOUR REPEATED VIOLATIONS OF FREELAND BOROUGH AND FREELAND BOROUGH POLICE DEPT POLICY AND YOUR FAILURE TO PERFORM WRITTEN REQUESTS IS OF GREAT CONCERN TO BOROUGH COUNCIL.

BASED ON THE ATTACHED LETTERS OF REPRIMAND FOR VIOLATIONS, COUNCIL WILL BE CONSIDERING FURTHER REPRIMAND UP TO AND INCLUDING POSSIBLE DEMOTION AND/OR SUSPENSION. IF YOU HAVE ANY QUESTIONS OR WISH TO DISCUSS THIS WITH BOROUGH COUNCIL, YOU ARE ENTITLED TO A PRE-DISCIPLINARY MEETING WITH COUNCIL BEFORE THE NEXT REGULAR MEETING OF BOROUGH COUNCIL ON TUESDAY, SEPTEMBER 7, 2010.

PLEASE NOTIFY BOROUGH MANAGER, SOLICITOR, MAYOR, OR CHIEF OF POLICE OF YOUR INTENTIONS BY 6PM ON THURSDAY, SEPTEMBER 1, 2010.

(N.T. 43, 64, FOP Exhibit 2 and Respondent Exhibits 5(a)-5(f). All capitals in original)

25. Five letters of reprimand were attached to the August 19 memorandum to Maholik. Three were dated August 17 and two were dated August 19. (N.T. 47, 64, FOP Exhibit 3, Respondent Exhibits 5(a) to (f))

26. The first August 17 reprimand concerned inappropriate remarks Maholik made to Quinn, including a May 17, 2010 remark in response to Quinn's proposal for a golf tournament fundraiser.

"Maybe you could play in one of them if we are still buddy-buddy then, if we don't bone him [Michalesko] up the ass with the police chief position."

Michalesko was a candidate for the chief position and was also present when Maholik made the statement to Quinn. (N.T. 43, 64, 77, 117, FOP Exhibit 2, Respondent Exhibit 5(c))

27. The second August 17 reprimand concerned Maholik and Michalesko using a Borough police vehicle to attend an out of town training on July 20, 2010 while off duty and out of uniform without first seeking permission. (N.T. 43, 64, 77, 117, FOP Exhibit 2, Respondent Exhibit 4)

28. The third August 17 reprimand concerned Maholik's failure to complete an inventory of police department equipment. The Borough Council police committee first requested the inventory on March 10, requesting that it be completed by April, 2010. Maholik did not meet that deadline. The Borough Council gave him two extensions to complete the report, neither of which Maholik met. (N.T. 43, 64, FOP Exhibit 2)

29. The first August 19 reprimand concerned four separate violations of department policy including, in particular, making derogatory statements about the police department and making "inappropriate statements to victims during the investigation of a burglary." (N.T. 78, 117, Respondent Exhibit 5(b))

30. The second August 19 reprimand concerned Maholik's failure to follow Chief Sist's July 24 order to obtain Officer William Bending's badge, weapons and keys "until he returns to the schedule." (N.T. 72, 117, Respondent Exhibit 5(d))

31. Also, on August 18, Borough Manager Falatko sent Maholik a reprimand letter concerned Demko's allegation that Maholik's conduct created a hostile work environment. (See Finding of Fact No. 25) (N.T. 53, 117, Respondent Exhibit 3(c))

32. Quinn testified that as Chairman of the police committee he initiated a policy of allowing the members of Council to discuss the incidents giving rise to the reprimands for weeks before the reprimands were issued. He wanted the council to fully review them before they were approved. (N.T. 77)

33. On August 30, 2010, Maholik sent an e-mail to Chief Sist stating,

"Please be advised that this electronic communication is to serve as notice of my intent to grieve the written reprimands which were issued to me by certified mail to me on August 21, 2010."

(N.T. 45, Respondent Exhibit 6)

34. On September 2, 2010, Michalesko filed a grievance with Borough Manager Falatko and Chief Sist over the August 17 letter of reprimand for the use of the Borough vehicle. Michalesko's letter stated,

"This communication shall serve as a grievance regarding this matter, as it has violated Section 10 of my contract with the Borough."

(N.T. 22, 117, Respondent Exhibit 7)

35. On September 13, 2011, Borough Manager Falatko sent Officer Maholik a memorandum informing him that on September 7, 2010 the Borough Council voted to demote his position from Sergeant to Patrolman. (N.T. 47, 64, FOP Exhibit 3)

36. Maholik was given the opportunity to attend the September 7 meeting but chose not to attend. He sent a letter to Chief Sist stating that it was his intent to grieve the reprimand. (N.T. 46)

37. Quinn testified that the reason the Council demoted Maholik was "lack of performance, and for the derogatory statements that are defined in those letters of reprimand." (N.T. 85, Respondent Exhibit 6)

DISCUSSION

The FOP's specification of charges has five distinct allegations. They will be addressed separately. In addition, at the hearing the FOP raised a sixth allegation that was not in the specification of charges.

The FOP, as the complainant, has the burden of proving the unfair labor practice charges by substantial and legally credible evidence. Pennsylvania Labor Relations Board v. Kaufman Department Stores, Inc. 345 PA. 398, 29 A.2d 90 (1942); St. Joseph's Hospital v. Pennsylvania Labor Relations Board, 473 Pa. 101, 373 A.2d 1069 (1977). If this burden is not met, the charges must be dismissed.

I. Weingarten Violation Allegation

The first allegation contends that the Borough violated Section 6(1)(a) of the PLRA and Act 111 on August 12, 2010, when the Borough denied union representation to Sgt.

Robert Maholik and Officer Scott Michalesko during investigatory interviews with them. The Borough's solicitor, manager and chief of police called both police employees to an afternoon meeting to interview them separately about Officer Steve Demko's complaint of the existence of a hostile work environment. Michalesko's meeting was first. He asked that Maholik be in the meeting with him, but he did not refer to Maholik as a union representative. The Borough officials denied his request. During Maholik's meeting, he specifically requested a union representative. The borough officials denied his request as well.

An employer commits an unfair labor practice under section 6(1)(a) of the PLRA if it denies an employee requested union representation at an investigatory interview that the employee reasonably believes may result in the imposition of discipline. Commonwealth of Pennsylvania, Office of Administration v. PLRB, 591 Pa. 176, 916 A.2d 541 (2007), citing NLRB v. J. Weingarten, Inc., 420 U.S. 251, 88 LRRM 2689 (1975).

Five years after the United States Supreme Court's decision in Weingarten, the Pennsylvania Labor Relations Board followed the federal precedent and adopted the right to union representation during an investigatory interview for Pennsylvania public employees, doing so in a police department. In Township of Shaler, 11 PPER 11347 (Nisi Decision and Order, 1980), the Board found that the rights granted to public employees pursuant to the Pennsylvania Labor Relations Act and Act 111 included the Weingarten right. A year later, the Board recognized the Weingarten right for employees covered by the Public Employee Relations Act. Pennsylvania Labor Relations Board v. Conneaut School District, 12 PPER ¶ 12155 (Final Order, 1981).

The allegations in the present case present a question that has not been addressed directly by the Board. Do employees have Weingarten rights in a workplace where there is no union?

For the vast majority of the 36 years since the Supreme Court issued Weingarten, the NLRB has restricted Weingarten to union workplaces. There was a four year period that began with Epilepsy Foundation of Northeast Ohio, 331 NLRB 676 (2000) when the NLRB applied Weingarten to workplaces where the union was not present. However, in IBM, 341 NLRB 1288 (2004), the Board overruled Epilepsy Foundation and returned to earlier Board precedent holding that Weingarten does not extend to a workplace where the employees are not represented by a union.

The FOP Christina Lodge 84, which filed the charge, is not the exclusive representative of the Borough's police officers. There are two ways for a union representing police employees to achieve exclusive bargaining status: recognition by the employer or PLRB certification. See, Roof Garden Lodge 98 v. Pennsylvania Labor Relations Board, 685 A. 2d 658 (Pa. Cmwlth. 1996), citing Commonwealth of Pennsylvania v. State Conference of State Police Lodges of the Fraternal Order of Police, 575 A. 2d 94 (Pa. 1990). Neither has happened here. 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.

Given the Board's prior reliance on federal labor law precedent, it seems appropriate to follow the current NLRB precedent, that Weingarten rights apply only to workplaces where a union is present. As the Board noted in Township of Shaler, supra, Weingarten rights stem from Section 7 of the National Labor Relations Act (NLRA), 29 U.S.C. § 157, which grants employees the right to "engage in other concerted activities for the purpose of ... mutual aid or protection." Id. at 559. The Board noted that the language under Section of the NLRA is virtually identical to the language under Section 5 of the PLRA, 43 P.S. § 211.5. Id. at 559, 561, footnote 1.

Accordingly, because the FOP is not the exclusive representative of the Borough's police employees, the police employees do not have the right to invoke Weingarten. Therefore, the Borough's denials of Maholik's and Michalekso's requests for union representation at the August 12 investigatory interviews did not violate the PLRA.

II. Maholik's Retaliatory Reprimands Allegation

The second allegation is that the Borough, on August 19, issued six written reprimands to Maholik as retaliation for his request of union representation at the August 12 investigatory interview. (The FOP is apparently including in this group of six reprimands the August 18 reprimand concerning Demko's hostile work environment complaint.) The FOP argues that the reprimands were not sincere reactions to employee misconduct but were manufactured discipline as a pretext to retaliate against a police officer who had exercised rights protected under the PLRA.

As stated above, the police employees did not have Weingarten rights. However, assuming that they did have such rights, was the Borough's discipline motivated by Maholik's request for union representation?

The FOP argues that the reprimands were pretextual discipline, as evidenced by the fact that the Borough combined six reprimands in one notice and issuing them just a week after the August 12 investigatory meeting. The FOP argues that this shows an insincere approach to discipline of the police. Vice President of Borough Council Robert Quinn, who is also chair of the Council's police committee, testified that the timing of the reprimands and for issuing them all on the same day was that he wanted the entire council to have the same information he had before discipline was given. Quinn's testimony explaining the Borough's discipline was credible. The FOP did not rebut the substance underlying the basis for the reprimand.

The FOP also argues that pretextual discipline can be inferred from the fact that one of the reprimands, failure to inventory police equipment, dredged up an incident that occurred five months earlier in March, 2010. As for the five month period from March to the issuance of a reprimand in August, Quinn explained the passage of time. He testified that on March 10, the Borough Council police committee first requested that Maholik complete the inventory of police department equipment by April. Maholik did not complete the task in the month allowed. The task was not completed, despite the Borough agreeing to Maholik's requests for extensions to complete the assignment. The Borough's cooperation was unfruitful. Maholik never completed the inventory and in August, the Borough informed Maholik that someone else would complete the task.

In light of all of the evidence of record, it must be concluded that the FOP has not met its burden of proving that the six reprimands to Maholik were a pretext to retaliate against an officer who was asserting Weingarten rights.

III. Michalesko's Retaliatory Reprimand Allegation

The FOP's third allegation is that the one written reprimand to Michalesko dated August 17 (FOP Exhibit 1) was retaliation for Michalesko requesting union representation in the August 12 meeting. The reprimand was for Michalesko's July 20 unauthorized use of a Borough police vehicle to attend training outside of the Borough while off duty and out of uniform. The Borough also reprimanded Maholik for the same incident. Again, Quinn testified credibly that the reprimand was not for requesting union representation. Therefore, on this record, the FOP has not met its burden of proving that the reprimand was retaliatory.

IV. Retaliatory Demotion of Maholik Allegation

The fourth allegation is that on September 7, 2010, the Borough retaliated against Maholik by demoting him from sergeant to patrolman because he filed a grievance on August 30 over the six written reprimands he had received on August 19.

Maholik's contention that he filed a grievance is based on an e-mail intending to grieve the reprimands pursuant to his individual employment agreement. However, in order to sustain a charge before the Board, the FOP must prove that Maholik was asserting a right under the PLRA.

Section 5 of the PLRA defines the Rights of Employees as

Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

43 P.S. 211.5.

Again, since Maholik was working pursuant to an individual employment agreement and not a collective bargaining agreement, it follows that the grievance he filed was not an activity protected by the PLRA. However, even assuming that there was a collective bargaining agreement in place to give protected status to the Maholik's grievance, the FOP did not present a convincing case that the Borough demoted Maholik because he filed a grievance. Borough Council Vice President Quinn testified credibly that the Council demoted Maholik because of his lack of performance and derogatory statements.

V. Section 6(1)(e) Allegation

The FOP's specification of charges makes a general allegation that the Borough violated Section 6(1)(e) of the PLRA, which makes it an unfair labor practice for an employer "[t]o refuse to bargain collectively with the representatives of his employees." As discussed above, the FOP is not the exclusive representative of the employees. Without exclusive representative status, the FOP has no standing to file a refusal to bargain charge. Perkiomen Township, 14 PPER ¶ 14259 (Final Order, 1983). Accordingly, this charge will be dismissed.

VI. Maholik's Ten Day Suspension Allegation

Finally, the FOP, at the hearing, raised the allegation that the Borough violated the PLRA on September 17, 2010 when it suspended Maholik for ten days for failing to report to work the previous evening. This allegation was not set forth in the specification of charges. Under Board law, consideration and discussion of allegations not set forth in the specification of charges is improper. Iroquois Education Association v. Iroquois School District, 37 PPER ¶ 125 (Proposed Decision and Order, 2006), 37 PPER ¶ 167 (Final Order, 2006). Accordingly, there will be no finding that the Borough's ten day suspension of Maholik violated the PLRA and Act 111.

CONCLUSIONS

The examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds:

1. That Freeland Borough is an employer within the meaning of Section 3(c) of the PLRA and Act 111.
2. That the Fraternal Order of Police Christina Lodge 84, is a labor organization within the meaning of Section 3(f) of the PLRA and Act 111.
3. That the Board has jurisdiction over the parties hereto.
4. That the Borough has not committed unfair labor practices in violation of Sections 6(1)(a), (c) and (e) of the PLRA and Act 111.

ORDER

In view of the foregoing and in order to effectuate the policies of the PLRA and Act 111, the examiner

HEREBY ORDERS AND DIRECTS

that the charge of unfair labor practices is rescinded and the complaint dismissed.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed pursuant to 34 Pa. Code 95.98(a) within twenty (20) days of the date hereof, this Decision and Order shall be and become absolute and final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this
sixth day of October, 2011.

PENNSYLVANIA LABOR RELATIONS BOARD

Thomas P. Leonard, Hearing Examiner