

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

UPPER GWYNEDD TOWNSHIP :
POLICE ASSOCIATION :
 :
v. : Case No. PF-C-01-110-E
 :
UPPER GWYNEDD TOWNSHIP :

FINAL ORDER

On April 23, 2002, the Upper Gwynedd Township Police Association (Association) filed with the Pennsylvania Labor Relations Board (Board) timely exceptions and a supporting brief to a Proposed Decision and Order (PDO) issued April 4, 2002. On May 16, 2002, Upper Gwynedd Township (Township) filed a brief opposing the Association's exceptions to the PDO. In the PDO, the Hearing Examiner dismissed the Association's Charge of Unfair Labor Practices alleging that the Township violated Section 6(1)(a) and (c) of the PLRA and Act 111 by disciplining Sergeant Stephen Gillen (Gillen) and Officers Charles Staub (Staub) and Benjamin Townsend (Townsend), members of the collective bargaining unit represented by the Association, in retaliation for their protected activity during the criminal investigation of fellow Officer Frank Tiziana (Tiziana) by the Montgomery County District Attorney's Office (County). In its exceptions, the Association asserts that the Hearing Examiner erred by: (1) finding that the investigation of Tiziana was beyond the scope of the Association's representational role under National Labor Relations Board (NLRB) v. Weingarten, Inc., 420 U.S. 251; 95 S.Ct. 959 (1975)¹; (2) finding that the subsequent actions of Gillen, Staub and Townsend with regard to the County's investigation of Tiziana must be deemed activity not protected by the PLRA or Act 111; (3) determining that there was no violation under Section 6(1)(a) of the PLRA, which would have indicated that the Township's actions tended to coerce employees in the exercise of protected rights; (4) failing to address whether there was a violation under Section 6(1)(c) of the PLRA, which would have indicated that the Township's actions were discriminatory.

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

¹ In Weingarten, the United States Supreme Court recognized a right, rooted in the concerted activities language 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 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).

AMENDED FINDING OF FACT

4. The Township's Chief of Police, Robert Freed (Chief), relinquished criminal allegations against Township Police Officer Frank Tiziana (Tiziana) to the County "as a matter of jurisdiction." While on duty on April 19, 2001, Sergeant Gillen and Officer Staub became aware that Tiziana was meeting with persons whom they did not recognize in one of the offices in the Township's police station. At the time, Tiziana was being interviewed by two County detectives (Raymond Kuter and Lieutenant Richard Peffall), who had been assigned by the County to investigate allegations of criminal conduct by Tiziana. Gillen and Staub proceeded to the Chief's office to attempt to determine the nature of the meeting and whether they should be providing union representation to Tiziana. Gillen asked the Chief whether Tiziana could be disciplined or criminally charged as a result of the meeting, to which the chief replied, "[t]he County's talking to Frank and I'm staying out of it." Gillen repeated his question and the Chief gave the same response. (N.T. 17-18, 64-65, 73-75.)

DISCUSSION

The Hearing Examiner's unchallenged findings of fact are summarized as follows. Gillen is the elected president of the Association, Staub is the elected secretary, Townsend is an elected representative and Tiziana is a bargaining unit member. On April 26, 2001, the Association informed the Township of its intention to commence bargaining for a new contract to succeed the contract expiring December 31, 2001. Regarding internal investigations, the Township's Police Department Rules and Regulations provide:

A designated representative [Sergeant, Detective, or an outside law enforcement agency] other than the Chief of Police shall investigate all complaints received from the public and all allegations of criminal conduct, serious misconduct or internal misconduct

* * *

At the request of the Officer under interrogation, he/she shall have the right to be represented by a member of the Department, who shall be present as a witness at all times during the interrogation. The interrogation shall be suspended for a reasonable time until a member of the Department can be obtained.

(PDO, F.F. 13)(N.T. 15-16; Ass'n Ex. 1).

While on duty April 19, 2001, Gillen and Staub became aware that Tiziana was meeting with two people they did not recognize in an office within the Township's police station. County Detectives Kuter and Peffall were interviewing Tiziana as part of their investigation of criminal allegations against him. In an attempt to ascertain the nature of the meeting and whether they should be providing union representation, Gillen and Staub approached the Chief in his office. Gillen twice asked the Chief whether Tiziana could be disciplined or criminally charged as a result of the meeting and the Chief twice replied that the County was talking to the officer and that he was staying out of it.

After an unsuccessful attempt to reach legal counsel, Gillen and Staub met with Townsend and the three decided to knock on the door of the office in which Tiziana was being interviewed. Peffall opened the door, but did not speak. Gillen indicated that he wished to speak with Tiziana, who left the office and met with the three Association representatives in the lobby of the police station. Townsend asked Tiziana whether he could be disciplined or criminally charged as a result of his discussion with the County detectives and Tiziana responded affirmatively. Tiziana then met with Gillen alone in the parking lot, where he indicated that he was under criminal investigation. Peffall then went to the parking lot, where Gillen raised the issue of whether Tiziana was entitled to union representation. Peffall responded that it was not an internal investigation and that he would not continue the interview if Gillen was present. Tiziana returned to the interview room and the interview continued with only the County detectives and Tiziana present. Gillen returned to the interview room, handed Tiziana a piece of paper and left. The Chief entered the office and announced that Attorney Gary Lightman (Lightman) was on the telephone for Tiziana. After Tiziana spoke with Lightman, he refused to submit to further questions by the County detectives and the interview was terminated.

Detective Peffall briefed the Chief both before and after the interview regarding the criminal allegations against Officer Tiziana and the information that he had gathered. After the interview, the Chief placed Tiziana on administrative leave with pay. The County thereafter decided not to file criminal charges against Tiziana, but the District Attorney wrote to the Chief and asserted that the Township's police officers had interfered with their investigation. The Chief requested further information and received Peffall's report, which discussed the Tiziana interview and Gillen's actions. The Chief then issued letters to Gillen, Staub and Townsend about their alleged interference with the County's criminal investigation of Tiziana. The three officers were disciplined with suspensions ranging from 36 to 240 hours and relieved of their tactical team assignments or officer-in-charge responsibilities. The Chief indicated that the District Attorney's letter was to be permanently placed in their personnel files.

The Association first argues that the Township committed an independent violation of Section 6(1)(a) of the PLRA, which makes it an unfair labor practice for an employer "[t]o interfere with, restrain or coerce employes in the exercise of the rights guaranteed in this act." The Board will find an independent violation of this provision if the actions of the employer, in light of the circumstances in which the particular act occurred, tend to be coercive, regardless of whether employes have been shown, in fact, to have been coerced. The standard for determining the existence of a Section 6(1)(a) violation does not require proof of anti-union motivation and even an inadvertent act by an employer may interfere with, restrain or coerce employes in the exercise of protected rights. Dormont Police Ass'n v. Dormont Borough, 32 PPER ¶ 32119 (Proposed Decision and Order, 2001)(citing Upper Mount Bethel Township Policemen's Ass'n v. Upper Mount Bethel Township, 28 PPER ¶ 28017 (Proposed Decision and Order, 1996); Northwestern Education Ass'n v. Northwestern Sch. Dist., 16 PPER ¶ 16092 (Final Order, 1995); PLRB v. Woodland Hills Sch. Dist., 13 PPER ¶ 13298 (Final Order, 1982)).

The Board agrees with the Association that the "threshold issue presented is whether the officers involved [Gillen, Staub and Townsend] were engaged in a protected activity." (Ass'n, Br. at 4.) The Association argues that the attempts by these officers to render assistance to Tiziana during

his April 19, 2001 interview with the County constituted protected activity under the PLRA, citing Conneaut Sch. Dist., supra. The Association further argues that these union representatives had a duty to determine if Tiziana required representation because "[a] union's breach of duty of fair representation to all members of the bargaining unit it is certified to serve is considered an unfair labor practice." (Ass'n, Br. at 7.) The Board rejects both arguments.

First, the Board has exclusive jurisdiction over unfair labor practices and their remedies under the PLRA and Act 111. Barron v. Philadelphia, 481 A.2d 379 (Pa. Cmwlth. 1984)(citing Kerr v. Butler Building Trades Council, AFL-CIO, 447 Pa. 247, 288 A.2d 525 (1972)). However, the Board has no jurisdiction to remedy any alleged breach of the duty of fair representation. Ziccardi v. Commonwealth of Pennsylvania, Dep't of General Services, et al., 500 Pa. 326, 456 A.2d 979 (1982). Any suggestion by the Association that these employees would have been subjected to unfair labor practice charges if they had not entered the interview room repeatedly, spoken to Tiziana and contacted Lightman, is incorrect as a matter of law.

Second, the type of activity which the Board found to be protected in Conneaut Sch. Dist., supra is not present. In Conneaut Sch. Dist., the Board adopted the Weingarten rule where the United States Supreme Court explained that "[t]he action of an employee in seeking to have the assistance of his union representative at a confrontation with his employer clearly falls within the literal wording of § 7[] that '(e)mployees shall have the right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection.'" Conneaut Sch. Dist., 12 PPER at 240 (citing Weingarten, 95 S.Ct. at 965-966)(emphasis added).

The activity protected in Weingarten and Conneaut Sch. Dist. is the activity of an employee who seeks "union representation at an investigatory interview with his or her employer, which the employee reasonably believes may result in the imposition of discipline." Commonwealth of Pennsylvania, Pennsylvania Emergency Management Agency (PEMA) v. PLRB, 768 A.2d 1201 (Pa. Cmwlth. 2001)(citing AFSCME, Council 13 by Keller v. PLRB, 514 A.2d 255 (Pa. Cmwlth. 1986)). The Commonwealth Court has further explained that in order for Weingarten rights to attach, "the meeting must have been calculated to form the basis for taking disciplinary or other job-affecting actions against [the employe] because of past misconduct." Id., 768 A.2d at 1205. There is no record evidence that (1) Tiziana sought union representation; (2) the interview was with his employer; or (3) the meeting was calculated to form the basis for taking disciplinary actions against Tiziana.

As regards the first requirement, Tiziana did not seek union representation. Instead, Gillen, Staub and Townsend sought out Tiziana. The Association argues that "[w]hereas the union representatives were involved in attempting to exercise the rights of a unit member, their attempt to provide representation must be considered a protected activity." (Ass'n, Br. at 8.) There is no precedential support for the Association's argument that this is protected activity under Weingarten. The Board's research has disclosed that Weingarten rights attach only to the employe subjected to the investigatory interview. See Fraternal Order of Police, Conference of Liquor Control Board Lodges v. Commonwealth of Pennsylvania, Pennsylvania State Police, 28 PPER ¶ 28203 (Final Order, 1997)(citing Township of Shaler, 11 PPER ¶ 11347 (Nisi Decision and Order, 1980)). There is no support for the Association's theory that Association representatives could exercise Weingarten rights on Tiziana's behalf. Township Order A-10 appears to reinforce this requirement

by providing that Association assistance will be provided "[a]t the request of the Officer under interrogation . . .", which placed Tiziana on actual notice of his requirement to request assistance.

Second, the interview was not conducted by Tiziana's employer. The Commonwealth Court has recognized "it is equally clear that the PLRB did not intend the Weingarten rule to extend beyond individual encounters with his or her employer in which performance was an issue in the discussion and had a specific bearing on that employee's job security." AFSCME, Council 13, 514 A.2d at 259. Tiziana's interview was conducted by the County, not the Township, his employer. The Association points to Order A-10 of the rules and regulations of the Township's police department which explains that an outside law enforcement agency may be designated to conduct internal investigations of criminal allegations. However, the Association offered no evidence that the Township designated the County to conduct an internal investigation of Tiziana on its behalf. To the contrary, the Chief testified that the criminal allegations "were turned over to the Montgomery County District Attorney's office as a matter of jurisdiction." (N.T. 73.) We construe Chief Freed's testimony as evidence that the Township regarded the matter as a criminal investigation and not an internal employment matter wherein the County detectives were acting as agents/representatives of the employer. The Board's research has disclosed situations where a separate law enforcement branch of the same employer conducts criminal investigations and Weingarten rights therefore attach. See U.S. Dep't of Justice and Office of Inspector General (OIG) v. FLRA, 266 F.3d 1228, 168 L.R.R.M. 2505 (D.C. Cir. 2001)(because Officer of Inspector General agents are representatives of, report to, and are under the control of the employer, Weingarten rights attach to their investigations); United States Postal Service and Eddie L. Jenkins, 241 N.L.R.B. 141, 100 L.R.R.M. 1520 (1979)(because criminal investigations conducted by Postal Inspection Service may result in administrative discipline, Weingarten rights attach); In the Matter of State of New Jersey (Department of Human Services), 14 NJPER ¶ 19146 (Recommended Decision, 1988)(Weingarten rights attach where employe has a reasonable basis to believe the information gathered at human services police investigation is available for purposes of administrative discipline by department of human services). In each of these cases, it was determined that the investigation was actually conducted by the employer and therefore Weingarten rights attached. There is no evidence that the County was working as an investigative arm of the Township when it interviewed Tiziana. Moreover, there is no evidence that the County was acting as an agent of the Township. See Penn-Dixie Steel Corp, Joliet Bar Mill Div. and Andrew Kelly, 253 N.L.R.B. 91, 105 L.R.R.M. 1470 (1989), where the NLRB found an employe was entitled to union representation under Weingarten during an investigatory interview that was conducted by private investigators hired by his employer, where he reasonably feared discipline. There is no evidence that the County was so engaged by the Township. The Chief told the union representatives, twice, that "[t]he County's talking to Frank and I'm staying out of it." (PDO at 2, F.F. 4.) Thus, there was no reason for them to believe otherwise.

Third, as the above discussion indicates, the interview was conducted in order for the County to investigate criminal allegations that were made against Tiziana, not to form the basis for disciplinary actions by his employer. In AFSCME, Michigan Council v. City of Troy, 462 NW2d 847 (Mich. App. 1989), the Michigan Court of Appeals reversed the Michigan Employment Relations Commission's (MERC's) finding that an employer committed an unfair labor practice when it disciplined two union officials who were attempting to represent a union member. Crucial to the Michigan Court was the fact that

the public employe who was subjected to an interview by his employer knew that the meeting was neither disciplinary nor investigatory. Because Weingarten rights did not attach to that individual, they likewise did not attach to the union representatives who were attempting to aid that employe at the meeting. The employer could discipline them for insubordination because "[m]isconduct in the course of concerted activity, including insubordination, is not beyond an employer's right to discipline." City of Troy. See also, In re State Employment Relations Board (SERB) v. City of Cleveland, 1997 OPER LEXIS 345 (Order, 1997)(where employer had twice informed union representatives that employes who were being subjected to investigatory interviews were not the focus of investigation and therefore had no reasonable fear of discipline, it was not an unfair labor practice for employer to threaten to arrest the union representatives if they attempted to represent them). Thus, activity protected by Weingarten, Conneaut Sch. Dist., and PEMA is not present.

The Association next argues that the Township violated Section 6(1)(c) of the PLRA, which makes it an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment, or any term or condition of employment to encourage or discourage membership in any labor organization" An employer commits an unfair labor practice within the meaning of this provision if it discriminates against an employe for having engaged in activity protected by the PLRA. Borough of Geistown v. PLRB, 679 A.2d 1330 (Pa. Cmwlth. 1996). As the Hearing Examiner explained, a complainant in a discrimination case has the burden of proving (1) that the employe is engaged in protected activity, (2) that the employer was aware of the employe's protected activity, and (3) that the employer took adverse action against the employe because of a discriminatory motive or anti-union animus. Shoop v. Millersburg Borough and Harold Trego, 33 PPER ¶ 33071 (Proposed Decision and Order, 2002); Commonwealth of Pennsylvania State Police Ass'n v. Commonwealth of Pennsylvania (Pennsylvania State Police), 33 PPER ¶ 33011 (Final Order, 2001); St. Joseph's Hosp. v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977).

As discussed above, Officers Gillen, Staub and Townsend were not engaged in protected activity under Weingarten, Conneaut Sch. Dist., or PEMA, supra. The Association offers other union activity, such as arbitration proceedings regarding a successor collective bargaining agreement as evidence of protected activity. However, there is no merit to an argument that the Township discriminated against Officers Gillen, Staub and Townsend because of arbitration proceedings between the Association and the Township. The Association demonstrated no nexus between the contract negotiations and the discipline. Rather, the Association argued that the discipline was imposed for their efforts on behalf of Tiziana, not due to contract negotiations. "[G]eneral union activity of the union is insufficient to prove protected activity of particular employes." APSCUF v. State System of Higher Educ. (East Stroudsburg Univ.), 32 PPER ¶ 32138 at 340 (Final Order, 2001); see also Halfhill v. Private Industry Council of Westmoreland/Fayette, Inc., 28 PPER ¶ 28138 (Final Order, 1997). In AFSCME Council 33 v. City of Philadelphia, 32 PPER ¶ 32009 (Final Order, 2000), the Board dismissed a charge of discrimination and explained that although a union shop steward was "engaged in activity in support of, and on behalf of, the union (union activity), not all union activity is necessarily statutorily protected activity . . . [because] union activity and protected activity are not synonymous." Id. Similarly, although Officers Gillen, Staub and Townsend were engaged in activity in support of, and on behalf of, the Association and bargaining unit member Tiziana, that activity was not necessarily protected

by the PLRA. The Association cites no authority, and the Board's research has discovered none, supporting the argument that interrupting an interview of a fellow union member conducted by an outside law enforcement authority as part of a criminal investigation, is protected activity under the PLRA or Act 111. Thus, there was no violation of Section 6(1)(c).

After a thorough review of the Exceptions and all matters of record, the Board shall dismiss the Exceptions and make the Proposed Decision and Order as amended herein final.

In view of the foregoing and in order to effectuate the policies of the Pennsylvania Labor Relations Act and Act 111, the Board

HEREBY ORDERS AND DIRECTS

that the Exceptions filed to the Proposed Decision and Order in the above-captioned matter be and the same are hereby dismissed, and the Proposed Decision and Order as amended is hereby 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 Edward G. Feehan, this sixteenth day of July, 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.