

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNSYLVANIA STATE CORRECTIONS :
OFFICERS ASSOCIATION :
 :
v. : Case No. PERA-C-01-398-E
 :
COMMONWEALTH OF PENNSYLVANIA :

FINAL ORDER

On September 18, 2002, the Pennsylvania State Corrections Officers Association (Association) filed with the Pennsylvania Labor Relations Board (Board) timely exceptions and supporting brief to a Proposed Decision and Order (PDO) issued August 30, 2002. The Commonwealth of Pennsylvania (Commonwealth) filed a timely brief in response to the Association's exceptions on October 8, 2002. In the PDO, the Hearing Examiner concluded that the Commonwealth of Pennsylvania (Commonwealth) violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA) by failing to timely provide information necessary for the processing of grievances. The Hearing Examiner further concluded that the Commonwealth violated Section 1201(a)(1) of PERA by denying an employe's request for union representation at an investigatory interview. The Commonwealth has not excepted to that portion of the PDO wherein an unfair practice was found. The Association's exceptions concern the Hearing Examiner's dismissal of that portion of the Association's charge that the Commonwealth violated Section 1201(a)(1) when it denied Corrections Officer Danielle Sohns (Sohns) her choice of representative at an investigatory interview under NLRB v. J. Weingarten, Inc., 420 U.S. 251, 95 S.Ct. 959 (1975). After a thorough review of the exceptions, briefs and all matters of record, the Board makes the following:

AMENDED AND ADDITIONAL FINDING OF FACT

31. On October 11, 2001, Lieutenant Lideg (Lideg), a representative of the Commonwealth at SCI-Muncy, met with Corrections Officer Danielle Sohns (Sohns) to ask her about a complaint that she had made inappropriate comments about the medical department. Before they met, Sohns asked Lideg if she needed union representation. Lideg said that she did and that a PSCOA official by the name of Reichard had been assigned by the Commonwealth to represent her. Sohns asked to be represented by Association President, Sergeant Lepley (Lepley) instead. Lideg denied her request. Before the investigatory interview, Sohns spoke with Lepley at the institution about representation. During the following interview, Lideg asked Sohns questions about the subject matter of the complaint and Sohns responded. Sohns was not disciplined. (N.T. 6-9.)

DISCUSSION

In its exceptions, the Association asserts that the Hearing Examiner erred when he concluded that: (1) as a general rule, an employe does not have the right to choose whom their union representative will be; (2) the PSCOA did not demonstrate that Lepley was readily available to represent Sohns; (3)

Sohns' testimony regarding Lepley's availability did not constitute substantial evidence for the finding of an unfair labor practice; and (4) the Commonwealth had not committed unfair practices within the meaning of Section 1201(a)(1) and (5) of PERA regarding the Sohns interview. In Weingarten, supra, the United States Supreme Court recognized a right, rooted in the concerted activities provisions of the National Labor Relations Act (NLRA) for employees to request union representation at investigatory interviews as a condition of their participation, where the employee reasonably believes the investigation may result in disciplinary action. The Board adopted the Weingarten rule in PLRB v. Conneaut School District, 10 PPER ¶ 10092 (Nisi Decision and Order, 1979), aff'd, 12 PPER ¶ 12155 (Final Order, 1981) and PLRB v. Township of Shaler, 11 PPER ¶ 11347 (Nisi Decision and Order, 1980). In Township of Shaler, the Board explained that three elements must be met in order to establish a violation of the Weingarten right and thereby Section 1201(a)(1) of PERA:

First, the Complainant must demonstrate that [s]he reasonably believed that the interview might result in disciplinary action. Second, the Complainant must request that a union representative be present and that such request must be denied. Finally, that subsequent to the employer's denial of representation, the employer must compel the employee to continue with the interview.

Township of Shaler, 11 PPER at 559. No exceptions were filed to the Hearing Examiner's conclusion that "the Commonwealth denied a request by Ms. Sohns to be represented by a specific union representative (Ms. Lepley) at an investigatory interview that she reasonably believed might result in the imposition of discipline." (PDO, at 14.) Thus, there is no dispute that Sohns reasonably feared discipline and requested representation. There is likewise no dispute that Sohns' request was denied and the Commonwealth continued the interview. Thus, the only issue is whether the Commonwealth violated Sohns' Weingarten right by denying her the choice of a specific representative.

The Commonwealth argues that Sohns was not entitled to the representative of her choice, only "to the presence of a union representative designated by the union to represent all employees." (Commonwealth, Br. at 6.) The Board disagrees, based upon its research of NLRB, Board and other public sector jurisdictions' precedent. Recently, in Anheuser-Busch, Inc. and International Brotherhood of Teamsters, 337 N.L.R.B. No. 2, 170 L.R.R.M. 1206 (2001), the NLRB addressed the issue of whether Weingarten requires "the employer to provide a specifically requested steward rather than one of its choosing." Id., 170 L.R.R.M. at _____. The NLRB adopted the administrative law judge's conclusion that "an employee has the right to specify the representative he or she wants, and the employer is obligated to supply that representative absent some extenuating circumstances." Id. See also, GHR Energy Corp and Oil, Chemical and Atomic Workers International Union, 294 N.L.R.B. 1011, 133 L.R.R.M. 1069 (1989)(the right to request a specific union representative rests with the employee and absent from Weingarten is any provision allowing an employer to impose a union representative on an employee); Gridley Union High School Teachers Association v. Gridley Union High School District, 12 PERC 19143 (Calif PERB Proposed Decision, 1988)(employer interfered with employee's right to representation when it denied him his choice of an available representative). Although this Board has not previously adopted this view, it is noted that on at least two occasions, Board Hearing Examiners have concluded that an employee may be

entitled to an available representative of the employe's choice. District 1199P, SEIU v. Commonwealth of Pennsylvania Department of Public Welfare, 32 PPER ¶ 32177 (Proposed Decision and Order, 2001)(Commonwealth violated Section 1201(a)(1) of PERA when it precluded a particular steward from being employe's representative of choice in an investigatory interview); AFSCME v. Commonwealth of Pennsylvania (Department of Corrections Greene SCI), 32 PPER ¶ 32131 (Proposed Decision and Order, 2001)(unfair practice to deny employe's request for particular, available union representative at factfinding).

The Commonwealth relies on Boling v. Commonwealth of Pennsylvania, Department of Public Welfare (Mayview State Hospital), 18 PPER ¶ 18096 (Final Order, 1987), wherein the Board concluded that an employe was not entitled to his choice of representative when that representative was not present at the job site and a qualified union steward was present and provided. In that case, the Board relied on Pacific Gas & Electric Company and Joseph C. Green, 253 N.L.R.B. 1143, 106 L.R.R.M. 1077 (1981), where the employer did not violate its employe's Weingarten rights when it denied the employe's request for representation by an off-site steward, rather than the steward that was on the premises. In Pacific Gas, the NLRB relied on Coca-Cola Bottling Company of Los Angeles and International Association of Machinists & Aerospace Workers, 227 N.L.R.B. 1276, 94 L.R.R.M. 1200 (1977), where the NLRB similarly refused to find a violation of Weingarten, where the employe insisted on a shop steward who was on vacation. The NLRB explained that "there is nothing in the Supreme Court's opinion in Weingarten which indicates that an employer must postpone interviews with its employees because a particular union representative, here the shop steward, is unavailable either for personal or other reasons for which the employer is not responsible." Coca-Cola Bottling, 227 N.L.R.B. at 1276. The Board distinguishes these cases because unlike the employes in Mayview State Hospital, Pacific Gas and Coca-Cola Bottling, Sohns' choice of representative, Lepley, was present at the job site and was therefore available to represent her. In fact, Sohns spoke to Lepley about representation before she attended the interview with Lideg. Although Sohns testified that when they spoke, Lepley expressed willingness to represent her, the Hearing Examiner properly identified that testimony as hearsay and declined to rely on it as to Lepley's willingness to represent Sohns at the interview. However, the Board accepts the fact that the two employes had a conversation at the institution as substantial evidence that Lepley was at the job site and thus available to represent Sohns. Indeed, the Commonwealth in its brief in opposition to the exceptions does not dispute that the conversation demonstrates Lepley's presence at the institution (Cmwlth, Br. at 8). Because the issue is Lepley's availability at the institution to represent Sohns and not Lepley's alleged expressed willingness to represent Sohns, the context of the conversation between the two is not determinative, as found by the Hearing Examiner.

In Anheuser-Busch, supra, the employer denied the employe's request to be represented by a particular representative of his own choosing during an investigatory interview and instead summoned another steward to represent him. The NLRB rejected the employer's defense that the chosen representative was unavailable because he was on his lunch break. Here, the Commonwealth argues that the chosen representative must not only be available, but must be present at the outset of the interview. (Commonwealth Br. at 6-7.) The Commonwealth asserts that the Association "simply glosses over this key fact and instead focuses solely on the word 'available.'" (Commonwealth, Br. at 7.) The administrative law judge in Anheuser-Busch rejected the suggested requirement that the chosen representative must be "present", as opposed to

"available" when the request was made, explaining "I do not believe that the fact that [the chosen representative] was on lunch break for a short period of time makes him any less 'available' than [the representative provided by the employer]". Id., 170 L.R.R.M. _____. Likewise, the Board finds that Lepley was "available", even though she may have had to have been called to Lideg's office in order to represent Sohns. The Commonwealth did not refute Lepley's availability. For instance, the Commonwealth did not present evidence that Lepley was unavailable because she was not present at the job site, as in Mayview State Hospital or Pacific Gas, supra, or that she was unavailable because she was on vacation, as in Coca-Cola Bottling, supra. The Commonwealth also did not demonstrate any "extenuating circumstances" (such as unwarranted disruption of Commonwealth services) that would justify its denial of Sohns' request for Lepley to serve as her Weingarten representative, as explained in Anheuser-Busch and Greene-SCI, supra.

Accordingly, the Board sustains the Association's exceptions regarding denial of Weingarten rights to Sohns and finds that the Commonwealth's denial of Sohns' request to be represented by Lepley violated Section 1201(a)(1) of PERA. The Board herein amends the PDO to include the Sohns violation in conclusion 4 (regarding Howell) previously set forth in the PDO. Because the Commonwealth did not discipline Sohns, no affirmative relief beyond the customary cease and desist, posting and filing of an affidavit remedy ordered by the Hearing Examiner is warranted.

The Association's final exception to the Hearing Examiner's alleged failure in a Weingarten setting to find a violation of Section 1201(a)(5) is dismissed. "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)'" AFSCME, Council 13 v. Commonwealth of Pennsylvania (PEMA), 31 PPER ¶ 31034, p. 83 (Final Order, 2000), aff'd, PEMA v. PLRB, 768 A.2d 1201 (Pa. Cmwlth. 2001). The Commonwealth's actions as to Sohns do not constitute a refusal to bargain, as "[t]he employer has no duty to bargain with the union representative at an investigatory interview." Weingarten, 420 U.S. at 260, 95 S.Ct. at 965.

After a thorough review of the exceptions, briefs and all matters of record, the Board shall sustain the exceptions in part and amend the Proposed Decision and Order, consistent with the above discussion.

CONCLUSIONS

Conclusions numbers 1 through 4 of the Proposed Decision and Order are hereby amended to include the Sohns violation, affirmed and incorporated herein by reference and made a part hereof.

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 be and the same are hereby sustained in part and the Order on page 15 of the Proposed Decision and Order, as amended, is adopted herein.

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 Anne E. Covey, this seventeenth day of December, 2002. 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.