



controversy and generated emails among bargaining unit members that were critical of the proposal.

Corporal Gerald Williams, who is an enlisted member of PSP and a member of the Association's contract negotiation committee, received numerous inquiries from unit members regarding the Association's contract proposals. Cpl. Williams responded to a number of these inquiries through his PSP email account from his home computer. In two of his responses, Cpl. Williams defended the Association's leadership and the Association's enhanced salary/service credit contract proposal, while criticizing PSP leadership calling them a "classless, good-ole boy network of commissioned officers." Reproduced Record (R.R.) at 333a. Cpl. Williams continued, "[f]eel free to send my comments to whomever you see fit, including commissioned officers." R.R. at 334a. The emails were circulated to other members of PSP, including commissioned officers. A complaint was filed against Cpl. Williams with PSP's Bureau of Integrity and Professional Standards (BIPS) citing "improper conduct on duty" because Cpl. Williams made "disparaging remarks" towards PSP and its command staff. BIPS directed the Internal Affairs (IA) Division to initiate an investigation regarding the emails. In response to the IA investigation, the Association filed a charge of unfair labor practices with the Board alleging that PSP violated, *inter alia*, Sections 6(1)(a) and (c) of the PLRA,<sup>3</sup> as read *in pari materia* with Act 111.

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<sup>3</sup> Section 6 of the PLRA provides, in pertinent part:

(1) It shall be an unfair labor practice for an employer—

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

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(Continued....)

A hearing before a Board hearing examiner was held on April 29, 2009. In the proposed decision and order filed on November 17, 2009, the hearing examiner concluded that Cpl. Williams was engaged in protected activity in writing the emails and that by subjecting him to an IA investigation because of the emails, PSP violated both Sections 6(1)(a) and (c) of the PLRA. The hearing examiner determined that although the emails were disparaging of commissioned officers, the emails were not “offensive, defamatory or opprobrious” and, therefore, constituted protected activity because they concerned the Association’s bargaining proposals, were sent while off-duty, and were disseminated only to employees and not to members of the public. The hearing examiner directed PSP to expunge the IA investigation from Cpl. Williams personnel file as a remedy. On December 7, 2009, PSP filed timely exceptions. By final order issued March 16, 2010, the Board dismissed PSP’s exceptions, finalized the hearing examiner’s proposed decision and order, and expanded the remedy to include expungement from IA records as well. On April 15, 2010, PSP filed a timely petition for review of the Board’s final order.<sup>4</sup> The Association has intervened.

PSP raises the following issues for our review:

1. Whether the Board erred as a matter of law by concluding that the initiation of the IA investigation

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(c) By discrimination in regard to hire or tenure of employment, or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

43 P.S. §211.6.

<sup>4</sup> This Court's scope of review of a Board’s final order is limited to determining whether there was a violation of constitutional rights, whether an error of law was committed, or whether the Board's necessary findings are supported by substantial evidence. Wilkes-Barre Township v. Pennsylvania Labor Relations Board, 878 A.2d 977 (Pa. Cmwlth. 2005); Delaware County Lodge No. 27 v. Pennsylvania Labor Relations Board, 694 A.2d 1142 (Pa. Cmwlth. 1997).

involving Cpl. Williams constituted an unfair labor practice in violation of the PLRA and Act 111.

2. Whether the Board erred as a matter of law by concluding that Cpl. Williams engaged in protected activity under the PLRA and Act 111 by sending emails disparaging of commissioned officers to fellow troopers and by encouraging them to forward the emails to commissioned officers of PSP.
3. Whether the Board erred in directing PSP to expunge any reference of the IA investigation from Cpl. Williams' personnel file as well as IA records.

PSP contends the Board erred as a matter of law by concluding that the initiation of the IA investigation involving Cpl. Williams constituted an unfair labor practice in violation of the PLRA and Act 111. We disagree.

The law protects an employee's 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." Section 5 of the PLRA, 43 P.S. §211.5; see Section 1 of Act 111, 43 P.S. §217.1. It is an unfair labor practice for an employer to discriminate against employees for engaging in activity protected by PLRA and Act 111. Section 6(1)(c) of the PLRA, 43 P.S. §211.6(1)(c). It is also an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of their rights guaranteed by the PLRA. Section 6(1)(a) of the PLRA, 43 P.S. §211.6(1)(a). In order to prove discrimination, the complainant must show that the employee engaged in activity protected by the PLRA, that the employer had knowledge of that protected activity, and that the employer took adverse action against the employee because of the

protected activity. St. John's Hospital v. Pennsylvania Labor Relations Board, 473 Pa. 101, 373 A.2d 1069 (1977).

The Board has held that an employee's criticism of the employer will lose the protection of the PLRA only if it is "offensive, defamatory, or opprobrious" and not if it is merely "intemperate, inflammatory or insulting." PSSU, Local No. 668 v. Washington County, 23 PPER ¶ 23040 (Proposed Decision and Order, 1992), 23 PPER ¶ 23073 (Final Order, 1992) (the Board looked to the then-existing test under the National Labor Relations Act).<sup>5</sup> The Board has further held an employee's conduct will only lose the protection of the act where it is so obnoxious or violent as to render the employee unfit for service. AFSCME, District Council 85, Local 3530 v. Millcreek Township, 31 PPER ¶ 31056 (Final Order, 2000); Teamsters Local Union No. 500 v. Southeastern Pennsylvania Transportation Authority, 28 PPER ¶ 28025 (Final Order, 1996).

Here, Cpl. Williams' off-duty emails with other employees about ongoing collective bargaining negotiations constitute protected activity. While we certainly do not condone Cpl. Williams' reference to commissioned officers as a "classless, good-ole boy network," such speech is not so obnoxious or violent as to render Cpl. Williams unfit for service and therefore did not lose the protections of the PLRA. Cpl. Williams' emails did not warrant the extreme measure of an IA investigation. PSP's initiation of the IA investigation based upon Cpl. Williams' emails constituted a discriminatory adverse employment action in violation of Section 6(1)(c) of the PLRA. This action has a tendency of deterring unit members from exercising their protected rights in violation of Section 6(1)(a) of the PLRA. We, therefore, conclude the Board did not err in determining that PSP violated

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<sup>5</sup> 29 U.S.C. §§151-168.

Sections 6(1)(a) and (c) of the PLRA by subjecting Cpl. Williams to a disciplinary IA investigation because of his emails.<sup>6</sup>

PSP also contends that the Board erred in directing PSP to expunge any reference of the IA investigation of Cpl. Williams from IA records due to the potential impact on PSP's discovery obligations in a pending federal lawsuit, in which Cpl. Williams is a named plaintiff.<sup>7</sup> In its brief and at the argument, the Board conceded that enforcement of its remedy would be subservient to the discovery obligations and orders involved in the pending federal litigation.<sup>8</sup> Therefore, expungement of the IA investigation of Cpl. Williams from IA records shall not occur until final disposition of the federal matter.

Accordingly, the order of the Board is affirmed as modified.<sup>9</sup>

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KEITH B. QUIGLEY, Senior Judge

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<sup>6</sup> While we recognize that collective bargaining can be contentious, we admonish members of PSP and the Association to conduct themselves in a professional manner and to refrain from name calling.

<sup>7</sup> Pennsylvania State Troopers Association, et al. v. Pawloski, et al. (M.D. Pa., No. 09-CV-1748).

<sup>8</sup> Following argument, the Board filed a communication with this Court indicating the parties' concurrence that PSP is relieved of its obligation to expunge the IA records as long as a discovery obligation exists in the federal case.

<sup>9</sup> This modification does not affect the portion of the Board's order directing expungement of the IA investigation from Cpl. Williams's *personnel records*.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Pennsylvania State Police,	:	
Petitioner	:	
	:	
v.	:	No. 626 C.D. 2010
	:	
Pennsylvania Labor	:	
Relations Board,	:	
Respondent	:	

ORDER

AND NOW, this 6<sup>th</sup> day of January, 2011, the final order of the Pennsylvania Labor Relations Board, at Case No. PF-C-08-154-E, is AFFIRMED, but modified to the extent that expungement of the Internal Affairs investigation of Corporal Gerald Williams from the Internal Affairs records shall not occur until final disposition of the federal matter.<sup>1</sup>

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KEITH B. QUIGLEY, Senior Judge

<sup>1</sup> Pennsylvania State Troopers Association, et al. v. Pawloski, et al. (M.D. Pa., No. 09-CV-1748).