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Jun 23 2009 02:19pm P001

STATE OF FLORIDA
PUBLIC EMPLOYEES RELATIONS COMMISSION

STEVEN J. DICKEY and
HILLSBOROUGH COUNTY
POLICE BENEVOLENT
ASSOCIATION, INC., D/B/A
WEST CENTRAL FLORIDA
POLICE BENEVOLENT
ASSOCIATION,

Charging Parties,

v.

DAVID GEE, SHERIFF OF
HILLSBOROUGH COUNTY,
FLORIDA,

Respondent.

Case No. CA-2008-095

FINAL ORDER

Order Number: 09U-193
Date Issued: June 23, 2009

R. Jeffrey Stull, Tampa, attorney for charging parties.

Thomas M. Gonzalez and Ernest F. Peluso, Tampa, attorneys for respondent.

On November 18, 2008, Steven J. Dickey and the Hillsborough County Police Benevolent Association, Inc., d/b/a/ West Central Florida Police Benevolent Association (PBA), filed an unfair labor practice charge alleging that David Gee, Sheriff of Hillsborough County, Florida (Sheriff), violated Section 447.501(1)(a), Florida Statutes (2008),¹ by suspending Dickey for five days for engaging in protected concerted activity. The charge was found sufficient and a hearing officer was appointed. The Sheriff filed an answer denying that he violated the law.

¹All citations to the Florida Statutes are to the 2008 edition.

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On February 13, 2009, an evidentiary hearing was held in Tampa. On March 31, the hearing officer issued his recommended order concluding that the Sheriff did not commit an unfair labor practice by suspending Dickey for five days, and that neither party was entitled to an award of attorney's fees and costs. On April 15, the Charging Parties filed ten exceptions. The Sheriff did not file exceptions, but he filed a response to the Charging Parties' exceptions. A transcript has been filed.

Prior to addressing the exceptions, we will review the pertinent facts. The PBA represented a unit of the Sheriff's detention deputies and corporals until it was decertified in June 2008. Dickey is a corporal and he served as the bargaining unit's president from 2004 through 2008. One of Dickey's duties as president was to communicate with bargaining unit members about the progress of collective bargaining negotiations and legislative issues. The goal was to achieve an executed and ratified contract. One method of communication was through the PBA's website. Dickey assumed that matters on the PBA's website would be read, printed, or shared with other bargaining unit members. The PBA's website is accessible to any interested person without the need of a password.

Chief Deputy Jose Docobo is second-in-command in the Sheriff's Office. Docobo is known and has been known for some time as "The Iceman." Sheriff personnel, including Dickey, do not address Docobo as "The Iceman" because it is considered inappropriate to address a high-ranking officer by a nickname.

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On October 5, 2007, Docobo wrote an interoffice memorandum to "All Detention Personnel." The memorandum, which addressed parity pay, stated:

In its most recent newsletter, the PBA continues to state that the Sheriff's Office has given detention personnel outside of the bargaining unit parity pay.

"A perfect example of this is when the Sheriff gave everyone outside of the bargaining unit in detention parity pay even though they constantly state that they could never afford to do this for all detention deputies" (HCSO PBA NEWS, October 2007).

As a point of clarification, personnel should know that this statement is absolutely false and misleading. No such action has been taken or even initiated. Anyone who would like to independently verify this information should contact the Hillsborough County Civil Service Board at 272-5625.

In response to Docobo's memorandum, that same day Dickey authored an article titled, "Dear cheif (sic) Deputy please read" and posted it on the PBA's website at 6:56 p.m. The article stated, in pertinent part:

I guess you have not read the after action report from the last ACA jail audit. This is the HCSO response to ACA standard #7E-03. The HCSO wrote this. This came from the HCSO. These are HCSO words. This is NOT PBA talking. Your office put this out. The HCSO, not the PBA, CLEAR

Later that same day, Dickey authored an article titled, "The Ice Strikes Againl," and posted it on the PBA's website at 11:11 p.m. The article stated:

Time after time the ICE MAN puts his foot in his mouth, he speaks of what he knows nothing of. Why does he speak? I do not know, maybe he assumes he is getting correct info. He sends out memo after memo spewing words that should let every one know that he is getting bad info. He speaks of contract talks, when he has

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attended none, not one meeting. He speaks of things like parity pay and says that its a lie that the HCSO has stated that the Jail lieutenants and jail Captains will get parity pay. ICE MAN it has been written and submitted by the HCSO to the ACA that lieutenants and Captains will get parity pay In 2008. It is in the report. You should have read this. I know it is a Jail Issue but it should be important enough to you to read the tax payers of this county paid a lot of money for the ACA audit. Please take the time to read it. Those inside the jail have read it. The Detention Colonel and the Detention Majors know it is the report. Did the HCSO detention staff lie to ACA?

You write, why was the PBA membership not given the opportunity to decide on the contract? What contract? Well I assume that someone told you we had a contract to vote on? Did no one tell you that the PBA has tried and tried to get the HCSO back to the table to talk and the HCSO refused. We are at Impasse because the HCSO would not negotiate, would not come to sit down and discuss the issues. Do you understand the process that poorly?

You have been quoted several times as to why the Detention Sergeants have Deputies and Corporals negotiating for them. Do you really not know the answer to that? Do you understand the process that poorly? Do you understand the pay proposal from the HCSO? Do you see that Deputies at step eleven and Corporals at step six get a 1% pay raise?

Do you understand that the HCSO has one of if not the highest paid Command staffs in the state? Do you understand the HCSO is the fourth largest Sheriff's Department in the UNITED STATES but Detention Deputies with the HCSO make less than Polk County, Pinellas County, Pasco County Manatee County, ETC. The HCSO can and does spend millions and millions on state of the art training centers, training offices, ranges, boot camp trailer parks, shooting ranges, helicopters, Hummers, armored trucks, rappelling towers, motor homes, Dodge Chargers, gun boats, polished AR-15's that sit in a safe, full size commercial air planes, and driving pads that used enough asphalt to pave all the roads in some small towns. When is train coming to the station? Any dates on the completion of the training city block? But the HCSO Jail Deputy makes less than the POLK COUNTY DEPUTY!

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Please, do not tell me about the federal grant money. I have heard that line before. Along with the line about the money the HCSO sends back to the County not being real money!

Bottom line educate yourself. Ask someone other than the one's who have been blowing smoke up your wazoo in the past.

Steve Dickey

After an investigation, the Sheriff suspended Dickey for five days because he determined that the articles contained insubordinate statements in violation of

Rule 4.1.09, "Public Disparagement." This rule states:

Sheriff's Office personnel shall not publicly criticize or ridicule the Sheriff's Office, its policies, or other personnel by speech, writing, or other expression, where such speech, writing, or other expression is defamatory, obscene, unlawful, is intended to undermine the effectiveness of the Sheriff's office, is insubordinate, or is made with reckless disregard for truth.

In the Charging Parties' first seven exceptions, they assert that the hearing officer failed to adopt certain of their proposed findings. The Commission will require additional fact finding only when a fact that is allegedly omitted is essential to the ultimate determination and appears to have been overlooked. See, e.g., Forrester v. Career Service Commission, 361 So. 2d 220 (Fla. 1st DCA 1978), cert. den., 368 So. 2d 1366 (Fla. 1979). We have reviewed the proposed findings identified in these exceptions and conclude that they are incorporated in the hearing officer's facts, unnecessary, or not supported by the record evidence. Thus, exceptions one through seven are denied.

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In exceptions eight and nine, the Charging Parties challenge the hearing officer's conclusions that Dickey was not engaged in protected concerted activity when he wrote the two articles and that the Sheriff did not commit an unfair labor practice by suspending Dickey. A charging party alleging that an employer has disciplined an employee for engaging in protected concerted activity must prove by a preponderance of the evidence that the conduct was protected and that the conduct was a substantial or motivating factor in the discipline taken by the employer. If the action taken by the employer was motivated by a non-permissible reason, the burden shifts to the employer to show that, notwithstanding the existence of factors relating to protected activity, it would have made the same decision anyway. Pasco County School Board v. PERC, 353 So. 2d 108, 117 (Fla. 1st DCA 1978).

Dickey argues that he was engaged in protected concerted activity when he wrote the two articles that were published on the PBA website and that the statements in the articles did not cause his conduct to lose its protection. The hearing officer concluded that Dickey was engaged in concerted activity when he wrote the two articles because they dealt with contractual matters. However, in determining that Dickey's writing of the articles "exceeded the bounds of protected activity," the hearing officer stated, "Not only is the tone of Dickey's articles, particularly the second one, disrespectful, but the articles are a personal attack directed against Docobo. I infer that Dickey's statements were meant to disparage and belittle Docobo in the eyes of his subordinates. Such

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disparagement and belittling is unacceptable and cannot be tolerated in a paramilitary organization."

We agree with the hearing officer that Dickey was engaged in concerted activity when he wrote the two articles. However, for the following reasons, we reject the remainder of the hearing officer's analysis and conclude that Dickey's writing of the articles was protected activity and the activity did not lose its protection because of the statements in the articles.

Public employees have the right "to engage in concerted activities not prohibited by law, for the purpose of collective bargaining or other mutual aid or protection."

§ 447.301(3), Fla. Stat.; DeMarois v. Military Park Fire Control Tax District No. 4, 7 FPER ¶ 12065 (1981), aff'd, 411 So. 2d 944 (Fla. 4th DCA 1982). Employees may use any means they choose to engage in protected concerted activity unless the method chosen is specifically prohibited by law or so opprobrious that the action is indefensible.

Communications Workers of America, Local 3172 v. City of Largo, 8 FPER ¶ 13043 at 67 (1981). Moreover, an employer may not specify the means through which employees engage in protected concerted activity. Id. at 67.

In United Faculty of Palm Beach Junior College v. District Board of Trustees of Palm Beach Junior College, 11 FPER ¶ 16101 at 327 (1985), aff'd, 489 So. 2d 749 (Fla. 4th DCA 1986), the Commission stated:

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We must broadly construe provisions which protect the rights of public employees to speak freely and to engage in protected concerted activity under § 447.301(3), especially in view of statutory and policy considerations encouraging robust and open discussion of labor relations matters. See §§ 447.501(3) and 447.605(2), Fla. Stat.

Thus, there is a "very high degree of protection for speech uttered in the context of public sector labor-management relations." Id. at 324.

Notwithstanding the high degree of protection for speech in the public arena, the Commission held in Palm Beach Junior College that public employees' free speech rights are not unlimited. For example, the Commission noted that employees use of threatening language, libelous speech, and language which constitutes extortion or bribery is not permitted. Id. at 324. In addition, "language which creates a real threat of immediate disruption in the workplace" is not protected, and intemperate, abusive, or insulting language loses its protection if it is likely to cause disruption in the workplace. Id. at 324-325.

The facts in Palm Beach Junior College are similar to the facts here. There, college employees/union officials sent survey results to high-ranking state officials in an attempt to receive more favorable treatment at the bargaining table. The survey results contained disparaging, critical, and insulting comments about the college's president and its board of trustees. The college disciplined the employees for sending the survey results. The Commission determined that employees sending survey results to state officials in an effort to improve the lot of unit members was protected concerted activity.

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In addition, the comments in the surveys were not so "offensive, defamatory or opprobrious" that the employees' conduct lost its protection. Id. at 325. Thus, the college committed an unfair labor practice by disciplining the employees for engaging in protected concerted activity.

Here, in his role as the PBA bargaining unit president, Dickey wrote two articles on his off-duty time which were published on a non-Sheriff website. The articles were responding to memoranda and statements from Chief Deputy Docobo, a public employer representative. We acknowledge that the articles contain disparaging, belittling, and insubordinate statements about Docobo. However, we reject the Sheriff's argument that these type of statements cause otherwise protected activity to lose its protection because their mere publishing may disrupt the paramilitary workplace. In Southwest Florida Police Benevolent Association, Inc. v. City of North Port, 15 FPER ¶ 20179 (1989), a police officer was disciplined for failing to follow the chain of command because he spoke to a city commissioner about unit members' concerns with a change in the paycheck distribution procedure and signed a petition presented to city officials. The city argued that the police officer's activity lost its protection because a breach of the chain of command could have created potential danger for disrupting the police department's operations. While the Commission agreed with the city that an activity may lose its protection by creating a threat of disruption in the workplace, the Commission rejected the city's argument because it failed to present evidence that the potential actually existed there. Thus, the Commission declined to "create an exception to the broad

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scope of protection afforded the exercise of employees' concerted activity, solely because the employees are police officers who went outside the department's chain of command...." Id. at 375.

Likewise, absent evidence about disruption in the workplace, we will not eviscerate the broad scope of protection afforded the exercise of employees' concerted activity merely because Dickey is a deputy sheriff in a paramilitary organization. In prior cases where the Commission has determined that otherwise protected conduct lost its protection, competent substantial evidence was presented to support the basis for removing the protection. For example, in Moakley v. City of Melbourne, 25 FPER ¶ 30071 (1999), the Commission found that the employees' conduct lost its protection because other employees were prevented from performing their duties. In Callin v. City of Auburndale, 24 FPER ¶ 29243 at 390 (1998), per curiam aff'd, 731 So. 2d 1282 (Fla. 2d DCA 1999), the employer presented evidence to show that the employee physically threatened his supervisor. The Commission determined in ATU, Local 1579 v. City of Gainesville, 19 FPER ¶ 24083 (1993), that the employee's conduct was not protected because it constituted a refusal to follow a superior's direct order.

Here, the Sheriff did not present any evidence to show that the statements in the articles created a real threat of immediate disruption in the workplace or were likely to cause disruption in the workplace. Moreover, there is no evidence that Dickey refused to follow a supervisor's direct order, the statements were false or defamatory, or that the statements contained threats of physical violence or coercion or constituted extortion or

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bribery. Based upon the foregoing, we conclude that Dickey engaged in protected concerted activity when he wrote the two articles which were published on the PBA website. In addition, the statements in the articles did not cause Dickey's activity to lose its protection. Thus, we must apply the remainder of the Pasco test to determine whether the Sheriff committed an unfair labor practice. Pasco County School Board v. PERC, 353 So. 2d 108 (Fla. 1st DCA 1978)

The next issue is whether Dickey's conduct was a substantial or motivating factor in the Sheriff's decision to suspend him for five days, and if it was, whether the Sheriff would have taken the same action anyway. Id. at 117. The Sheriff argues that he did not suspend Dickey for protected conduct, but rather because he violated Rule 4.1.09. We reject the Sheriff's argument.

The hearing officer stated in finding eleven that Dickey's rule violation was based on the two articles he authored and posted on the PBA's website. Thus, the conduct which the Sheriff relied on to find a violation of Rule 4.1.09 was Dickey's protected activity. In addition, there was no other reason articulated by the Sheriff for Dickey's suspension. Therefore, absent the protected activity, Dickey would not have been suspended. In sum, Dickey's suspension was "inextricably linked" to his protected activity on behalf of the bargaining unit members. Communications Workers of America, Local 3172 v. City of Largo, 8 FPER ¶ 13043 at 68 (1981). Thus, the Sheriff violated Section 447.501(1)(a), Florida Statutes, by suspending Dickey for engaging in protected activity. The Charging Parties' exceptions eight and nine are granted.

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In exception ten, the Charging Parties assert that the hearing officer erred in denying them an award of attorney's fees and costs. Section 447.503(6)(c), Florida Statutes, provides that the Commission has the discretion to award attorney's fees and costs to a prevailing party whenever it determines that such an award is appropriate. Given our conclusion that the Charging Parties proved that the Sheriff committed an unfair labor practice, they are eligible for an award of fees as a prevailing party.

A prevailing charging party is entitled to an award of fees if the charged party knew or should have known that its conduct was unlawful. See DeMarois v. Military Park Fire Control Tax District No. 4, 7 FPER ¶ 12065 (1981), aff'd, 411 So. 2d 944 (Fla. 4th DCA 1982). Although the Commission's case law is well established that an employer is prohibited from disciplining an employee for engaging in protected concerted activity, this case was more difficult than the typical discrimination case. There was a legitimate and significant dispute about whether Dickey's activity lost its protected status because of the language he used in the articles. The difficulty of the issue is highlighted by the fact that the hearing officer found that Dickey's conduct was not protected, and thus the Sheriff did not commit an unfair labor practice. Therefore, under the facts presented here, we exercise our discretion and conclude that it is not appropriate to award attorney's fees to the Charging Parties. Exception ten is denied.

Upon review of the complete record, including the transcript, we conclude that the hearing officer's findings of fact are supported by competent substantial evidence received in a proceeding which satisfied the essential requirements of law. Thus, we

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adopt those findings. § 120.57(1)(l), Fla. Stat. For the reasons set forth above, we substitute our analysis for the hearing officer's analysis.

Accordingly, the Sheriff is ORDERED to:

1. Cease and desist from:
 - a. Suspending employees for engaging in protected concerted activity; and
 - b. In any like or related manner, interfering with, restraining, or coercing public employees in the exercise of any rights guaranteed them by Chapter 447, Part II, Florida Statutes.
2. Take the following affirmative action:
 - a. Rescind the five-day suspension imposed on Steven J. Dickey and pay him back pay;
 - b. Post immediately, in conspicuous locations where notices to PBA bargaining unit employees were customarily posted, copies of the attached notice to employees.² The Sheriff shall ensure these notices remain posted for sixty consecutive days and the notices are not altered, defaced, or covered by other material. Copies of the notice shall be signed by the Sheriff's authorized representative prior to posting; and
 - c. Notify the Public Employees Relations Commission in writing, within twenty calendar days from the issuance of this order, of the steps that the Sheriff has taken to comply with its contents.

²In the event the Commission's order is appealed and affirmed by the district court of appeal, the words in the notice "posted by order of the Public Employees Relations Commission" shall immediately be followed by the words "affirmed by the district court of appeal."

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This order may be appealed to the appropriate district court of appeal. A notice of appeal must be received by the Commission and the district court of appeal within thirty days from the date of this order. Except in cases of indigency, the court will require a filing fee and the Commission will require payment for preparing the record on appeal. Further explanation of the right to appeal is provided in Sections 120.68 and 447.504, Florida Statutes (2008), and the Florida Rules of Appellate Procedure.

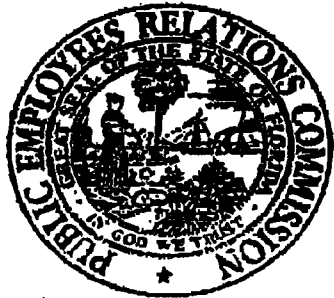
It is so ordered.

RAY, Chair, VARN and DELGADO, Commissioners, concur.

I HEREBY CERTIFY that this document was filed and a copy served on each party on June 23, 2009.

BY: Bary Edum
Clerk

/bjk



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NOTICE TO EMPLOYEES



POSTED PURSUANT TO AN ORDER OF THE PUBLIC EMPLOYEES RELATIONS COMMISSION

AN AGENCY OF THE STATE OF FLORIDA

AFTER A HEARING IN WHICH ALL PARTIES HAD THE OPPORTUNITY TO PRESENT EVIDENCE, THE PUBLIC EMPLOYEES RELATIONS COMMISSION HAS DETERMINED THAT I HAVE VIOLATED THE LAW AND I HAVE BEEN ORDERED TO POST THIS NOTICE. I INTEND TO ABIDE BY THE FOLLOWING:

I WILL NOT suspend employees for engaging in protected concerted activity.

I WILL NOT in any like or related manner interfere with, restrain, or coerce public employees in the exercise of any rights guaranteed them under Chapter 447, Part II, Florida Statutes.

I WILL rescind the five-day suspension imposed on Steven J. Dickey and pay him back pay.

David Gee, Sheriff of Hillsborough County, Florida

DATE

BY

TITLE

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Commission.

(ULP)

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**NOTICE
EFFECTIVE OCTOBER 10, 2003**

Pursuant to the Uniform Facsimile Signature of Public Officials Act, Section 116.34, Florida Statutes, this order is being issued to you by facsimile delivery. You will **NOT** receive a duplicate paper copy by mail. Accordingly, please retain this facsimile as your copy of the order. If you have encountered problems with the electronic delivery of the copy, please contact the Commission's Clerk at (850) 488-8641.