COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNSYLVANIA STATE CORRECTIONS OFFICERS ASSOCIATION	:	
v.	:	Case No. PERA-C-02-21-E
COMMONWEALTH OF PENNSYLVANIA	:	

FINAL ORDER

On August 21, 2002 the Pennsylvania State Corrections Officers Association (Association) filed with the Pennsylvania Labor Relations Board (Board) timely exceptions to a Proposed Decision and Order (PDO) issued August 1, 2002. Pursuant to an extension of time granted by the Secretary of the Board, the Association filed a timely brief in support of exceptions on September 30, 2002. The Commonwealth of Pennsylvania (Commonwealth) filed a timely brief in response to exceptions on October 18, 2002. In the PDO, the Hearing Examiner declined to consider the issue of whether the Commonwealth violated the Public Employe Relations Act (PERA) by denying a request by Sergeant Robert F. DiLello (DiLello), a union representative, to meet privately with food service employe Donald Gelnett (Gelnett) during an investigatory interview, because the Association did not allege that violation in its Charge of Unfair Practices. The Hearing Examiner considered only the issue of whether the Commonwealth violated PERA by allegedly ordering DiLello to remain silent or be ordered out of the interview room. On this contested issue of fact, he credited the Commonwealth's witnesses, who both denied the allegation.

The Association's exceptions may be summarized as follows. The Hearing Examiner erred by (1) not considering testimony and arguments regarding the Commonwealth's alleged failure to allow the employe and his union representative to confer privately during the interview and (2) failing to credit the Association's witness regarding the contested point of fact.

A review of the Association's Charge reveals that the conduct alleged to have constituted the unfair practice consisted of "Commonwealth representatives bec[oming] extremely abusive and advis[ing] the PSCOA representative that he was to remain silent and if he uttered one more word during the course of the interview, he would be ordered out of the room." (Charge, ¶ 3.) The Association's Charge was never amended. Upon Motion for a More Specific Pleading, the Hearing Examiner granted the Association the opportunity to specify the names of the representatives of the parties and bargaining unit members involved in the alleged unfair practice. For the first time in its Answer dated March 21, 2002, the Association alleged a violation of PERA due to the Commonwealth's denial of DiLello's request to step outside to confer with Gelnett during the meeting. The Board notes that the Association's Answer was transmitted to the Hearing Examiner via facsimile. It is not the Board's policy to accept facsimile filings. Regardless of the method of transmittal, the Board dismisses the Association's first exception for three reasons.

First, the Association's Charge as originally filed did not support a cause of action against the Commonwealth for violating Section 1201(a)(1) of PERA by denying Gelnett the opportunity to speak to his union representative

in private. Nowhere in the specification of charges is there any reference whatsoever, either specific or general, to this activity. The Board has explained that "[c]harges must be sufficiently detailed so as to put a respondent on notice of the specific conduct alleged to have been in violation of the Act, thereby allowing adequate opportunity to prepare and present the defense." Independent State Store Union v. Commonwealth of Pennsylvania, Liquor Control Board, 22 PPER ¶ 22009 (Final Order, 1990). See also Pennsylvania Human Relations Commission v. U.S. Steel Corporation, 458 Pa. 559, 325 A.2d 910 (1974); Carlisle Education Association, PSEA v. Carlisle School District, 24 PPER ¶ 24168 (Final Order, 1993). The Association acknowledges that "a literal reading of the specification of charges will not produce a specific allegation that the Commonwealth violated the Act by refusing to allow Gelnett to confer with his union representative." (Ass'n, Br. at 6.) The Association's Charge fails for just this reason.

Second, the Association did not seek to amend its Charge, even though the Board's rules and regulations provide that "any complaint may be amended, in such manner as the Board may deem just and proper, at any time before the issuance of a final decision and order, if no new cause of action is added after the statute of limitation has run." 34 Pa. Code 95.32(a). The Association did not cure the defects of its Charge in its Answer to the Commonwealth's Motion for a More Specific Pleading. The Association's Answer is not the functional equivalent of an amended complaint. Amending a complaint benefits the Complainant, by allowing it to add additional causes of action before the statute of limitations runs. On the other hand, an Answer to a Motion for a More Specific Pleading, benefits the respondent by putting it on notice of the parameters of the investigation of claims already of record, not new causes of action. Even if the Board were to construe the Association's Answer as an attempt to amend its Charge, it was untimely under the statute of limitations set forth in Section 1505 of PERA. The Answer was transmitted to the Hearing Examiner March 21, 2002, more than four months following the date of the alleged unfair practice, September 26, 2001.

Third, contrary to the Association's arguments in its brief, the charge of a discrete Weingarten violation (ordering the union representative to remain silent or be removed) is insufficient to encompass a separate alleged Weingarten violation of denying a private consultation during the interview. In National Labor Relations Board (NLRB) v. Weingarten, Inc., 420 U.S. 251, 95. S.Ct. 959 (1975), the United States Supreme Court recognized a right, rooted in the concerted activities language of the National Labor Relations Act (NLRA), for employes to request union representation at investigatory interviews as a condition of their participation, where the employe reasonably believes the investigation will 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. Shaler Township, 11 PPER ¶ 11347 (Nisi Decision and Order, 1980). See also, AFSCME, Council 13 and William O'Donnell v. Commonwealth of Pennsylvania, Pennsylvania Emergency Management Agency (PEMA), 31 PPER ¶ 31034 (Final Order, 2000), aff'd, PEMA v. PLRB, 768 A.2d 1201 (Pa. Cmwlth. 2001).

In prior decisions, the Board has found separately identifiable and discrete unfair practices that fall under the ambit of Weingarten. For example, an employer violates Weingarten if it forces an employe to continue an investigatory interview after denying that employe's request to have a union representative present. Kevin Hand v. Falls Township, 29 PPER ¶ 19012

(Final Order, 1987). An employer violates Weingarten when it denies an employe's request for a private consultation with a union representative prior to an investigatory interview. Fraternal Order of Police, Conference of Pennsylvania Liquor Control Board Lodges v. Commonwealth of Pennsylvania, Pennsylvania State Police (Liquor Control Board), 28 PPER ¶ 28203 (Final Order, 1997). An employer violates Weingarten if it constructively denies or tends to discourage and dissuade an employe from adhering to an initial request for union representation at an investigatory interview. Fraternal Order of Police Lodge #9 v. City of Reading, 26 PPER ¶ 26172 (Final Order, 1995). An employer violates Weingarten if it denies an employe's request to consult with a union representative prior to deciding whether to consent to a drug test. Liquor Control Board, supra. An employer violates Weingarten if it denies an employe's request for union representation at any further meeting or interview beyond a first meeting to discuss or review a public employe's performance evaluation or rating. Conneaut School District, supra. An employer also violates an employe's Weingarten rights when it denies an employe's request for a private consultation with a union representative once the investigatory interview has begun. Pennsylvania State Corrections Officers Association v. Commonwealth of Pennsylvania, Case No. PERA-C-02-30-E, 33 PPER ¶ _____ (Final Order, 2002). As the Hearing Examiner explained, an employer also violates an employe's rights under Weingarten if it prohibits a union representative from speaking at an investigatory interview. AFSCME v. Commonwealth of Pennsylvania, Department of Corrections, Greene SCI, 32 PPER ¶ 32095 (Proposed Decision and Order, 2001)(citing NLRB v. Texaco, Inc., 659 F.2d 124 (9th Cir. 1981)). The burden of proving an unfair practice rests upon the complainant, who must both allege and prove discrete Weingarten violations with substantial evidence. Township of Shaler, supra. The Board will not accept a generalized Weingarten violation as sufficient to encompass each separately identifiable Weingarten claim. Thus, the Commonwealth's alleged denial of Gelnett's request for a private consultation with his union representative during the investigatory interview, was not timely stated and the Hearing Examiner committed no error by refusing to consider that issue. The Association's exceptions regarding this matter are dismissed.

The Association's remaining exceptions concern the Hearing Examiner's decision to credit the Commonwealth's witnesses, rather than the Association's witness on the issue of whether the Commonwealth ordered Gelnett's union representative to remain silent. The Board's long-standing policy is not to disturb the credibility determinations of its hearing examiners, absent compelling reasons. AFSCME v. PEMA, supra; Upper Merion Education Association v. Upper Merion School District, 30 PPER ¶ 30091 (Final Order, 1999); FOP, Lodge 27 v. Haverford Township, 27 PPER ¶ 27130 (Final Order, 1996); PLRB v. Springfield Township, 12 PPER ¶ 12354 (Final Order, 1981). The Board disagrees with the Association's opinion that the Hearing Examiner's findings are "fraught with an inherent bias against corrections officers that they present 'compelling circumstances' justifying their being overturned." (Ass'n, Br. at 8). The burden of proof is on the Association to show by substantial and legally credible evidence at the hearing that the Commonwealth violated Gelnett's Weingarten rights by ordering his union representative to remain silent or be ordered out of the room. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). Although the Association offered the testimony of DiLello which supports the cause of action alleged, the Commonwealth offered the rebuttal testimony of Kertes and Macon, which disproved the allegation. After review of the exceptions, the PDO and the record, the Board finds no compelling reason to overturn the Hearing Examiner's decision to credit Kertes and Macon, rather than DiLello.

"The Board's Hearing Examiner, who presided at the hearing and observed the manner and demeanor of the witnesses, is in a far more advantageous position to evaluate the credibility of the witnesses than is the Board on review of these Exceptions." AFSCME v. Commonwealth of Pennsylvania, Department of Public Welfare, 18 PPER ¶ 18028 (Final Order, 1986). The Board rejects without comment the Association's assertion that the Hearing Examiner decided in favor of the Commonwealth's witnesses because he was "impressed by men dressed in ties and using perfect diction." (Ass'n, Br. at 12.) The Hearing Examiner's findings of fact are fully supported by substantial evidence of record and he made all relevant findings necessary to resolve the issue, as required by Paige's Department Store v. Velardi, 464 Pa. 275, 346 A.2d 556 (1975).

Accordingly, after thorough review of the exceptions and all matter of record, the Board shall dismiss the Association's exceptions and make the Proposed Decision and Order absolute and final.

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 are dismissed and the Proposed Decision and Order is made absolute and final

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.