

35 PPER 115

104 LRP 45012

**ELIZABETHTOWN POLICE
ASSOCIATION v. ELIZABETHTOWN
BOROUGH**

**Pennsylvania LRB Hearing Examiner's
Decision**

PF-C-04-43-E

September 23, 2004

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County Police**

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Judge / Administrative Officer

Donald A. Wallace

Ruling

The **Elizabethtown Borough** violated Section 6(1)(a) of the **PLRA** by denying a police detective's request of union representation at an investigatory interview into his alleged misuse of sick time. However, the PLRB hearing examiner dismissed the union's Section 6(1)(e) claim because a violation of the right to union representation does not constitute a refusal to bargain within the meaning of the cited section.

Meaning

An employee has the right to union representation upon request at an investigatory interview that the employee reasonably believes may result in the imposition of discipline.

Case Summary

The PLRB hearing examiner concluded that the police chief's memorandum directing a municipal police detective to respond in writing to sick leave misuse allegations, improperly denied the detective his right to union representation at an investigatory in violation of section 6(1)(a) of the PLRA.

Suspecting that a detective who called off sick was involved with a department secretary who was scheduled to be on vacation the same day, the police chief went to the detective's home and observed the secretary enter the house and leave two hours later.

The chief issued the detective a memorandum regarding possible sick leave misuse. The memo directed him to respond in writing detailing the nature of his illness, whether he visited a doctor and whether he was home alone. Before submitting his response the detective approached the chief and asked if he wanted to discuss the memo. The chief reiterated his request for a written response.

The detective subsequently spoke with a union representative and delivered his response to the chief who asked several clarifying questions regarding whether anyone could corroborate his sickness. No union representative was present. The detective was subsequently given an opportunity to offer any evidence that might modify the penalty presently being considered. The borough issued the detective a one-day suspension for misuse of sick leave, unbecoming conduct and falsely entering a report.

The union filed an unfair practice charge alleging the borough violated Sections 6(1)(a) and 6(1)(e) by denying the detective's request for union representation. The borough contended that the detective never requested representation, and in the alternative that the interview was not investigatory and the detective waived his right to representation.

Initially the hearing examiner concluded that the

township violated the detective's right to union representation when the chief conducted an investigatory interview after the detective provided his written response to the memo. However, the hearing examiner determined that the disciplinary action taken against the detective was not unlawful because it was not based on information obtained through the interview. Although the hearing examiner credited the borough's contention that the detective never requested representation during later encounters, the hearing examiner concluded the detective requested union representation on an earlier occasion. The hearing examiner also rejected the claim the interview was not investigatory, noting that the police chief's clarifying questions belied claims the interview was not investigatory.

Full Text

Proposed Decision and Order

On February 26, 2004, the Elizabeth Township Police Association (Association) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair labor practices alleging that Elizabethtown Borough (Borough) had violated sections 6(1)(a) and 6(1)(e) of the Pennsylvania Labor Relations Act (PLRA)¹ by denying a request by Detective Clair Martin for union representation at an investigatory interview on January 26, 2004. On March 15, 2004, the Secretary of the Board issued a complaint and notice of hearing assigning the charge to conciliation and directing that a hearing be held on May 12, 2004, if conciliation did not resolve the charge by then. On March 23, 2004, the hearing examiner continued the hearing at the request of the Association and without objection by the Borough. On June 10, 2004, the hearing was held. Both parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. On August 10, 2004, the Association filed a brief. On August 25, 2004, the Township filed a brief.

The hearing examiner, on the basis of the testimony and exhibits presented by the parties at the

hearing and from all other matters and documents of record, makes the following:

Findings of Fact

1. The Association is the exclusive representative of a bargaining unit comprised of police officers employed by the Borough, including Detective Martin. (Charge; N.T. 7, 28)

2. On January 23, 2004, Detective Martin called off sick. A secretary in the police department (Jill Risser) was scheduled to be on vacation the same day. Suspecting that Detective Martin was not sick but was meeting with Ms. Risser instead, the Borough's chief of police (Dennis E. Landvater), accompanied by the Borough's manager (Peter Whipple), went to Detective Martin's residence. As they were outside the residence, Ms. Risser arrived and went inside. (N.T. 32, 34-35)

3. On January 26, 2004, Chief Landvater gave to Detective Martin a memorandum as follows:

"This correspondence is to inform you of a concern I have regarding possible misuse of sick leave.

I noted that you took a 'short notice vacation day' on Friday, January 16th and that you took a 'sick day' on Friday January 23rd. It is interesting to note that Jill Risser took a vacation day both of those same dates.

You shall respond in writing to me by the end of your duty shift today, (a) explaining the illness on Friday, January 23, 2004, which precluded you from performing your duties, (b) if you had visited a doctor; (c) if you were home alone or if somebody was home with you, and (d) any additional facts you feel would explain your need to take a paid sick day that date."

(N.T. 8, 35; Union Exhibit 1)

4. Around 8:30 A.M or 9:00 A.M., Detective Martin asked Chief Landvater if he wanted to talk about the memorandum. Chief Landvater said, "no, I want you to respond in writing like the letter tells you to do." Detective Martin said, "okay, I just wondered

because if you wanted to talk, I'd like to have a union rep present." Detective Martin had the opportunity to speak with the vice-president of the Association (Detective Stephen Roberts) before responding in writing. (N.T. 8, 13-15, 17, 28, 36-37, 42-43)

5. Shortly before 2:00 P.M., Detective Martin gave to Chief Landvater in his office a memorandum as follows:

"This is in response to your correspondence regarding my possible misuse of one sick leave day on Friday, Jan. 23rd 2004.

I was beginning to feel ill on Thursday the 22nd and felt too ill to perform my duties to the best of my abilities so I called off sick for the 23rd.

I believe I followed Article 5 section 5.11 pertaining to: failure to be home without legitimate reason after reporting off sick, as I was home all day and I was sick. My children were not home with me as they were in school. I did not go to a Doctor.

Again, I felt that I was not well enough to perform my duties to the best of my abilities because of how I felt. I also did not want to come in to work and possibly infect someone else if I was coming down with something."

(N.T. 37-38; Borough Exhibit 3)

6. After reading the memorandum from Detective Martin, Chief Landvater asked Detective Martin if anybody had been with him all day who could corroborate that he was home sick. Detective Martin said, "my children were in school all day, so no." Chief Landvater then asked him if anybody had been with him any time during the day who could corroborate that he was home sick. Detective Martin said, "no." Chief Landvater also asked him if he had seen a doctor or gone to purchase medicine. Detective Martin said, "no." No union representative was present at the time. (N.T. 10, 17-19, 37-39, 43-46, 48-49, 51-54)

7. On January 26, 2004, Chief Landvater also interviewed Ms. Risser. (N.T. 36-37)

8. By memorandum dated January 29, 2004,

Chief Landvater wrote to Detective Martin as follows:

"Based on the conduct described in this letter, you may be subject to disciplinary action up to and including discharge. The purpose of this letter is to provide you with timely notice of the potential for disciplinary action against you, to provide you with a brief explanation of the evidence which the Borough obtained during its investigation of this matter and to provide you with an opportunity to offer any and all information which would cause the Borough to modify the penalty presently being contemplated.

The underlying basis for potential disciplinary action involves misuse of sick leave, unbecoming conduct and falsely entering a report.

Regarding misuse of sick leave: On January 23, 2004, you took a sick leave day off. On that morning, before 8:50 a.m., you had parked your vehicle in front of the right garage door of your two-car garage. You allowed the left garage door to remain in an open position. The temperature that day was approximately eight degrees. At 9:14 a.m., Jill Risser arrived and drove directly into the open garage bay and the garage door immediately closed. At 11:09 a.m., you walked out of your residence to the mailbox. You looked around briefly and walked back to the garage. Within a few seconds, Jill Risser backed her vehicle out of the garage and drove away. During an interview in the office of the Chief of Police on Monday, January 26, 2004, you stated that you had not seen a doctor for your illness and that you had not gone anywhere to purchase medicine for your illness. You merely offered that you felt too ill to perform your duties. At no time did you ever explain the illness. You state that you were too ill to perform your duties, but the facts indicate that you were not too ill to engage in some sort of conduct with a secretary for nearly two hours.

Regarding unbecoming conduct: On February 11, 2001, Corporal David Pickel interviewed you regarding concerns he and other officers of the department had regarding an affair between you and Jill Risser. On that date, you told Corporal Pickel there was no truth to the rumor of an affair between

you and Jill Risser. Corporal Pickel expressed his concern about the amount of time you were spending with Risser in the office. Corporal Pickel informed you that you must cease pursuing secretary Jill Risser or face potential disciplinary action.

On April 7, 2003, Chief Landvater spoke to you about your continued involvement with secretary Jill Risser. I told you that I received information from citizens in the community that you were both seen at locations in and around the borough together. I mentioned that I was concerned about public perception of a Borough police officer and how it might reflect on the department. I was also concerned about what might happen if Jill Risser's husband found out. Since you were both 'off duty' at the times you were seen together, I informed you that I would not take any disciplinary action at that time. However, I ordered you to cease having lunches upstairs with Jill Risser and cease using the upstairs microwave. I was concerned about the time you were spending with Jill impacting negatively on her work efficiency. You stated that you understood.

Late in April, 2003, an officer of the department informed me that you were spending an inappropriate amount of time each morning with Jill Risser prior to my arrival at work around 8:00 a.m. On April 25, 2003, I observed your assigned cruiser parked at the department at 7:45 a.m. I radioed you and could tell that you were using a portable radio. Within one minute, I observed your leaving the department, entering your cruiser and pulling out of the lot.

On August 29, 2003, I came into the office during the mid-afternoon on a day when I was scheduled on vacation. I noticed your vehicle parked in the lot at a time when you were off duty. I Nextel contacted Jill Risser to state that I would be there in ten minutes. Actually, I was already in the parking lot. As I quietly climbed the stairs to the rear entrance of the administration offices, you were exiting.

Regarding false entry of report: On January 26, 2004, I gave you a written order to respond in writing to me by the end of the day regarding your taking a 'sick' day on the previous Friday, January 23, 2004. In

that order you were to inform me if you were home alone or if anyone was home with you. You stated that your children were not at home as they were in school. Because you never answered the question, I had to ask you several times if you were home alone. Several times you answered by stating that your children were in school, so they were not home. When I asked you if there ever was anybody else who may have been at your residence anytime during last Friday, you became agitated and answered no. Clearly this was a false report to me as Jill Risser and other eye witnesses concur that she was at your residence for nearly two hours that day.

As part of the Borough's investigation of these matters, I interviewed you on Monday, January 26, 2004, to attempt to clarify your activities and your failure to answer the questions as ordered. Based upon the Borough's investigation of the above events, it appears that your activities set forth above may fall within that category of activities identified in the Borough Code as a violation of an official duty. 53 P.S. § 46190(2). Your activities may also constitute conduct unbecoming an officer. 53 P.S. § 46190(4). Finally, it appears that you may have been untruthful during your interviews with the Chief of Police.

You now have the opportunity to provide me with any and all information which would cause me to reconsider recommending that disciplinary action be taken against you and any and all information which might cause me to reconsider recommending the level of disciplinary action that I am currently contemplating. Any information which you would like to provide should be submitted in a sealed envelope delivered to my attention at the Elizabethtown Borough Police Department. You will have until 4:00 p.m. on Friday, February 6, 2004 to provide me with any additional information which you would like me to consider prior to making a formal decision regarding disciplinary action in this case."

(Union Exhibit 2)

9. By letter dated February 13, 2004, the president of the Borough's council (Douglas W.

Pfautz) wrote to Detective Miller in pertinent part as follows:

"This letter is formal notice that last night, at a regularly scheduled public meeting, Elizabethtown Borough Council voted to suspend you without pay from your employment as an Elizabethtown Borough Police Officer for a period of one (1) day. The date on which you will serve your suspension will be identified after any rights of appeal are exhausted. You have been suspended for:

1. Neglect and/or violation of your official duties; and
2. Inefficiency, neglect, disobedience of orders and/or conduct unbecoming an officer.

See Section 1190(2) and (4) of the Borough Code, 53 P.S. § 46190(2) and (4).

The underlying factual conduct which has resulted in Borough Council's decision to suspend you for one (1) day was set forth in the January 29, 2004 Loudermill letter to you."

(Union Exhibit 3)

Discussion

The Association contends that the Borough committed unfair labor practices within the meaning of sections 6(1)(a) and 6(1)(e) of the PLRA by denying a request by Detective Martin for union representation at an investigatory interview on January 26, 2004. The Association also contends that the Detective Martin should be made whole by way of relief because the Borough suspended him based on information it obtained from him at the interview.

The Borough contends that the charge should be dismissed because Detective Martin never requested union representation, because the interview was not investigatory and because Detective Martin waived his right to union representation. The Borough also contends that no make whole relief is available to Detective Martin even if it violated his right to union representation because the information it obtained from him during the interview did not form the basis for the disciplinary action it took against him.

An employe has the right to union representation upon request at an investigatory interview that the employe reasonably believes may result in the imposition of discipline. *Commonwealth of Pennsylvania, PEMA v. PLRB*, 768 A.2d 1201 (Pa. Cmwlth. 2001), citing *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 88 LRRM 2689 (1975). An employer commits an unfair labor practice within the meaning of section 6(1)(a) of the PLRA if it conducts such an interview in violation of that right. *City of Reading v. PLRB*, 689 A.2d 990 (Pa. Cmwlth. 1997). If the employe does not request union representation, the employer does not have to provide union representation. *Beaver County Community College*, 17 PPER ¶ 17121 (Final Order 1986). If the interview is not investigatory, the employer does not have to provide union representation. *AFSCME, Council 13 v. Commonwealth of Pennsylvania, PLRB*, 514 A.2d 255 (Pa. Cmwlth 1986). An employe may waive the right to union representation. *Indiana Area School District*, 34 PPER 133 (Final Order 2003). An employe is to be made whole if an employer disciplines the employe based on information obtained from the employe in violation of the right to union representation. *Commonwealth of Pennsylvania, PEMA*. An employe is not to be made whole if the employer has a basis for disciplining the employe independent of the information obtained at the interview. *Duryea Borough*, 35 PPER 23 (Final Order 2004).

The record shows that the Township violated Detective Martin's right to union representation by conducting an investigatory interview of him in Chief Landvater's office on January 26, 2004, without affording him requested union representation (findings of fact 3-6). Thus, the Township committed an unfair labor practice within the meaning of section 6(1)(a) of the PLRA. The charge as filed under section 6(1)(e) of the PLRA must be dismissed, however, because a violation of the right to union representation does not constitute a refusal to bargain within the meaning of that section. See *Commonwealth of Pennsylvania*, 33 PPER ¶ 33177

(Final Order 2002), *aff'd*, 826 A.2d 932 (Pa. Cmwlth. 2003) (construing the analogous provisions of the Public Employment Relations Act).

The record also shows that the disciplinary action taken by the Borough against Detective Martin was not based on information it obtained from him at the interview (findings of fact 2, 6-8). Accordingly, he is not entitled to make whole relief.

In support of its contention that Detective Martin never requested union representation, the Borough submits that testimony by Detective Martin and Detective Roberts that Detective Martin asked Chief Landvater for union representation by Detective Roberts immediately before Detective Martin met with Chief Landvater in Chief Landvater's office (N.T. 10, 16, 27) was fabricated. The Borough points out that Detective Roberts also testified that he did not advise Detective Martin at that time of his right to forego the interview if union representation was not provided (N.T. 29-30) and that he left to get a cup of coffee when "things got a little bit heated" between Chief Landvater and Detective Martin regarding his right to union representation (N.T. 27). The Borough also points out that in subsequent correspondence to and meetings with the Borough Detective Martin never referenced a denial of requested union representation (N.T. 40, 65; Borough Exhibit 1). Suggesting that no union representative would simply walk away when an employee's request for union representation is denied and that an employee who was denied requested union representation surely would reference as much when given the opportunity to do so thereafter, the Borough would have the Board find that Detective Roberts did not advise Detective Martin of his right to forego the interview if union representation was not provided but rather left for a cup of coffee instead and that Detective Martin did not subsequently reference the denial of requested representation because, as Chief Landvater testified (N.T. 39), no such request was ever made by Detective Martin immediately before he met with Chief Landvater in Chief Landvater's office.

It is hard to believe that a union representative

would simply walk away from an employe if the employe requested union representation and got into a heated exchange over a denial of the request, so the testimony of Detective Martin and Detective Roberts that Detective Martin asked to be represented by Detective Roberts immediately before Detective Martin met with Chief Landvater in Chief Landvater's office has not been credited. The record nevertheless shows that Detective Martin requested union representation on an earlier occasion (finding of fact 4). At the time of that request, Chief Landvater had given Detective Martin a memorandum directing him to respond in writing about his possible misuse of sick leave (finding of fact 3), thereby giving rise to his right to union representation. *See City of Reading, supra* (police officer's right to union representation attached when employer directed him to respond in writing to an inquiry that the police officer reasonably believed might result in the imposition of discipline). Thus, the Borough's contention that Detective Martin never requested union representation is without merit.

In support of its contention that the interview was not investigatory, the Borough points out that Chief Landvater only asked Detective Martin a limited number of questions to clarify a written response that Detective Martin had already submitted and that Detective Martin's answers did not implicate himself or vary from the written response (findings of fact 5-6). The very fact that Chief Landvater even asked a clarifying question of Detective Martin, however, establishes that the interview was investigatory. Thus, the Borough's contention that the interview was not investigatory is without merit.

In support of its contention that Detective Martin waived his right to union representation, the Borough points out that Detective Martin attended the interview in the absence of union representation (finding of fact 6). Once Detective Martin requested union representation, however, the Borough had three choices: (1) to grant the request, (2) to terminate the interview or (3) to obtain his consent to continue with the interview in the absence of union representation. *Commonwealth of Pennsylvania, Department of*

Corrections, Greene SCI, 28 PPER ¶ 28139 (Final Order, 1997). The Borough did not grant the request, terminate the interview or obtain his consent to continue with the interview in the absence of union representation; to the contrary, it proceeded with the interview. Thus, the Borough's contention that Detective Martin waived his right to union representation is without merit.

The Borough's reliance on *Indiana Area School District, supra*, is misplaced. In that case, the employer offered to reschedule an investigatory interview so a particular union representative would be available to attend, but the employe declined the offer, stating that he wished to proceed with the interview at that time. On that record, the Board found that the employe had voluntarily and knowingly waived his right to union representation. The record does not show that Detective Martin did the same, so *Indiana Area School District* is distinguishable on the facts.

In support of its contention that Detective Martin is entitled to make whole relief, the Association submits that the Borough used responses given by him at the interview as a basis for the disciplinary action taken against him. As the Association points out, the Borough in its Loudermill notice as well as its suspension letter stated the following:

"During an interview in the office of the Chief of Police on Monday, January 26, 2004, you stated that you had not seen a doctor for your illness and that you had not gone anywhere to purchase medicine for your illness. You merely offered that you felt too ill to perform your duties. At no time did you ever explain the illness. You state that you were too ill to perform your duties, but the facts indicate that you were not too ill to engage in some sort of conduct with a secretary for nearly two hours."

(Union Exhibits 2-3). Although Detective Martin said during the interview that he had not seen a doctor and had not gone to purchase medicine, he also said that there was no one who could verify that he was home alone that day (finding of fact 6). Thus, his responses did not give the Borough reason to believe

that he was "not too ill to engage in some sort of conduct with a secretary for nearly two hours." Moreover, the record shows that Chief Landvater knew from his observation of Detective Martin's residence on the day in question that the secretary visited with Detective Martin (finding of fact 2). It is apparent, then, that the information the Borough obtained from Detective Martin during the interview played no part in its disciplining of him for having engaging in the matter under investigation at the time -- misuse of sick leave. Accordingly, under *Duryea Borough*, he is not entitled to make whole relief. See also *Monroe County*, 34 PPER 55 (Proposed Decision and Order 2004) (no make whole relief available to an employe where the employe denied everything at an investigatory interview held in violation of the right to union representation and where the employer had information from outside the interview to support the discipline it imposed on the employe); *Commonwealth of Pennsylvania, Department of Public Welfare, Montgomery CAO*, 33 PPER ¶ 33113 (Proposed Decision and Order, 2002) (same); *Commonwealth of Pennsylvania, Department of Corrections, Greene SCI*, 32 PPER ¶ 32095 (Proposed Decision and Order 2001) (no make whole relief available to an employe where the employer's discipline of the employe was based on information it obtained independent of an investigatory interview held in violation of the right to union representation).

Conclusions

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

1. The Borough is an employer within the meaning of section 3(c) of the PLRA.
2. The Association is a labor organization within the meaning of section 3(f) of the PLRA.
3. The Board has jurisdiction over the parties.
4. The Borough has committed an unfair labor practice within the meaning of section 6(1)(a) of the PLRA.
5. The Borough has not committed an unfair

labor practice within the meaning of section 6(1)(a) of the PLRA.

Order

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

HEREBY ORDERS AND DIRECTS

that the Borough shall:

1. Cease and desist from interfering with, restraining or coercing employes in the exercise of the rights guaranteed in the PLRA.

2. Take the following affirmative action which the hearing examiner finds necessary to effectuate the policies of 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 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.

¹Those provisions are as follows:

"Section 6. Unfair Labor Practices. -- (1) It shall be an unfair labor practice for an employer --

(a) To interfere with, restrain or coerce employes in the exercise of the rights guaranteed in this act.

...

(e) To refuse to bargain collectively with the representatives of his employes, subject to the provisions of section seven (a) of this act."

43 P.S. §§ 211.6(1)(a) and 6(1)(e).

Statutes Cited

PLRA 6(1)(a)

PLRA 6(1)(e)

Cases Cited

768 A.2d 1201

420 U.S. 251

17 PPER 17121

514 A.2d 255

34 PPER 133

35 PPER 23

33 PPER 33177

826 A.2d 932

28 PPER 28139

33 PPER 33113

32 PPER 32095

34 PPER 55