

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AFSCME COUNCIL 13 :
:
and :
:
William O'Donnell, :
Intervenor¹ :
v. :
:
COMMONWEALTH OF PENNSYLVANIA : Case No. PERA-C-98-396-E
PENNSYLVANIA EMERGENCY :
MANAGEMENT AGENCY :
CHARLES F. WYNNE, et al. :

FINAL ORDER

On September 23, 1999, a hearing examiner of the Board issued a proposed decision and order (PDO) dismissing AFSCME's unfair practice charge, which alleged that William O'Donnell, a former employe of the Commonwealth of Pennsylvania, Pennsylvania Emergency Management Agency (PEMA), was denied "Weingarten rights"² in violation of Section 1201(a)(1) of the Public Employe Relations Act (PERA). The hearing examiner concluded that a meeting between representatives of PEMA and O'Donnell on June 16, 1998, wherein O'Donnell was discharged, was not an investigatory interview that would have entitled him to union representation. AFSCME did not file exceptions. However, on October 13, 1999, O'Donnell filed a petition to intervene and a brief in support along with timely exceptions and a brief in support of exceptions to the PDO. On November 3, 1999, PEMA filed a brief in opposition to intervention and in opposition to exceptions.

After a thorough review of the petition to intervene, the exceptions and all matters of record, the Board makes the following:

AMENDED AND ADDITIONAL FINDINGS OF FACT

9. The meeting then continued, with Mrs. Johnston informing Mr. O'Donnell of deficiencies in his work performance, mentioning some recent incidents. After telling him of the problems with his performance, the supervisors and managers then recessed for a private ten-minute meeting, leaving Mr. O'Donnell alone. When they returned, Mrs. Breitenbach informed Mr. O'Donnell his employment was being terminated. Mrs. Breitenbach then gave Mr. O'Donnell a termination letter dated June 16, 1998, that had been prepared before the meeting. She asked him to sign an acknowledgment indicating that he had received the letter. He signed the acknowledgment under protest. The entire meeting, including the management recess, lasted about one-half hour. (N.T. 16-21, 37-38, 45-48; Joint Exhibit 2, Union Exhibit 1).

11. The June 16, 1998 letter provided in pertinent part:

¹ The caption appears as amended by the Board following intervention by William O'Donnell as discussed infra.

² NLRB v. Weingarten, 420 U.S. 251 (1975).

On June 16, 1998, a meeting concerning your level of performance was held to afford you an opportunity to hear and discuss your side of the specifics of your unsatisfactory work performance: failure to comprehend and comply with instructions, you require constant supervision, you are uncooperative, you are not an advocate for the applicant, and there are prior incidents of you leaving your work site without permission. These reasons are the basis of this action and your responses were unsatisfactory.

(Joint Exhibit 2).

12. There was some discussion during the meeting between O'Donnell and Mrs. Johnston. Mrs. Johnston mentioned several things regarding O'Donnell's performance. Mrs. Johnston questioned O'Donnell on certain technical parts of the job in order to test his knowledge of the job. O'Donnell answered both questions. Mrs. Johnston also referred to applicants in western Pennsylvania as her applicants. O'Donnell told her that they didn't belong to her and that they belonged to the people of Pennsylvania. (N.T. 31).

13. Mrs. Johnston and Mr. Schulze each made various comments at the meeting. O'Donnell responded with his own version of events. (N.T. 18, 34, 47).

DISCUSSION

On April 6, 1998, William O'Donnell was hired by PEMA as an Auditor 2 in the Bureau of Recovery and Mitigation. O'Donnell's position was for a limited term and was due to expire on December 31, 1998. At the time of the meeting in question, O'Donnell was still serving his six-month probationary period. His position was included in the A-4 bargaining unit represented by AFSCME and was covered by the collective bargaining agreement between AFSCME and the Commonwealth. On June 16, 1998, O'Donnell was notified of a meeting in the office of Karen Critchfield, Director of PEMA's Bureau of Recovery and Mitigation. Also present were Rita Breitenbach, the personnel director, Richard Schulze, his immediate supervisor, and Deborah Johnston, PEMA's team leader for Western Pennsylvania. Breitenbach was the first to talk; she informed O'Donnell that the purpose of the meeting was to discuss his job performance. Learning this, and feeling outnumbered by the supervisory and management people in attendance, O'Donnell asked for a union representative. Breitenbach told him that he could not have a union representative present.

The meeting then continued, with Johnston informing O'Donnell of deficiencies in his work performance, mentioning some recent incidents. There was some discussion during the meeting between O'Donnell and Mrs. Johnston. Mrs. Johnston mentioned several things regarding O'Donnell's performance. Mrs. Johnston questioned O'Donnell on certain technical parts of the job in order to test his knowledge of the job. O'Donnell answered both questions. Mrs. Johnston also referred to applicants in western Pennsylvania as her applicants. O'Donnell told her that they didn't belong to her and that they belonged to the people of Pennsylvania. (N.T. 31). Mrs. Johnston and Mr. Schulze each made various comments at the meeting. O'Donnell responded with his own version of events. After telling him of the problems, the supervisors and managers left O'Donnell alone and recessed for a private 10-minute meeting. When

they returned, Breitenbach told O'Donnell his employment was terminated. Breitenbach gave O'Donnell a termination letter dated June 16, 1998, that had been prepared prior to the meeting. The letter provided in part that "a meeting concerning your level of performance was held to afford you an opportunity to hear and discuss your side of the specifics of your unsatisfactory work performance." (Additional Finding of Fact 11). The letter further provided that O'Donnell was being discharged because of certain deficiencies in his performance and his "responses were unsatisfactory." Id. She asked him to sign an acknowledgment that he had received the letter, which O'Donnell did under protest. The entire meeting, including the recess, lasted about 30 minutes. The next day, he received a copy of the letter in the mail.

1. Intervention

O'Donnell's bargaining representative, AFSCME, filed the charge of unfair practices but did not except to the hearing examiner's PDO dated September 23, 1999, wherein the examiner dismissed the charge. O'Donnell, the affected employe of the alleged Weingarten violation, has moved to intervene and timely except to the PDO. The Board will first address O'Donnell's petition to intervene. Section 95.44 of the Board's rules and regulations provides in pertinent part:

(c) The Board or a member of the Board, or the hearing examiner, as the case may be, may, by orders, permit intervention in person, by counsel, or by other representative to such extent and upon the terms as they may deem proper.

34 Pa. Code § 95.44(c). Based on this provision, intervention is clearly a matter of discretion with the Board. However, Section 95.44 falls under "Prehearing Provisions" and therefore does not contemplate post-hearing intervention. Indeed, the Board is unaware of any situation where an individual employe, on whose behalf a charge was filed by his or her bargaining representative, has attempted to intervene in that unfair practice proceeding after the PDO is issued.

Whether the Board should permit an individual employe to intervene in an unfair practice proceeding first raises the question of whether the individual employe had standing to file the charge initially. The charge filed by AFSCME here alleged that PEMA violated Section 1201(a)(1) of PERA because O'Donnell was denied Weingarten rights.³ In NLRB v. Weingarten, the United States Supreme Court recognized a right, rooted in the concerted activities language of Section 7 of the NLRA,⁴ for employes to request union presence and advice at investigatory interviews as a condition of

³ A denial of Weingarten rights constitutes an independent violation of Section 1201(a)(1) of PERA. Conneaut School District. See also Southwestern Bell Telephone Co., 227 NLRB 1223 (1977).

⁴ Section 7 of the NLRA provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection and shall also have the right to refrain from any or all such activities except to the extent such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)." Section 401 of PERA contains a similar provision.

their participation where the employe reasonably believes the investigation will result in disciplinary action. The Board adopted the Weingarten rule in Conneaut School District, 10 PPER ¶ 10092 (Nisi Decision and Order, 1979), *aff'd*, 12 PPER ¶ 12155 (Final Order, 1981) and in Shaler Township, 11 PPER ¶ 11347 (Nisi Decision and Order, 1980). However, the Board has never opined on whether an individual employe may file a charge alleging the denial of Weingarten rights.

In Lillian Franks v. Philadelphia School Dist., 21 PPER ¶ 21187 (Final Order, 1990) and Gerald Boling v. Commonwealth of Pennsylvania, 16 PPER ¶ 16167 (Final Order, 1985), the Board declined to issue complaints on charges filed by individual employes alleging the denial of Weingarten rights in violation of Section 1201(a)(1). The Board did not, however, dismiss the individual charges in those cases because the respective bargaining representative did not file the charges. Rather, the Board dismissed the charges because the meetings were either not investigatory or union representation was in fact provided. In Philadelphia Federation of Teachers v. Philadelphia School Dist., 21 PPER ¶ 21178 (Proposed Decision and Order, 1990), the Secretary of the Board issued a complaint on a charge filed by an individual employe alleging an independent (a)(1) violation. However, at the hearing the union entered an appearance and amended the complaint to include itself as a complainant. A hearing examiner found a Weingarten violation and the Board affirmed the PDO in a final order. 22 PPER ¶ 22067 (Final Order, 1991). However, in none of these cases did the Board specifically address whether the individual could properly file the charge.

After review of the case law and other relevant authorities, the Board is satisfied that an individual employe may file a charge alleging a denial of Weingarten rights. Weingarten is viewed as "an employe right, deprivation of which exposes the employer to liability under Section 8(a)(1), not Section 8(a)(5), since, as the [Supreme] Court noted, 'the employer has no duty to bargain with any union representative who may be permitted to attend the investigatory interview.'" THE DEVELOPING LABOR LAW, vol. I 604 (2nd ed. 1983). Although the union has an interest in attending investigatory interviews as a means of safeguarding not only the particular employe's interest, but also the interests of the entire bargaining unit, it is the individual employe's right to insist on concerted protection by requesting the presence of a union representative. Weingarten. Thus, unlike an alleged bargaining violation, where the union rather than the employes must file the charge, the individual employe may file a charge alleging a denial of Weingarten rights in violation of Section 1201(a)(1) of PERA. Because the right is a right possessed by individual employes under PERA, O'Donnell's bargaining representative has declined to pursue the matter further and O'Donnell has timely acted to protect his interests in this matter, the Board will grant O'Donnell's intervention and address his exceptions.

2. Merits Of Alleged Weingarten Violation

In his first two exceptions, O'Donnell challenges the hearing examiner's findings regarding O'Donnell's receipt of the June 16, 1998 letter. O'Donnell claims that he received a copy of the letter the next day by mail and did not get a copy of the letter at the conclusion of the meeting as found by the hearing examiner. O'Donnell testified that he only signed an acknowledgment of his dismissal at the conclusion of the meeting.

(N.T. 20-21).⁵ However, these exceptions are without merit because Richard Schulze, O'Donnell's immediate supervisor, testified that O'Donnell received a copy of the letter at the meeting. (N.T. 48). Moreover, the acknowledgment (Union Exhibit 1) that O'Donnell admitted signing states that he received the "DISMISSAL dated June 16, 1998," thus indicating that he received more than just oral notice of his dismissal. Based on this evidence, the hearing examiner determined that O'Donnell did in fact receive a copy of the June 16 letter at the conclusion of the meeting. Any suggestion that O'Donnell should be believed over Schulze involves a credibility determination, which rests with the Board's hearing examiner. The Board's long-standing policy is not to disturb credibility determinations absent compelling reasons. Upper Merion Area School District, 30 PPER ¶ 30091 (Final Order, 1999); Haverford Township, 27 PPER ¶ 27130 (Final Order, 1996); Springfield Township, 12 PPER ¶ 12354 (Final Order, 1981). Because the challenged findings involve credibility and there is no compelling reason to find otherwise, the Board will dismiss these exceptions.

In his third and fourth exceptions, O'Donnell excepts to the hearing examiner's conclusion that the June 16 meeting was not an investigatory interview that triggered Weingarten rights. O'Donnell contends that the record evidence, including the June 16 letter, show that the meeting was investigatory, with the ultimate decision whether to discharge O'Donnell to be based at least in part on the outcome of the meeting. The Board has reviewed the record evidence in its entirety and concludes that there are compelling reasons to reverse the hearing examiner regarding whether Weingarten rights applied here. Contrary to PEMA's present assertions, their very own letter provides evidence of record indicating that an investigatory interview occurred. The hearing examiner failed to account for the explicit language of the June 16, 1998 letter, which states:

On June 16, 1998, a meeting concerning your level of performance was held **to afford you an opportunity to hear and discuss your side** of the specifics of your unsatisfactory work performance: failure to comprehend and comply with instructions, you require constant supervision, you are uncooperative, you are not an advocate for the applicant, and there are prior incidents of you leaving your work site without permission. These reasons are the basis of this action **and your responses were unsatisfactory**.

(Joint Exhibit 2) (emphasis added). In finding 9 of the PDO, the examiner simply found that the letter had been prepared before the meeting and did not address the language of the letter itself, which was not addressed by PEMA at the hearing and cannot be ignored. The employer's letter clearly states that the meeting was held to discuss O'Donnell's poor performance and to get his side of the story. In addition, his dismissal was based in part on his unsatisfactory responses. Although the letter may have been drafted prior to the meeting as found by the examiner, that fact does not negate the investigatory nature of the employer's inquiries at the meeting.

We do not find the preparation of the letter in advance of the June 16 interview to be dispositive in light of the fact that the letter

⁵ Finding 9 of the PDO is amended herein to reflect that O'Donnell signed the acknowledgement under protest and did not sign the letter itself as found by the hearing examiner.

was withheld from O'Donnell until the interview was completed. PEMA acknowledges in the letter that the meeting was for the purpose of discussing O'Donnell's work performance, giving him an opportunity to respond and factoring his responses into the employer's decision announced to him following the meeting and the employer's private ten minute recess. One obvious alternative for PEMA following the interview and the private recess session was for the employer not to discharge O'Donnell and withhold the letter if his responses were satisfactory.

In defining "investigatory interviews" the Board has ruled that an employe does not have a right to union representation in a meeting called by an employer solely for the purpose of informing the employe of discipline, the decision to discipline having already been made. Pennsylvania Fish Commission, 18 PPER ¶ 18029 (Final Order, 1986). This is what the examiner concluded occurred here, but the record evidence does not support the examiner's conclusion. If a meeting goes beyond merely informing the employe of the previously made disciplinary decision and becomes investigatory in nature, the right to union representation will attach. Baton Rouge Water Works Co., 246 NLRB 995 (1979). PEMA's own letter here shows that questions were posed to O'Donnell during the June 16 meeting and that he responded to those questions. The letter was withheld until O'Donnell was given the opportunity to respond, providing further indication that his responses were considered as represented in the letter. Last, following the interview PEMA representatives recessed and privately met, and only after that meeting was the discipline announced. Under the circumstances of this case, it is clear that the June 16 meeting was more than a mere announcement of O'Donnell's shortcomings as an employe and PEMA's alleged already-made decision to discharge him.

Although O'Donnell's testimony regarding what transpired at the June 16 meeting is at times rather vague and cursory, his testimony does provide some support that the meeting was investigatory in nature. Indeed, a close review of the testimony reveals that there was at least some discussion between O'Donnell and Mrs. Johnston. O'Donnell testified that:

"Mrs. Johnston mentioned several other things. Mrs. Johnston questioned me on certain technical parts of the job, which I won't go into the technical parts . . . I answered both questions. Both questions, she tested me on the job. Mrs. Johnston also referred to those applicants in western Pennsylvania as her applicants. They belonged to her. I told her that they didn' [sic] belong to her, they belonged to the people of Pennsylvania . . . That was what Mrs. Johnston brought up at the meeting."

(N.T. 31). Moreover, Mr. Schulze, whose testimony is otherwise of little assistance in this regard, testified as to the comments Mrs. Johnston made at the meeting and conditioned that testimony with "of course, two sides of the story," inferring that O'Donnell voiced his own version of the events at the meeting. (N.T. 47). This testimony provides further support that this meeting was more than just the announcement of a pre-made disciplinary decision. Indeed, this testimony, when considered with the employer's own letter (Joint Exhibit 2), indicates that this meeting went beyond supervisors' statements explaining O'Donnell's deficiencies as found by the examiner. It is only logical to imply given the fact that O'Donnell provided unsatisfactory responses at the meeting, as explicitly stated in the letter, that O'Donnell was asked questions during the meeting. Thus,

the examiner's conclusion that the meeting did not consist of questions is not supported by the record and is indeed contradicted by the letter itself. PEMA's own letter supports the conclusion that O'Donnell was entitled to union representation at the June 16 meeting and, despite the opportunity to do so, PEMA did not address the contents of the letter at the hearing. Because O'Donnell was unlawfully denied representation as requested, a violation of section 1201(a)(1) of PERA will be found. The Board will sustain O'Donnell's exceptions in this regard and will reverse the PDO.

3. Remedy

Finally, O'Donnell contends that because he was denied Weingarten rights he should be made whole for his losses. O'Donnell was discharged over five months prior to expiration of his employment contract on December 31, 1998. The Board typically has issued a cease and desist order for Weingarten violations. City of Reading, 26 PPER ¶ 26172 (Final Order, 1995), *aff'd*, 689 A.2d 990 (Pa. Cmwlth. 1997); Conneaut School District. O'Donnell points out, however, that a cease and desist order for a terminated employe is ineffectual and does not deter future unlawful conduct. O'Donnell urges the Board to issue a make-whole remedy consistent with the NLRB's decision in Kraft Foods, 251 NLRB 598 (1980). Under Kraft Foods, once a Weingarten violation is established, an employer can avoid a conventional make-whole remedy only by showing that the discipline meted out was not based upon information obtained at the unlawful interview.⁶

Section 1303 of PERA provides that where there is an unfair practice, the Board may "issue and cause to be served on such person an order requiring such person to cease and desist from such unfair practice, and to take such reasonable affirmative action, including reinstatement . . . with or without back pay, as will effectuate the policies of this act." Pursuant to this section and Section 1301 of PERA, which empowers the Board to prevent any person from engaging in any unfair practice listed in PERA, the Board has broad remedial powers to issue make-whole remedies for violations of PERA. Appeal of Cumberland Valley School District, 483 Pa. 134, 394 A.2d 946 (1978). The Board concludes that Kraft Foods is consistent with its broad remedial powers under PERA and provides a sound workable approach to Weingarten violation situations. Based upon the explicit language in PEMA's June 16 letter in this case, the Board concludes that PEMA factored in O'Donnell's responses at the interview into its ultimate decision to discharge O'Donnell. (Amended Findings of Fact 11-13). Although PERA, like the NLRA, contains a just cause provision in Section 706, any cause PEMA may have had for discharging O'Donnell was tainted by the unlawful interview. A cease and desist order standing alone would not be an effective remedy because it would not deter an employer that conducts an interview in violation of employe rights under PERA from engaging in unlawful conduct in the future.

Moreover, the Pennsylvania Supreme Court has recognized that the Board's powers are remedial in nature, not punitive, and therefore a

⁶ In Taracorp Industries, 273 NLRB 221 (1984), the NLRB overruled Kraft Foods. Under Taracorp Industries, the only time a make-whole remedy is appropriate is if the employe is disciplined solely on the basis of his exercise of Weingarten rights. The Board notes, however, that it is not required to blindly follow NLRB precedent. AFSCME v. PLRB, 529 A.2d 1188 (Pa. Cmwlth. 1987).

make-whole remedy in order to rectify an employer unfair practice is appropriate. Appeal of Cumberland Valley School District. Unlike Kraft Foods, Taracorp Industries unduly restricts and sanctions tainted employer investigations. Where an employer conducts an interview in violation of Weingarten and factors employe responses from the unlawful interview into its disciplinary decision, as occurred here, it is difficult to subsequently assess the influence that the unlawful interview had on the employer's decision. An employer can avoid a make-whole remedy by showing that the discipline was not based on information obtained from the unlawful interview.

Because the employer here did not show that its decision to discharge O'Donnell was not based on information obtained at the unlawful interview, the Board will direct that O'Donnell be made whole for back pay he would have earned but for the discharge. Because O'Donnell's employment was due to expire on December 31, 1998, PEMA will not be required to reinstate O'Donnell to his prior position. Therefore, PEMA will be directed to pay O'Donnell what he would have earned from the date of his discharge, June 16, 1998, to the expiration of his employment, December 31, 1998.

Accordingly, after a thorough review of the record we sustain O'Donnell's exceptions in part and vacate the hearing examiner's finding that PEMA did not violate Section 1201(a)(1) of PERA.

CONCLUSIONS

Conclusion numbers 1 through 3 as set forth in the Proposed Decision and Order are hereby affirmed and incorporated herein by reference and made a part hereof.

Conclusion number 4 of the Proposed Decision and Order is hereby vacated and set aside and the following additional conclusion is made:

5. That the Commonwealth of Pennsylvania, Pennsylvania Emergency Management Agency has committed unfair practices within the meaning of Section 1201(a)(1) of PERA.

ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employe Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the Exceptions filed to the above case number are hereby sustained in part and denied in part and the Order on page 4 of the Proposed Decision and Order is hereby vacated and set aside, and

IT IS HEREBY FURTHER ORDER AND DIRECTED

that the Commonwealth of Pennsylvania, Pennsylvania Emergency Management Agency shall:

1. Cease and desist from interfering with, restraining or coercing employes in the exercise of their rights in Article IV of PERA.

2. Take the following affirmative action, which the Board finds necessary to effectuate the policies of the Public Employe Relations Act:

(a) Make William O'Donnell whole for all lost wages and benefits from the period of his discharge on June 16, 1998 to the date of expiration of his position with the Pennsylvania Emergency Management Agency on December 31, 1998;

(b) Post a copy of this Final Order and the Proposed Decision and Order within five (5) days of the date hereof in a conspicuous place readily accessible to the employes of PEMA and have the same remain so posted for a period of ten (10) consecutive days; and

(c) 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.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania, pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, John Markle Jr., Chairman, and Members L. Dennis Martire and Edward G. Feehan, this eighteenth day of January, 2000. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within Order.

CHAIRMAN JOHN MARKLE JR. CONCURS IN PART AND DISSENTS IN PART

I concur in the decision of the majority to permit O'Donnell to intervene in this unfair practice proceeding. However, I dissent as to the remainder of that decision because Weingarten rights did not attach to the June 16, 1998 meeting. I would affirm the hearing examiner's conclusion that the meeting was for the purpose of announcing PEMA's already-made disciplinary decision. Moreover, even if there were a Weingarten violation under the facts of this case, I would conclude that only a cease and desist remedy is appropriate because PEMA had reasons independent of the information obtained at the meeting for discharging O'Donnell. I would adopt the rule announced by the NLRB in Taracorp Industries.

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AFFIDAVIT OF COMPLIANCE

Commonwealth of Pennsylvania, Pennsylvania Emergency Management Agency, hereby certifies that it has ceased and desisted from its violation of Section 1201(a)(1) of the Public Employee Relations Act; that it has made William O'Donnell whole for all lost wages and benefits from the period of his discharge on June 16, 1998 to the date of expiration of his position with the Pennsylvania Emergency Management Agency on December 31, 1998; that it has posted the proposed decision and order and final order as directed, and that it has served a copy of this affidavit on AFSCME at its principal place of business and on counsel for William O'Donnell at his principal place of business.

Signature/Date

Title

SWORN AND SUBSCRIBED TO before me
the day and year first aforesaid.

Signature of Notary Public