

STATE OF FLORIDA
PUBLIC EMPLOYEES RELATIONS COMMISSION

LOCAL 1158, CLEARWATER FIRE
FIGHTERS ASSOCIATION, INC.,
IAFF,

Charging Party,

v.

CITY OF CLEARWATER,

Respondent.

Case Nos. CA-2005-065
CA-2005-071

FINAL ORDER

Date Issued: August 30, 2006
Order Number: 06U-177

Paul A. Donnelly and Laura A. Gross, Gainesville, attorneys for charging party.

Gregory A. Hearing and Brian C. Ussery, Tampa, attorneys for respondent.

On October 19, 2005, Local 1158, Clearwater Fire Fighters Association, Inc., IAFF (Local 1158), filed an unfair labor practice charge alleging that the City of Clearwater (City) violated Section 447.501(1)(a), Florida Statutes (2005).¹ The charge was docketed as Case No. CA-2005-065 and found to be sufficient. On November 4, Local 1158 filed another charge alleging that the City violated Section 447.501(1) (a), Florida Statutes. This charge was docketed as Case No. CA-2005-071 and also found to be sufficient. The City filed answers denying that it committed any unfair labor practices. On December 1, the two charges were consolidated. An evidentiary hearing on the charges was conducted before a Commission hearing officer on April 25 and 26, 2006. The hearing officer issued his recommended order on June 27. A transcript of the hearing

¹Unless noted otherwise, all statutory references are to the 2005 edition of Florida Statutes.

CA-2005-065
CA-2005-071

has been filed with the Commission, and both parties have filed exceptions to the recommended order. Additionally, Local 1158 filed a reply to the City's exceptions.

The hearing officer found that the City violated Section 447.501(1)(a) when Fire Chief Jamie Geer and City Manager William Horne issued separate e-mails on September 1, 2005, which unambiguously threatened Local 1158's officers and bargaining unit members for engaging in the protected activity of conducting a "no confidence" vote regarding Geer and opposing changes proposed by Geer. The hearing officer further found that Assistant Fire Marshall Steve Strong violated Section 447.501(1)(a) by issuing a letter, through his attorney, threatening to sue Local 1158 because its officers had engaged in the protected concerted activity of investigating Strong's qualifications. Similarly, Geer was found to have committed an unfair labor practice for sending an e-mail threatening to sue Local 1158 for questioning Geer's failure to obtain a State of Florida firefighter certification within a year of his employment. However, the hearing officer found that another e-mail, issued by Geer on September 16, did not constitute a threat. In that e-mail Geer commented on Strong's threat to sue, stating that questions concerning possible liability of union members for a damage claim needed to be answered by representatives of Local 1958 and relating that union members would not be liable for any award if the award did not exceed Local 1958's insurance coverage for slander and libel. The hearing officer concluded that the City should be required to cease and desist from threatening employees for engaging in

CA-2005-065
CA-2005-071

protected concerted activity, pay to Local 1158 its attorney's fees and costs of litigation, and post a notice stating that it will comply with the remedy ordered.

We first address Local 1158's exceptions to the hearing officer's recommended order. In its first exception, Local 1158 takes issue with the hearing officer's determination that Geer's September 16 e-mail did not convey unlawful threats. Local 1158 objects to what it characterizes as the hearing officer's "piecemeal" approach of considering each letter or e-mail separately and asserts that they should be taken as a whole in determining that a violation occurred. Further, Local 1158 argues that the September 16 e-mail constitutes an unfair labor practice because it conveyed and legitimized Strong's unlawful threat to sue.

Geer's September 16 e-mail does not threaten to sue the union or its members. Rather, it reacts to questions received by Geer regarding Strong's threat to sue. We do not accept Local 1158's contention that by commenting on Strong's threat to sue, and specifically pointing out that individual liability for damages would be subject to insurance coverage, Geer validated Strong's threat. It may have been unwise for Geer to comment on Strong's suit in any manner, but the subject e-mail does not rise to the level of validating the threatened suit. Union exception one is denied.

In its second exception, Local 1158 contends that the hearing officer erred in failing to analyze whether the September 1 e-mail statements made by Geer and Horne interfered with and were coercive as to the selection of union representatives. The

CA-2005-065
CA-2005-071

charge filed by the union regarding the September 1 communications alleged threats to the officers of Local 1158 and bargaining unit members for engaging in protected concerted activity. Neither the charges in these cases, nor the parties' prehearing statements, allege that the e-mails interfered in the selection of union leadership. Therefore, the issue was not before the hearing officer and is not now before us. Alcorn v. City of Jacksonville, 16 FPER ¶ 21507 (1990); Bass v. Department of Transportation, 2 FCSR ¶ 10084 (1986); cf. Dober v. Worrell, 401 So. 2d 1322 (Fla. 1981); Boyd v. Department of Revenue, 682 So. 2d 1117 (Fla. 4th DCA 1996) (holding that it is inappropriate to raise an issue for the first time on appeal). Union exception two is denied.

Local 1158 argues in exception three that neither the Commission nor the National Labor Relations Board requires proof of good faith as an element of protected concerted activity. Therefore, Local 1158 contends that the hearing officer's consideration of whether the statements contained in the "whereas" clauses of the no confidence ballot were made in good faith is superfluous. The Commission has held that there is a very high degree of protection for speech uttered in the context of public sector labor-management relations. United Faculty of Palm Beach Junior College v. District Board of Trustees of Palm Beach Junior College, 11 FPER ¶ 16101 at 324 (1985). However, the free speech rights of public sector employees are not unlimited. Statements that are libelous, coercive, threatening, unlawful as constituting extortions or bribery, or which

CA-2005-065
CA-2005-071

create a real threat of immediate disruption in the workplace, lose their protected status.

Id.

The hearing officer found that the statements made in the whereas clauses of the no confidence ballot did not cause disruption of the workplace. Our review of the record reveals that that finding is supported by competent substantial evidence. However, in considering this issue the hearing officer also addressed the City's argument that the accusations against Geer were bound to cause divisiveness and disruption in the workplace.² In so doing, the hearing officer noted that while the accuracy of the statements made by Local 1158 is debatable, they were opinion rather than fact, and were generated in good faith based on a sincere belief that Geer was not doing a good job.

A determination of whether statements were made in good faith goes to the question of whether factual statements are libelous; that is whether they were made with knowledge of their falsity or made with reckless disregard for their truth or falsity. See New York Times Co. v. Sullivan, 373 U.S. 254 (1964). This libel standard has been adopted and applied in the labor-management context to determine whether otherwise protected speech has lost its protection. See NLRB v. New York University Medical Center, 702 F. 2d 284, 291 (2d Cir.), vacated on other grounds, 104 S. Ct. 53 (1983), enforcement granted, 751 F. 2d 370 (2d Cir. 1984) (holding that employees' failure to

²The recommended order states that the unfounded accusations were about Local 1158 President John Lee. (HORO at p. 25) This is a scrivener's error as the accusations pertain only to Geer.

CA-2005-065
CA-2005-071

take certain steps before disseminating rumors regarding searches of minority employees "casts doubt upon their good faith" belief that searches occurred), cited with approval in Palm Beach Junior College, 11 FPER at 324-25.

However, the hearing officer found that the whereas clauses at issue in this case are expressions of opinion rather than factual statements. Expressions of opinion cannot be false. Palm Beach Junior College, 11 FPER at 326 (adopting analysis of National Association of Letter Carriers v. Austin, 418 U.S. 214 (1974)). Since the statements at issue are opinion and not fact, they cannot be false. If they cannot be false, there is no question of the statements being libelous, and it is immaterial whether they were made in good faith. Thus, we agree with Local 1158 that in the context of this case it was unnecessary for the hearing officer to consider whether the whereas clauses at issue were made in good faith and grant union exception three.

In its fourth exception, Local 1158 asserts that the City should be required to post and publicly publish the Commission's notice and order of relief in the same manner as it conveyed its threats, through the City's e-mail system. The purpose of the posting remedy is to advise those persons adversely affected by an unfair labor practice that the unlawful conduct will stop and what affirmative action will occur to remedy the unlawful activity. In this instance, the specific purpose is to notify union members that the City will stop threatening them for participating in no confidence votes, investigating the qualifications of management employees, and opposing changes to policies and procedures.

CA-2005-065
CA-2005-071

Posting of notices in the workplace accomplishes this purpose, therefore, additional dissemination of the notice through e-mail or other means is not necessary and we decline to require it. For the same reason, we reject Local 1158's request that the City be required to issue an apology. Consequently, union exception four is denied.

In its single exception, the City argues that it should not be required to pay Local 1158's attorney's fees and costs because the statements made by Geer and Horne in their communications were ambiguous and the City could not have reasonably known they were unlawful. Further, the City asserts that it could not have known that Geer and Strong's threats to sue were unlawful due to the unsettled nature of the law regarding threats to sue. We have carefully reviewed the record in this case. We agree with the hearing officer's analysis regarding the content of Geer and Horne's e-mails and letter and his conclusion that these communications contain unambiguous unlawful threats. Therefore, part A of the City's exception is denied.

Regarding the threats to sue, we turn, as did the hearing officer, to our recent decision in Communication Workers of America, Local 3178 v. City of Miami Beach, 31 FPER ¶ 162 (2005), in support of the proposition that a threat made by a supervisor to file legal action against a subordinate in retaliation for engaging in protected activity is an unlawful labor practice. Thus, we reject the contention that the Commission's case law on this issue is unsettled. On the contrary, we find that the City knew or should have

CA-2005-065
CA-2005-071

known that the threats to sue as well as the other communications which we have found to contain threats were unlawful. Therefore, part B of the City's exceptions is denied.

Upon review of the complete record, we conclude that the hearing officer's findings of fact are supported by competent substantial evidence in the record. Therefore, we adopt those findings. § 120.57(1)(l), Fla. Stat. (2006). Furthermore, with the exception of the superfluous discussion of good faith discussed above, we agree with the hearing officer's analysis of the dispositive legal issues, his conclusions of law, and his recommendation. Accordingly, the hearing officer's recommended order is incorporated herein, and the City is ORDERED to:

1. Cease and desist from:
 - (a) Threatening employees with adverse employment action and lawsuits 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 right guaranteed them under Chapter 447, Part II.

2. Take the following affirmative action:
 - (a) Pay to Local 1158 its reasonable attorney's fees and costs of litigation;
 - (b) Post immediately for, in conspicuous locations where notices to employees represented by Local 1158 are customarily posted, copies of the attached notice to employees.³ The

³In 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 be immediately followed by the words "affirmed by the District Court of Appeal."

CA-2005-065
CA-2005-071

City shall ensure that these notices remain posted for 60 consecutive days and that the notices are not defaced or altered and are not covered by other material. Copies of the notice shall be signed by the City's authorized representative prior to posting; and

- (c) Notify the Commission, in writing, within 20 calendar days of the date of issuance of this order, of the steps that the City has taken to comply with its contents.

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 (2006), and the Florida Rules of Appellate Procedure.

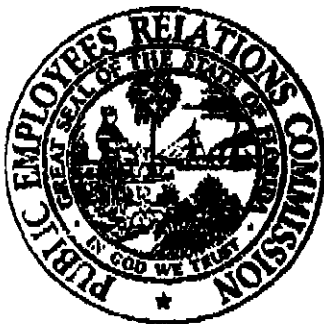
It is so ordered.

POOLE, Chair, KOSSUTH, JR., and VARN, Commissioners, concur.

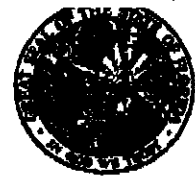
I HEREBY CERTIFY that this document was filed and a copy served on each party on August 30, 2006.

BY: Jim M. Jarrell
Clerk

/bjk



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, IT HAS BEEN DETERMINED THAT WE HAVE VIOLATED THE LAW AND WE HAVE BEEN ORDERED TO POST THIS NOTICE. WE INTEND TO CARRY OUT THE ORDER OF THE PUBLIC EMPLOYEES RELATIONS COMMISSION AND ABIDE BY THE FOLLOWING:

WE WILL NOT threaten employees with adverse employment action and lawsuits for engaging in protected concerted activity.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce bargaining unit members in the exercise of any rights guaranteed them under Chapter 447, Part II, Florida Statutes.

WE WILL pay to Local 1158, Clearwater Fire Fighters Association, Inc., IAFF, its reasonable attorney's fees and costs of litigation.

City of Clearwater

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.

**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.