[J-142-2005]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

ROY C. PINTO,	: No. 70 MAP 2005
	:
Appellee	: Appeal from the Order of the
	: Commonwealth Court entered 9-14-2004
v.	: (reargument denied 11-19-2004) at No.
	: 2070 C.D. 2003, reversing the Order of the
STATE CIVIL SERVICE COMMISSION,	: Civil Service Commission entered 09-05-
	: 2003 at No. 23108.
Appellant	:
	: ARGUED: December 7, 2005
ROY C. PINTO,	: No. 71 MAP 2005
	:
Appellant	: Appeal from the Order of the
	: Commonwealth Court entered 9-14-2004
v.	: (reargument denied 11-19-2004) at No.
	: 2070 C.D. 2003, reversing the Order of the
STATE CIVIL SERVICE COMMISSION,	: Civil Service Commission entered 09-05-
	: 2003 at No. 23108.
Appellee	:
	: ARGUED: December 7, 2005

DISSENTING OPINION

MADAME JUSTICE NEWMAN **DECIDED: December 27, 2006**

The Majority concludes that Roy C. Pinto (Pinto) was on "leave of absence to take a non-civil service position" and, therefore, was not subject to the political activity prohibition of Section 905b of the Civil Service Act, 71 Pa.C.S. § 905(b). I must respectfully disagree and, accordingly, I dissent.

I believe that an analysis of the relevant statutes demonstrates that employees released from their regular state workplace for union activities, union business, or any other employee organizational purpose pursuant to a paid leave agreement are actually still active employees on active duty. The political activity prohibition should be applicable to

active employees, such as Pinto, if: (1) they receive some benefit for the time spent on leave; (2) they would be performing duties at the usual job site if they were not on paid leave; and (3) the employee is permitted to leave for a specific purpose approved by the employer. In the case sub judice, Pinto received a benefit that he was not entitled to if on a non-paid leave of absence; he would have been performing his usual duties if not on paid leave; and he was permitted to work on paid leave status for a specific purpose, sanctioned by statute, upon agreement of his employer. Unlike the Majority, I essentially agree with both parties and the Commonwealth Court that Pinto's status as a paid or unpaid employee governs this appeal.

Employee Subject to Restrictions of the Act

Contrary to the conclusion of the Majority, I do not believe that Pinto is on leave of absence to take a non-civil service position. Pinto continues to serve the Commonwealth as a union employee, to the mutual benefit of both the Commonwealth and the union. The Majority errs in regard to both the statutory text and its underlying policy.

Pinto challenges the determinations made by the Commonwealth Court and the Commission that he is a civil service employee for purposes of Sections 905.2(b)(7) and (b)(10) of the Act. 71 P.S. §§ 741.905(b)(7), (10). Like the Majority, Pinto asserts that the Commonwealth Court incorrectly focused its scrutiny on whether he was on a paid or unpaid leave of absence. Pinto believes that the essential element is whether he remained in the classified service once he began his leave of absence and that, if he has shown that he is not in the classified service, his actions as Vice President of the Pennsylvania State Corrections Officers Association (PSCOA) cannot violate the Act.

In support of this contention, he notes that Section 3(d)(4) of the Act, 71 P.S. § 741.3(d)(4), defines "classified service" to include "[a]ll positions now existing or hereafter

created under the State Civil Service Commission." He observes that subsection 3(f) defines "position" as "a group of current duties and responsibilities assigned or delegated by competent authority requiring the full-time or part-time employment of one person." 71 P.S. § 741.3(f). Pinto maintains that, without current duties, he does not hold a "position" in the "classified service." He also argues that he is accountable solely to the union for his conduct and receives absolutely no compensation from the Commonwealth. Finally, Pinto contends that, because "every penny" that he receives from the Commonwealth in remuneration is refunded to the Commonwealth by PSCOA, he is on an unpaid leave of absence and not subject to the restrictions. I cannot agree.

The first flaw in Pinto's argument is that he has no current duties. It is clear that the Department of Corrections (DOC) assigned Pinto to work as an employee of the union, just as the DOC could assign Pinto to other duties. It is the DOC, as the employer, that controls the duties of its employees. Consistent with the authority of DOC to regulate job specifications, discipline, and job performance, it is clear that the union could not remove employees from their normal duties without the consent of the DOC. Rather, the union was required to request that DOC approve the assignment of Pinto from his normal duties for union leave because the DOC had the ability and authority to approve such an assignment. Further, while Pinto is on union leave, he is presumably still subject to discipline by DOC and the Commission.[1] Therefore, Pinto's current duties are those assigned by DOC, which are to function as a union officer.

Union activities often provide mutual benefit to both the union and the employer. When utilized properly, union leave contributes to a peaceful and productive relationship

[1] Although the Majority finds that the political activity prohibition does not apply to Pinto, it did not conclude that Pinto was beyond the disciplinary authority of the DOC.

between the state and its employees, in turn, providing a benefit to the state by improving state services. Mich. State AFL-CIO v. Mich. Civil Serv. Comm'n, 566 N.W.2d 258, 268 (Mich. 1997) (Brickley, J., dissenting). Thus, the willingness of the DOC to assign its employees to union leave is consistent with the fact that the DOC reaps a benefit from union leave thereby making it a part of an employee's duties as a public employee.

An employee of the civil service who is on a paid leave of absence is still a civil service employee subject to the political restrictions of the Act. See Section 103.11(b) of the Pennsylvania Code, 4 Pa. Code § 103.11(b).[2] Pinto is on a paid leave of absence even though he argues that the union reimburses the Commonwealth for his salary and benefits. Pursuant to the definition of reimbursement, the Commonwealth pays Pinto's salary. Reimbursement comes later, often weeks after the Commonwealth has paid Pinto. The arrangement for PSCOA to reimburse the DOC for Pinto's salary and benefits does not negate the fact that Pinto's status with the DOC is as an employee. Cf. Nat'l Labor Relations Bd. v. BASF Wyandotte Corp., 798 F.2d 849 (5th Cir. 1986); Commc'ns Workers of Am. v. Bell Atl. Network Servs., Inc., 670 F. Supp. 416 (D.D.C. 1987). If this were not the case, Pinto would be ineligible for the pension benefit that he seeks. This benefit is unavailable to those on unpaid leaves of absence and could not be purchased by Pinto after his return to the DOC. Further, Section 5302(b)(2)[3] explicitly indicates that Pinto is an

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[2] Section 103.11(b) of the Pa. Code states in pertinent part as follows:

> The provisions of the act which expressly prohibit certain political activities do not apply to the classified service employee who has been furloughed or who is on a regular leave of absence, or leave of absence to take a noncivil service position. An employe on another type of leave of absence shall continue to comply with the political activity restrictions while on leave.

[3] Section 5302(b)(2) provides:

§ 5302. Credited State service
(continued…)

"active member on paid leave" for purposes of holding union office, while still recognizing that the union is to reimburse the Commonwealth for all salary and benefit expenses. 71 Pa.C.S. § 5302(b)(2). Accordingly, I would affirm that portion of the decision of the Commonwealth Court that held that Pinto is a DOC employee and subject to the political restrictions of the Act.

Endorsement as Political Activity

Pinto argues that, even if he is a civil service employee, he sent the endorsement letter to then gubernatorial candidate Rendell as part of the duties required by his position as an officer in the union and not in his individual capacity. He complains that, in return for the sole benefit of maintaining his status in the Commonwealth's retirement system, he is

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(b) Creditable leaves of absence

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(2) An **active member on paid leave** granted by an employer for purposes of serving as an elected full-time officer for a Statewide employee organization which is a collective bargaining representative under the . . . Public Employe Relations Act: Provided, That such leave shall not be for more than three consecutive terms of the same office; that the **employer shall fully compensate** the member, including, but not limited to, salary, wages, pension and retirement contributions and benefits, other benefits and seniority, as if he were in full-time active service; and that the **Statewide employee organization shall fully reimburse** the employer for all expenses and costs of such paid leave, including, but not limited to, contributions and payment in accordance with sections 5501, 5505.1 and 5507 [concerning employer responsibilities vis-à-vis retirement benefits], if the employee organization either directly pays, or reimburses the Commonwealth or other employer for, contributions made in accordance with section 5507.

71 Pa.C.S. § 5302(b)(2) (emphasis added) (internal footnote omitted).

stripped of the free speech rights guaranteed to every other citizen of this Commonwealth. Further, he avers that he is prohibited from performing his essential job duties because political speech is characteristically intertwined with informative and dutiful union representation. Interestingly, he does concede that a strict application of Sections 905.2(b)(7) and (b)(10), regardless of the context surrounding the speech, means that "any expression by [Pinto] to another person of the PSCOA's endorsement of Rendell would subject him to discipline under the Act." (Pinto's Brief at 27.)

These arguments are unavailing to me. The United States Supreme Court has held that the interests of the government in avoiding the appearance of bias and favoritism, the maintenance of a workforce in which performance is measured by occupational achievement rather than political activity, and the freedom of public employees from political pressures override the interests of government employees in engaging in overt political campaign activities. See Broadrick v. Oklahoma, 413 U.S. 601 (1973); U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 431 U.S. 548 (1973); United Pub. Workers of Am. v. Mitchell, 330 U.S. 75 (1947). The endorsement of a political candidate is an overt political action.

It is Pinto's concurrent status as both a Vice President of PSCOA **and** a classified service employee that creates the necessity to restrict his, not the union's, right to comment **publicly** on partisan political matters. His interests as a union vice president do not outweigh the State's interests in preventing the classified service from becoming politicized and its employees from thereby losing their impartiality. I do not believe that Pinto is permitted to do what the remaining union members may not do, which is to engage in "hard core" political activity on their behalf. Further, Pinto could have sent the letter[4] signed by

[4] The text of the letter was as follows:
(continued…)

the union only, rather than from him personally as an officer of the union. Notably, Pinto commented on an issue with future implications when he stated, "We strongly oppose privatizing in our branch of public safety." This is exactly the type of behavior that Section 905.2(b) was meant to prohibit. Pinto chose to wear two hats - one of a PSCOA Vice President and the second, that of a civil service employee. If Pinto wished to engage in the political activity that he believes is essential to his position, then he needed to accept an unpaid leave of absence as provided for in the collective bargaining agreement.[5]

(…continued)

> We are writing on behalf of the members of PSCOA to inform you that we voted to endorse your candidacy for Governor of Pennsylvania.
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> PSCOA proudly represent[s] over 9,500 correctional employees in the State of Pennsylvania[. I]t is our mission to promote the corrections officer profession and improve public safety, while still addressing the concerns of our membership. The PSCOA understands the high cost of operating our business to the point we are currently working with the House Appropriations committee to see how we can best save money in the department. We strongly oppose privatizing in our branch of public safety.
>
> Our membership is like no other in law enforcement, and considers it an honor to provide you with this endorsement due to your demonstrated commitment to our profession. We look forward to working together with you during the next[] four years.
>
> Sincerely,
>
> Roy Pinto, VP PSCOA.

(Reproduced Record at 129a.)

[5] See, e.g., United States v. Genova, 333 F.3d 750, 759 (7th Cir. 2003) (stating that employees are entitled to unpaid leave for political endeavors, not leave with corresponding benefit); State ex rel. Sowards v. County Comm'n of Lincoln County, 474 S.E.2d 919 (W.Va. 1996) (sanctioning political activity by furloughed civil service employee and by civil (continued…)

Otherwise, the union alone should have been the letter signatory or one of the other officers who was not on paid leave.[6]

Pinto argues that, as the Act 195 representative for almost ten thousand Commonwealth employees, the PSCOA is statutorily obligated to further the interests of its membership. He posits that, inherent in this obligation, is the duty to monitor and, if necessary, participate in the legislative process as it inevitably affects the membership. However, participation in the legislative process does not require political activity such as that prohibited by the Act. Internal endorsements to the union membership as to those prospective candidates whose views are most consistent with the best interests of the union can fulfill the obligation of the representative to the rank and file.[7] However,

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service employee on unpaid leave of absence). I am unsure as to whether Pinto could engage in political activity even if he were on an unpaid leave of absence, but that is an issue outside the purview of this appeal. See, e.g., Alexander v. Merit Sys. Prot. Bd., 165 F.3d 474 (6th Cir. 1999) (holding that employee could be terminated for violating the Hatch Act prohibition on engaging in prohibited political activity even if he took an unpaid leave of absence); (Minnesota, Dep't of Jobs & Training v. Merit Sys. Prot. Bd., 875 F.2d 179 (8th Cir. 1989) (finding that state employee violated proscription on political activity even though on leave of absence).

[6] But in Burrus v. Vegliante, 336 F.3d 82, 87 (2d Cir. 2003), the Second Circuit opined that union postings on bulletin boards constituted forbidden political activity because "the bulletin boards are controlled by the [union], which is an agent of the active employees, and its use for 'political activity' must be deemed to be an act of those employees." Accord Kenner Police Dep't v. Kenner Mun. Fire & Police Civil Service Bd., 783 So.2d 382 (La. App. 2001) (concluding that campaign contribution check signed by executive board of city police association was personal action taken by the officers individually, and not an action of the association, and as such, officers individually endorsed and contributed to political candidate in violation of statute prohibiting political activity by civil service employees; officers' conduct was not shielded by their status as members of the police union).

[7] See, e.g., Biller v. Merit Sys. Prot. Bd., 863 F.2d 1079 (2d Cir. 1988) (determining that actions of government employees, while on extended leave as union presidents, in urging in union newspapers that union members contribute to unions' political action funds did not (continued…)

publishing those endorsements violates the intent and spirit of the Act and compromises the neutrality of a State employee.

Finally, Pinto argues that his endorsement letter to Rendell did not affect the State's interests because, when he signed the letter, and it was posted on the PSCOA website, no one could have known that he was a civil service employee. However, it does not follow that, if a civil service employee violates the Act's political activity prohibitions, and no one knows about it, there is no violation. I believe that the decision here is clear. Pinto is a DOC employee and is subject to the restrictions of the Act. Pinto violated those restrictions by engaging in political activity. Accordingly, I would reverse this portion of the Commonwealth Court's decision and reinstate the five-day suspension.

Knowing and Intentional Violation of the Act

Although the Majority found it unnecessary to address this issue, I believe that, because Pinto is a civil service employee and violated the political prohibitions of Section 905(b), we must reach the issue of whether a violation of the Act requires a scienter element. The Commission contends that the decision of the Commonwealth Court is a significant departure from its other decisions in this area. Although the Commonwealth Court has addressed this issue on several previous occasions, this is an issue of first impression for this Court.

(…continued)
violate the Hatch Act, where the funds were not designated for any political campaign, party, committee or candidate at the time they were made); Blaylock v. Merit Sys. Prot. Bd., 851 F.2d 1348 (11th Cir. 1988) (finding that officer of union of government employees did not violate political activity prohibition by writing articles for union newspaper opposing re-election of President of the United States).

In its decision, the Commonwealth Court determined that Pinto did not engage in political activity because he sent the letter to then gubernatorial candidate Rendell solely for informational purposes and not as part of any official campaign activities. The court found it determinative that Pinto did not know that the letter was posted on the PSCOA website. However, it is my belief that a classified employee may not publish a letter in favor of or against a political candidate and that an employee who authors such an endorsement is responsible for any use that is made of it, whether or not he gives consent to such use.

The Commission argues that the holding of the Commonwealth Court ignores prior precedent that a violation of the Act's political activity prohibitions need not be knowing or intentional to be sanctioned. Further, the Commission chastises the Commonwealth Court for making its own finding of fact on this issue and rendering a determination as to Pinto's credibility.

Beginning with Cardamone v. State Civil Service Commission, 428 A.2d 757 (Pa. Cmwlth. 1981), the Commonwealth Court held that a violation of the Act need not be knowing or intentional to result in sanction. In Cardamone, a civil service worker defended his dismissal on the basis that he was unaware that his activity was political in nature. The court said that no scienter requirement is contained in the Act and his dismissal from employment was affirmed. It should be noted that originally the Act called for immediate dismissal when the civil service employee engaged in political activity. The Act was amended several times, reducing the punishment to a maximum suspension of one hundred twenty days. See also Hetman v. State Civil Serv. Comm'n, 714 A.2d 532 (Pa. Cmwlth. 1998); DeMarco v. Pa. Liquor Control Bd., 657 A.2d 1359 (Pa. Cmwlth. 1995);[8]

[8] In DeMarco, the worker also argued that he did not know that his conduct was prohibited political activity. Once again the court stated that "Petitioner's knowledge of this prohibition and hence his intent to violate the act is legally irrelevant." Id. at 1361.
(continued…)

McCormick v. Pa. State Civil Serv. Comm'n, 466 A.2d 273 (Pa. Cmwlth. 1983);[9] Vaniscak v. State Civil Serv. Comm'n, 428 A.2d 763 (Pa. Cmwlth. 1981);[10].

Hetman is most closely analogous to the instant matter. Hetman and one or two of her co-workers in a county mental health/mental retardation program were volunteer union mobilizers, whose primary union function was regular, lawful distribution of non-political union leaflets and printed informational material to fellow county co-workers. In late 1995, she received pamphlets from the Labor Council for distribution. She disseminated the material with another co-worker without reading it. The pamphlet contained anti-Republican material, clearly endorsing Democratic candidates. Again, the court held that a finding regarding whether or not the union mobilizers were aware of the nature and contents of the pamphlets was unrelated to the ultimate legal determination that they violated the Act.

The Commonwealth Court, in the instant matter, failed to distinguish its current position from that it adopted in Cardamone, Vaniscak, McCormick, DeMarco, and Hetman. In all of those cases, the Commonwealth Court's analysis of political activity prohibitions

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[9] In McCormick, a housing authority employee submitted a signed petition for placement of his name on a ballot for the position of township auditor. The court, quoting Cardamone, held that the "assertion of unawareness of the prohibited nature of his conduct cannot relieve [an employee] of culpability therefor." Id. at 275 (quoting Cardamone, 428 A.2d at 758).

[10] In Vaniscak, the civil service worker signed a petition to run for office, which was circulated and filed by her husband. When informed that this was forbidden political activity, she immediately withdrew her candidacy. However, due to an oversight, her name remained on the ballot. She argued that her action was an unintentional, technical violation, but the court said that her behavior clearly went beyond personal expression and upheld her dismissal.

stopped once the court determined that the employee engaged in prohibited political activity. Although the Majority is correct that none of these employees was on a leave of absence, their status was not determinative in deciding that they had violated the political prohibitions of the Act; only their forbidden political conduct was considered. I am reminded that this is, after all, merely a matter of civil discipline and sanctions can be imposed without proof of intent. Further, had the General Assembly intended that civil service employees must knowingly and intentionally engage in political activity before it would be actionable, it would have included such a requirement in the Act, which was most recently amended in 2002.

The political activity prohibition set forth in the Act does not provide an exception for unknowing or unintentional conduct and I would not require an element of intent when the General Assembly has clearly declined to include it in the statute. Accordingly, I would reverse the decision of the Commonwealth Court on this issue.