

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNSYLVANIA STATE CORRECTIONS :
OFFICERS ASSOCIATION :
 :
v. : Case No. PERA-C-02-30-E
 :
COMMONWEALTH OF PENNSYLVANIA :

FINAL ORDER

On June 17, 2002 the Pennsylvania State Corrections Officers Association (Association) filed with the Pennsylvania Labor Relations Board (Board) timely exceptions to a May 28, 2002 Proposed Decision and Order (PDO), in which the Board's Hearing Examiner concluded that the Commonwealth of Pennsylvania (Commonwealth) did not violate Section 1201(a)(1) or (5) of the Public Employe Relations Act (PERA). Pursuant to an extension of time granted by the Secretary of the Board, the Association filed a timely brief in support of those exceptions on July 8, 2002. The Commonwealth hand-delivered a responsive brief on July 31, 2002, which has not been considered.¹

The Association charged the Commonwealth with violating the rights of Corrections Officer Todd Harris under National Labor Relations Board (NLRB) v. Weingarten, Inc., 420 U.S. 251; 95 S.Ct. 959 (1975), wherein 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 Sch. Dist., 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), et al., 31 PPER ¶ 31034 (Final Order, 2000), aff'd, PEMA v. PLRB, 768 A.2d 1201 (Pa. Cmwlth. 2001). The facts as found in the PDO (and as amended herein) are in relevant part that a fact-finding session was conducted by Lieutenant George Funk, a representative of the Commonwealth, as part of an investigation into whether Harris violated a code of ethics when he reported being injured on the job. Association representative Clair Boring accompanied Harris to the fact-finding. During the fact-finding, Lt. Funk asked Officer Harris, "Did you ever have a back injury prior to this incident or been treated for a back injury?" At this point, Harris asked for a break to meet with Boring in private before answering the question. Funk denied the request and directed Harris to answer the question first. Boring then requested a break and his request was also denied. Funk ordered Harris to answer the question and Harris answered that his medical history was personal and privileged information. Funk then allowed Harris and Boring to break and meet in private before the fact-

¹ The Commonwealth indicated that it received the Association's brief in support of exceptions on July 10, 2002. Section 95.98 of the Board's Rules and Regulations provides that a response to exceptions must be filed within 20-calendar days following the date of receipt of the statement of exceptions and supporting brief. The Commonwealth's brief was not filed within 20 calendar days of July 10, 2002 and is therefore untimely.

finding was concluded. At the end of the fact-finding, Funk gave Harris and Boring the opportunity to add to the fact-finding, at which time Harris made a closing statement and indicated that he had a prior work-related injury to his back in 1996.

The Association sets forth the following sixteen exceptions: (1) finding of fact number 3 is not supported by the evidentiary record; that the Hearing Examiner erred in (2) failing to conclude that Harris was confused by Funk's question and required the assistance of his representative before responding; (3) concluding that there was a debate with respect to the requests by Harris and Boring to consult prior to answering Funk's question; (4) concluding that the Commonwealth did not interfere with Harris in the exercise of his rights to union representation; (5) concluding that the Commonwealth's obligations were satisfied by giving Harris and Boring the opportunity to meet before the fact-finding and to meet in private after Harris answered Funk's question; (6) concluding that the Commonwealth had a right to insist upon the answering of a question that the member and representative found confusing without allowing the member to consult with the representative; (7) concluding that Southwestern Bell Telephone Co. v. NLRB, 667 F.2d 470, 109 L.R.R.M. 2602 (5th Cir. 1982) justified the refusal of the Commonwealth to permit a bargaining unit member to consult with the union prior to answering a question of major importance; (8) concluding that affording the union member an opportunity to consult with his representative would have interfered with the Commonwealth's right to insist upon a response to its question; (9) misunderstanding, misinterpreting and misapplying the nature and function of the member's right to meaningful union representation and the union's right to represent bargaining unit members in disciplinary proceedings; (10) concluding that the Commonwealth had a right to insist that a bargaining unit member answer a question that the member found to be confusing while being deprived of the assistance of his union representative; (11) concluding that the right to union representation is to be balanced against the employer's right to hear the employe's own account of the matter under investigation once an investigatory interview begins; (12) concluding that the union representative's sole substantive function during the investigatory interview was to ask for a clarification to a confusing question as opposed to consulting with the member prior to responding to the question; (13) concluding that affording a member the right to meet with a union representative, after the member responds to a question without consultation with the representative, satisfies the Commonwealth's duties; (14) concluding that the Commonwealth afforded Harris all the union representation he was entitled to under Weingarten; (15) concluding that the Commonwealth had not committed unfair practices within the meaning of Section 1201(a)(1) and (5) of PERA; and (16) disregarding the precedent of the Board in concluding that the Commonwealth had not violated Section 1201(a)(1) and (5) of PERA.

After a thorough review of the record and the exceptions, the Board makes the following:

AMENDED FINDINGS OF FACT

3. On January 11, 2002, prior to the fact-finding, Lt. Funk telephoned Officer Harris and informed him that he was going to be conducting a fact-finding. Lt. Funk testified regarding that telephone conversation as follows:

I said, "You have a fact-finding. I have to conduct a fact-finding investigation." I believe it was 8:00 or 8:30 that day. "Who do you want as a union rep?" He told me Clair. Then I told him what time to be there. I said, "Are you aware of what this is about?" And he said, "Yes." . . . He said he knew what it was about.

In response to the question, "Did you have a clear understanding as to what the nature of the discipline was that he was investigating?", Officer Harris responded, "I think my union representative told me pretty much what it was about." Regarding the subject of the fact-finding, representative Boring testified that "I never got an official notification; just rumors from floating around work." Representative Boring accompanied Officer Harris to the fact-finding and they had the opportunity to confer prior to the fact-finding in a private hall on the second floor of the main gate complex. (N.T. 7-10, 10, 26-29, 38.)

7. At the end of the fact-finding, Lt. Funk asked Officer Harris and Representative Boring if they had anything to add. Officer Harris gave a closing statement and indicated that he had a prior work-related back injury in 1996. (N.T. 25, 32-33.)

DISCUSSION

The Association first argues that there is no evidentiary support for Finding of Fact 3, that "[p]rior to the fact-finding, Officer Harris knew what the fact-finding was going to be about and had the opportunity to meet in private with a representative of the PSCOA (Clair H. Boring, Jr.)." After review of the exception, this finding is amended above. As amended, the finding is supported by the evidence of record. The Association cites testimony of Harris and Boring indicating that they did not know what the fact-finding was about. However, Funk testified that when he telephoned Harris, he asked Harris whether he was aware of what the fact-finding was about and that Harris responded "Yes." (N.T. 27.) The Hearing Examiner was free to credit the testimony of Funk. It is well-settled that the Board will not reverse credibility determinations of its hearing examiners who were able to observe the manner and demeanor of the witnesses at the hearing, absent compelling reasons. AFSCME, Council 13 v. Commonwealth of Pennsylvania Office of Attorney General, 30 PPER ¶ 30215 (Final Order, 1999); Purchase Line Educ. Ass'n v. Purchase Line Sch. Dist., 26 PPER ¶ 26184 (Final Order, 1995); Bereczky, et al v. McKeesport Area Sch. Dist., 17 PPER ¶ 17155 (Final Order, 1986). The mere fact that the Hearing Examiner chose to credit Funk's testimony is not error. Pennsylvania State Troopers Ass'n v. Commonwealth of Pennsylvania State Police, 27 PPER ¶ 27159 (Final Order, 1996). There is sufficient evidentiary support for the finding that Harris and Boring had the opportunity to confer prior to the start of the fact-finding. The Association quotes language from Boring's testimony, where he responded "No, sir" to the question, "Did he [Harris] know what the hearing was about? Did he fill you in that he thinks maybe it was this or that or whatever?" (Ass'n Br. at 8)(N.T. 20.) Whether or not Harris and Boring actually discussed the subject of the fact-finding is irrelevant. The fact that they had the opportunity to confer prior to the fact-finding is all that is necessary for the Board's analysis on this point. Fraternal Order of Police, Conf. of Pennsylvania Liquor Control Board Lodges v. Commonwealth of Pennsylvania State Police, 28 PPER ¶ 28203 (Final Order, 1997)(Weingarten right incorporates opportunity for prior consultation with the union

representative)(citing Climax Molybdenum, Inc., 227 N.L.R.B. 1189, 94 L.R.R.M. 1177 (1977)). There is ample support in the record for the amended finding that they had such an opportunity.

The Association next excepts to the Hearing Examiner's alleged failure to conclude that Harris was "confused" by Funk's question regarding his prior back injury, and therefore required the assistance of his representative before responding. The Board dismisses this exception for three reasons. First, Harris did not tell Funk that he was confused by the question, only that "I need to speak to my union rep before I answer the question." (N.T. 12.) Second, Boring did not tell Funk that he believed Harris did not understand the question. Third, Funk testified "Mr. Boring could have said to me, 'I don't understand the question,' but even Harris didn't say they didn't understand the question. He began answering the question. Therefore, I took it he understood the question, and Mr. Boring said nothing. So I took it he understood the question." (N.T. 47.) The Hearing Examiner therefore did not err by failing to finding that Harris was "confused." However, "confusion" is not required for the employe to seek the assistance of his union representative during a Weingarten investigation, as will be discussed more fully below.

The Association next excepts to the Hearing Examiner's conclusion that "Harris and Funk 'debated' over whether Harris had the right to meet with his union official prior to answering the question." (Ass'n Br. at 10.) In support of this exception, the Association offers the Webster's II New Riverside Dictionary definition of "debate": "1. To consider: deliberate 2. To argue opposing points. 3. To discuss or argue (a question) formally." (Ass'n, Br. at 11.) We do not find the Hearing Examiner's use of the word "debate" to be in error, as all three definitions of debate cited by the Association accurately describe the exchange.

I said, "Well, I need to step out to speak to my union representative." Lieutenant Funk told me, "You will answer my question first." I said, "But I need to speak to my union rep before I answer the question." He said, "No. You will answer my question first." I said, "You can't stop me. You can't deny me to talk to my union rep." It started heating up, kind of getting into an argument."

(N.T. 11-12). There is record evidence to support that Harris and Funk "debated" the issue and the Board dismisses this exception to the Hearing Examiner's choice of words in the finding.

The Association's remaining fourteen exceptions to the Hearing Examiner's legal analysis regarding Harris' rights and the Commonwealth's obligations under Weingarten will be addressed together. The Commonwealth Court has held that "a public employee, covered by a collective bargaining agreement, has the right to union representation at an investigatory interview with his or her employer, which the employee reasonably believes may result in the imposition of discipline . . . This principle is commonly referred to as the employee's 'Weingarten' rights" PEMA v. PLRB, 768 A.2d at 1205 (citing AFSCME, Council 13 v. PLRB, 514 A.2d 255 (Pa. Cmwlth. 1986); Conneaut Sch. Dist., supra; Weingarten, supra). There is no dispute that Weingarten rights attached to the fact-finding conducted by the Commonwealth through Funk. The meeting was investigatory and was "calculated to form the basis for taking disciplinary or other job-affecting actions", as explained in PEMA v. PLRB, supra.

In its exceptions, the Association acknowledges that Harris was provided a representative, but argues that Harris was not afforded the representation to which he was entitled under Weingarten. The Association asserts that because the union representative's role is to provide assistance and counsel to the employe being interrogated, that the Commonwealth was required to grant the requests of Harris and Boring to stop the interrogation so that they could confer privately before answering Funk's question regarding a prior back injury.

It is well settled that an employe has the right to a private consultation with his or her union representative prior to an investigatory interview under Pennsylvania's labor statutes as well as the National Labor Relations Act (NLRA) and the labor statutes of other public jurisdictions. Fraternal Order of Police, Conference of Pennsylvania Liquor Control Board Lodges v. Commonwealth of Pennsylvania, Pennsylvania State Police, 28 PPER ¶ 28203 (Final Order, 1997); Westside Community Mental Health Center, Inc. and Service Employees Int'l Union, 327 N.L.R.B. 661, 166 L.R.R.M. 1325 (NLRB, 1999); United States Postal Service and American Postal Workers Union, 303 N.L.R.B. 463, 138 L.R.R.M. 1339 (NLRB, 1991). Hubbard v. Illinois State Labor Relations Board, 293 Ill. App. 3d 1122, 718 N.E.2d 1083 (1997); Massachusetts Correction Officers Federated Union v. Labor Relations Comm'n, 424 Mass. 191, 675 N.E.2d 379 (1997); California Sch. Employees Ass'n v. Placer Hills Union Sch. Dist., 8 PERC ¶ 15037 (Cal. PERB, 1984); Palm Beach Classroom Teachers Ass'n v. Sch. Board of Palm Beach County, 14 FPER ¶ 19116 (Fla. PERC, 1988); Fraternal Order of Police, Lodge 31 v. City of Fort Lauderdale, 12 FPER ¶ 17167 (Fla. PERC, 1986); International Brotherhood of Electrical Workers and Chicago Park Dist., 17 PERI ¶ 3021 (Ill. LLRB, 2001); City of Oak Park and Police Officers Ass'n of Mich, 9 MPER ¶ 27006 (MERC Decision and Order, 1995). The Commonwealth's obligation in this regard was met.

The Board's research of federal precedent, as well as that of other public sector jurisdictions, has disclosed only one case concerning the right of an individual employe to a private consultation with the union representative after an investigatory interview has already begun. System 99 and Walter Manning, 289 N.L.R.B. 723, 131 L.R.R.M. 1226 (1988). In System 99, employe Manning was under investigation for coming to work intoxicated. The employer arranged for an available "acting steward" to be present as Manning's union representative. During the interview, the employer repeatedly asked Manning if he would submit to a sobriety test. The employer denied Manning's request that he be allowed to step outside the office to confer privately with his union representative regarding that question. The NLRB adopted the administrative law judge's conclusion that the employer "violated Section 8(a)(1) of the Act at least by refusing Manning's request to consult privately with [his union representative] before responding finally to the implicit question: 'Will you submit to a sobriety test?' . . . Manning was on the spot; and it was hardly unreasonable of him to believe that a private candid conference with an employe representative might give him a more reliable basis for deciding how to answer Respondent's question." Id., 289 N.L.R.B. at 726-727. Likewise, the Board finds that Harris was on the spot and it was not unreasonable of him to believe that a private candid conference with Boring would give him a more reliable basis for deciding how to answer Funk's question. The NLRB noted that

if Manning had been permitted to consult with Pinkston, the latter might well have pointed out that, under the

circumstances, Manning had nothing to lose by taking the test. Hearing this from a fellow employee in a candid, private setting might well have caused Manning to agree to the test, rather than remaining silent on the question.

Id., 289 N.L.R.B. at 728. The same may be said for Harris. Indeed, after Funk granted the two a private consultation, Harris revealed that he did have a prior back injury in 1996.

The United States Supreme Court explained in Weingarten that "[t]he representative is present to assist the employee, and may attempt to clarify the facts or suggest other employees who may have knowledge of them." Id., 420 U.S. at 260. The Association argues that by denying Harris the opportunity to consult privately with his union representative when the 'big' question was posed", the Commonwealth deprived him of his right to the "meaningful assistance of that representative." (Ass'n, Br. at 18-19.) The Association further argues that in order for Weingarten rights to be effective, "an employee must have the opportunity . . . to meet and confer with the representative both prior to and during the investigation . . . he is entitled to assistance, aid and protection by that representative." (Ass'n, Br. at 21)(emphasis in original)(citations omitted). The Board agrees.

In reaching the contrary result, the Hearing Examiner relied on Southwestern Bell Telephone Co. v. NLRB, 667 F.2d 470 (5th Cir. 1982)(denying enforcement of NLRB's finding of Weingarten violation). In that case, the employer suspected the employe of stealing and pawning the employer's equipment. The employer advised the union steward that it intended to interview the employe and permitted the two to consult prior to the meeting. The representative was told not to answer any of the questions put to the employe, who ultimately confessed. The Court specifically noted that "at no time did [the employe] attempt to solicit his [representative's] advice or counsel." Id., at 473. Contrary to the employe under investigation in Southwestern Bell, Harris did attempt to solicit his representative's advice and counsel under Weingarten and his request was unlawfully denied. Weingarten provides that the representative "is present to assist the employee" and the Commonwealth denied Harris that assistance when it refused his request to speak with Boring in private. Weingarten, 420 U.S. at 260.

In New Jersey Bell Telephone Co. and Local 827 Int'l Brotherhood of Electrical workers, 308 N.L.R.B. 277, 141 L.R.R.M. 1017 (1992), the NLRB explained that Weingarten permits "assistance and counsel" to the employe being interrogated. It is generally recognized that an employer is free to insist that it is only interested in hearing the employe's account and that Weingarten does not allow the union representative to disrupt the interview or convert it into an adversarial confrontation. Yellow Freight System, Inc. and Otic Cross, et al, 317 N.L.R.B. 115, 1149 L.R.R.M. 1327 (1995). Delays and interruptions are not protected by Weingarten. However, there is no record support for the position that permitting Harris to consult with Boring would have deprived the Commonwealth of Harris' own account of the incident. Indeed, what in fact occurred after Harris did have a private consultation with Boring was a prompt acknowledgement of the prior back injury. The facts of this case hardly support the notion that such consultation will disserve, rather than serve, the process. There is no evidence that this single request for a private consultation would have disrupted the interview or converted it into an adversarial confrontation. To the contrary, the only disruption of the interview was not caused by the union representative, but

rather the Commonwealth through Funk's denial of the request and the ensuing "debate" referenced in finding of fact 6.

The Association's final two exceptions will be addressed together. As discussed above, the Commonwealth violated Harris' rights under Weingarten supra, and therefore committed an unfair practice under Section 1201(a)(1) of PERA. However, there is no evidence of the Commonwealth committing an unfair practice under Section 1201(a)(5). "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 (Final Order, 2000), aff'd, PEMA v. PLRB, supra. The Commonwealth's actions 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. Thus, the Association's final two exceptions are sustained only as regards Section 1201(a)(1).

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

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.

5. That Conclusion number 4 of the Proposed Decision and Order is hereby vacated in part and set aside regarding a violation of Section 1201(a)(1) of PERA.

6. That the Commonwealth of Pennsylvania has committed unfair practices in violation 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 be and the same are hereby sustained in part and the Order on page 5 of the Proposed Decision and Order is hereby vacated and set aside, and

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that the Commonwealth shall:

1. Cease and desist from interfering with, restraining or coercing employes in the exercise of their rights guaranteed 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) Post a copy of this Final Order within five (5) days from the effective date hereof in a conspicuous place readily accessible to the employes of the Commonwealth of Pennsylvania Department of Corrections and have the same remain so posted for a period of ten (10) consecutive days; and

(b) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this Final 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 Member L. Dennis Martire, this fifteenth day of October, 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.

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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AFFIDAVIT OF COMPLIANCE

The Commonwealth of Pennsylvania certifies that it has ceased and desisted from its violation of section 1201(a)(1) of the Public Employee Relations Act; that it has posted the Final Order as directed therein; and that it has served a copy of this Affidavit of Compliance on the Association at its principal place of business.

Signature/Date

Title

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

Signature of Notary Public