

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

CHELTENHAM TOWNSHIP POLICE ASSOCIATION :
:
v. : Case No. PF-C-02-65-E
:
CHELTENHAM TOWNSHIP :

FINAL ORDER

On May 19, 2003, Cheltenham Township (Township) filed with the Board timely exceptions and a brief in support of exceptions to a Proposed Decision and Order (PDO) issued April 28, 2003. Pursuant to an extension of time, the Board received a brief in response from Cheltenham Township Police Association (Association) on June 23, 2003. In the PDO, the Hearing Examiner concluded that the Township violated Section 6(1)(a) of the Pennsylvania Labor Relations Act (PLRA) and Act 111 when it denied Police Officer Robert T. Dougherty, Jr. (Dougherty) representation by attorney Jeffrey Kolansky (Kolansky) at an internal affairs investigatory interview, where Dougherty reasonably feared discipline. The Hearing Examiner dismissed the Association's charge that the Township violated Section 6(1)(e) of the PLRA, as an employer has no duty to bargain with a union representative at an investigatory interview.

The Township sets forth fifteen exceptions, which may be summarized as follows. The Hearing Examiner erred by (1) finding that the interview was scheduled for April 23, 2002, rather than April 19, 2002; (2) finding that the Township refused to allow Kolansky into the interview, when he was permitted to stay for a preliminary portion where warnings were administered; (3) failing to find that the Township advised Dougherty of his right to have union representation and that Union President Michael Eves (Eves) was present and could have provided such representation; (4) concluding that Kolansky was an appropriate representative and that the Township violated Section 6(1)(a) by excluding him; (5) concluding that under the Township's logic, if a bargaining unit member obtained a law degree, he or she would be precluded from representing officers at investigatory interviews; (6) concluding that there were no extenuating circumstances which warranted the Township's refusal to allow Kolansky to serve as Dougherty's representative; (7) failing to examine the reasoning and basis behind the United States Supreme Court's decision in National Labor Relations Board v. J. Weingarten, Inc., 420 U.S. 251, 95 S.Ct. 959 (1975); and (8) relying on an interest arbitration award and precluding the Township from introducing evidence concerning the parties' bargaining history and the Township's interpretation of that award.

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

AMENDED FINDING OF FACT

4. Robert T. Dougherty, Jr. is a seventeen-year veteran of the Township Police Department and an officer in the Association. On March 28, 2002, Dougherty was involved in a high-speed chase. The Township suspected Dougherty's actions therein might have violated police department directives.

An internal affairs investigatory interview was scheduled for April 19, 2002. On that date, Dougherty appeared, accompanied by Jeffrey Kolansky, Esquire, an attorney retained by the Association to represent its members in internal affairs investigatory interviews. The Township refused to allow Kolansky to serve as Dougherty's representative and told him that his representative must be a member of the Association. The interview was postponed until April 25, 2002. On April 25, 2002, Dougherty returned, again accompanied by Kolansky as his representative. Kolansky tendered a letter from the Association naming Kolansky as the Association's representative for internal affairs investigatory interviews. The Township permitted Kolansky to stay for a preliminary portion of the interview, where Dougherty was informed of his right to union representation and advised that his statement would be used for internal purposes only. The Township then required Kolansky to leave the interview and urged Dougherty to choose an Association member to represent him. Dougherty wanted only Kolansky and refused to choose another representative, despite the presence and apparent availability of the Association President, Michael Eves (Eves) at the interview location. Dougherty was told by Police Chief John P. Scholly that he could be disciplined for refusing to participate in the interview. (N.T. 8, 10, 23, 25-26, 29, 52-53, 56-57, 61, 65, 67, 94, 95, 119-120, 138-142, 144, 160-161; Association, Exhibit 2.)

DISCUSSION

The Township's exceptions regarding the first three issues are sustained. Finding of Fact 4 is amended to reflect that the internal affairs investigatory interview was originally scheduled for April 19, 2002. Although Dougherty originally testified that the date was April 23, 2002, he acknowledged during cross-examination that the date may have been April 19, 2002 and the earlier date comports with the testimony of other witnesses. Finding of Fact 4 is amended to reflect that after the interview was rescheduled to April 25, 2002, Kolansky was permitted to stay during the portion of the interview on that date, wherein the Township informed Dougherty of his right to union representation and advised him that his statement would be used for internal purposes only. Kolansky was not permitted to stay for the remainder of the interview covering Dougherty's involvement in a high-speed chase and whether he violated police department directives. Finding of Fact 4 is also amended to reflect that the Township advised Dougherty of both his right to union representation at the investigatory interview and the presence of Eves at the interview site as a possible union representative.

The Township's exceptions concerning the appropriateness of Dougherty's selection of Kolansky as his union representative for an investigatory interview subject to Weingarten, supra will be addressed together. It is well established that an employee is statutorily entitled to the assistance of his/her collective bargaining representative in an employer-conducted investigatory interview where there is a reasonable expectation that discipline may follow. PLRB v. Conneaut School District, 10 PPER ¶ 10092 (Nisi Decision and Order, 1980), aff'd, 12 PPER ¶ 12155 (Final Order, 1981); PLRB v. Township of Shaler, 11 PPER ¶ 11347 (Nisi Decision and Order, 1980); Commonwealth of Pennsylvania, Pennsylvania Emergency Management Agency (PEMA) v. PLRB, 768 A.2d 1201 (Pa. Cmwlth. 2001); American Federation of State, County and Municipal Employees, Council 13 (AFSCME, Council 13) v. PLRB, 514 A.2d 255 (Pa. Cmwlth. 1986). The parties do not dispute that the internal affairs interview the Township subjected Dougherty to falls squarely within

the parameters of Weingarten. Their only dispute is whether Kolansky is an appropriate representative. The Board concludes that he is and affirms the decision of the Hearing Examiner.

A police officer's right to union representation at investigatory interviews under the PLRA is derived from the "right . . . to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection." 43.P.S. § 211.5. The Board is satisfied that the Association's retention of Kolansky to represent its members at investigatory interviews falls within this right. The Township cites language from Weingarten, supra, wherein the United States Supreme Court explained that the "union representative whose participation [the employe] seeks is safeguarding not only the particular employe's interest, but also the interests of the entire bargaining unit" Id., at 260. Despite the Township's argument that Kolansky is an "outsider" who lacks a "direct connection with the collective bargaining representative" (Township, Br, at 9), the fact remains that Dougherty did not hire Kolansky to represent him in this isolated matter. Rather, Kolansky was retained by the Association to represent any police officer within the bargaining unit who is subjected to an internal affairs investigatory interview. Certainly, he is not only safeguarding Dougherty's interests, but also the interests of any other bargaining unit member who may require his representation in the future, precisely what is intended by Weingarten. The Board is satisfied that when the police officers in the Association retained Kolansky for this purpose, they were engaged in concerted activity for their mutual aid and protection. It was entirely appropriate for Dougherty to choose Kolansky, rather than the union president, a coworker or another bargaining unit member.

The Township places much emphasis on the fact that Kolansky is a licensed attorney who is paid for his services by the Association, and not a Township employe or member of the collective bargaining unit. The Board sees little difference between this arrangement and that of a business agent or business representative who is likewise paid by a union to represent its members and is not an employe or member of the bargaining unit. In Pennsylvania State Corrections Officers Association v. Commonwealth of Pennsylvania Department of Corrections (Greene SCI), 34 PPER ¶ 52 (Final Order, 2003), three corrections officers were subjected to investigatory interviews where they reasonably feared discipline. They contacted the union business agent to represent them and the Board concluded that the employer was required to provide the employes and their chosen representative Weingarten protection regarding the subject matter of the interview and the misconduct being investigated. There was no evidence that the business agent was a coworker, a corrections officer, or even a member of the collective bargaining unit. The Board's research has disclosed no case authority prohibiting a collective bargaining representative from providing representation to employes at investigatory interviews, simply because that person is a lawyer and not an employe.

The Township asserts that the National Labor Relations Board (NLRB) "has consistently held that private attorneys are not equivalent to union representatives within the meaning of Weingarten" and cites TCC Center Companies, Inc. and Handley, 275 N.L.R.B. 604, 119 L.R.R.M. 1195 (1985); McLean Hospital and Malin, 264 N.L.R.B. 459, 112 L.R.R.M. 1125 (1982); and Sentry Investigation Corp. and Simon, 249 N.L.R.B. 926, 104 L.R.R.M. 1277 (1980). Unlike Dougherty's request for an attorney retained by his Association to represent police officers in internal affairs investigatory interviews, the employe in TCC Center, sought to have his personal attorney

(who was representing the employe in a workers compensation case) represent him at an investigatory interview. The NLRB affirmed the Administrative Law Judge's (ALJ's) conclusion that a request for a personal attorney to be present at an employer-conducted investigatory interview is not protected concerted activity under the NLRA. The ALJ explained that the employe "was not acting together with other employees in this respect for their mutual aid or protection. He was, instead, seeking the personal and private assistance of his own attorney." Id., 275 N.L.R.B. at 609. Here however, the Association's members selected Kolansky to be their representative at internal affairs investigations for their mutual aid and protection. Dougherty's use of this representative is not analogous to the employe's decision in TCC Center to use his personal attorney, who had neither a connection to his union nor his fellow bargaining unit members. To the contrary, Kolansky maintains a connection to both - he was retained by the Association and is available to represent other bargaining unit members, should they be subjected to internal affairs investigatory interviews.

Similarly, in McLean Hospital, the employe also sought to consult "his private legal counsel who is neither an employee of Respondent nor a representative of any employees of Respondent" Id., 264 N.L.R.B. at 472. The ALJ contrasted the McLean Hospital scenario with that in Climax Molybdenum Company, 227 N.L.R.B. 1189, 94 L.R.R.M. 1177 (1977), where "the representative was the official representative of the employees' union" McLean Hospital, 264 N.L.R.B. at 473. Although Kolansky is not an employe of the Township, he was retained to be a representative of Township employes and the Association. Sentry, supra, provides no guidance, as it was not even a Weingarten case, but rather a discrimination case. In a footnote, the ALJ noted that employes have no statutorily protected right to be represented by outside, personal counsel during investigatory or disciplinary interviews. As discussed above, Kolansky was not Dougherty's outside, personal counsel. The Township's reference to a first circuit decision, Downing v. Lebritton, 550 F.2d 689 (1st Cir. 1977) is likewise unpersuasive, as it concerned a post-disciplinary grievance procedure, rather than a pre-disciplinary investigatory interview, where Weingarten rights attach. Further, the grievance procedure in Downing provided that only another employe could serve as a representative at a grievance meeting. There are no such restrictions under Weingarten.

Contrary to the cases cited by the Township, in Meharry Medical College and Reynolds, 236 N.L.R.B. 1396, 99 L.R.R.M. 1002 (1978), the ALJ explained that under Weingarten, "[an employe] was not denied union representation [where h]e telephonically consulted with the Union's attorney and acted upon his advice", indicating that a union attorney is an appropriate Weingarten representative. Id., 236 N.L.R.B. at 1406. Similarly, in In re State Employment Relations Board v. City of Cleveland, 1997 OPER ¶ 345 (Opinion, 1997), the Ohio State Employment Relations Board concluded that an employe who asked his supervisor if he should have the union attorney with him during an investigatory interview where he reasonably feared discipline, sufficiently invoked his Weingarten rights. In United States Postal Service and Jenkins, 241 N.L.R.B. 141, 100 L.R.R.M. 1520, the NLRB adopted the ALJ's conclusion that "the choice of whether to be represented by a union steward, an attorney, both, or neither during an investigation is normally confided to the employe and/or his bargaining representative rather than to the employer who is conducting the investigation of the employe." Id., 241 N.L.R.B. at 152.

The PDO is consistent with both NLRB and Board precedent regarding an employe's right to choose his or her representative in a Weingarten setting. See, Anheuser-Busch, Inc. and International Brotherhood of Teamsters, 337 N.L.R.B. No. 2, 170 L.R.R.M. 1206 (2001); GHR Energy Corporation and Oil Chemical and Atomic Workers International Union, 294 N.L.R.B. 1101, 133 L.R.R.M. 1069 (1989); Pennsylvania State Corrections Officers Association v. Commonwealth of Pennsylvania, 34 PPER 21 (Final Order, 2003)(employe is entitled to choice of an available representative, absent extenuating circumstances); Pennsylvania State Corrections Officers Association v. Commonwealth of Pennsylvania, 34 PPER 1 (Final Order, 2002)(same). The Township cites these last two cases in its brief and argues that extenuating circumstances justified the Township's denial of Dougherty's choice of representative. However, because the Board rejects the Township's position that Kolansky was an improper Weingarten representative, we likewise reject the Township's circuitous argument that "an employe's insistence on an improper representative would constitute extenuating circumstances and justify the Township's denial of the employe's choice of representative." (Township, Br. at 17.) The Township's position that an attorney representative automatically turns an investigatory interview into an adversarial contest is rejected and this exception is therefore dismissed.

The Board notes that a chosen representative's availability may be an extenuating circumstance which would justify the employer's denial of an employe's choice of representative at a Weingarten interview. Boling v. Commonwealth of Pennsylvania, Department of Public Welfare (Mayview State Hospital II), 18 PPER ¶ 18096 (Final Order, 1987)(employe not entitled to his choice of representative where chosen representative is not present at the job site). The Board also recognizes that unavailability as an extenuating circumstance may be more likely where the chosen representative is an attorney, rather than an employe. The Board cautions the parties that "there is nothing in the Supreme Court's opinion in Weingarten which indicates that an employer must postpone interviews with its employes because a particular union representative . . . is unavailable either for personal or other reasons for which the employer is not responsible." Coca-Cola Bottling Co. of Los Angeles and International Association of Machinists & Aerospace Workers, 227 N.L.R.B. 1276, 94 L.R.R.M. 1200 (1977). However, this record reveals that Kolansky arrived at both interviews with Dougherty, and as such, his availability is not an issue before the Board.

Because we also reject the Township's argument that an employe's choice of representative is limited to members of the bargaining unit, we need not address the Township's exception to the Hearing Examiner's statement concerning whether a bargaining unit member who obtained a law degree could represent employes under Weingarten. A law degree is irrelevant to the Board's analysis and an employe has many choices in this regard and may choose, for example, an attorney retained by the union, a fellow bargaining unit member, a union official, a business representative or a business agent.

The Township violated Section 6(1)(a) of the PLRA and Act 111 when it denied a police officer his choice of representative at an investigatory interview where he reasonably feared discipline. The fact that the chosen representative was a lawyer retained by the collective bargaining representative to represent bargaining unit members in internal affairs investigations does not alter the Board's statutory or caselaw analysis. The Board need not address the Township's exception to the Hearing Examiner's reliance on the interest arbitration award nor its alleged inability to present a sound arguable basis defense. The Board has neither considered nor

relied on the parties' interest arbitration award and therefore, any evidence the Township was precluded from introducing evidence to explain the award or its interpretation of the award is not relevant. The Weingarten right is statutory and is not dependent on contractual or other employe protections.

After a thorough review of the exceptions, briefs in support and opposition and all matters of record, the Board shall sustain the exceptions in part, dismiss the exceptions in part and affirm the Proposed Decision and Order, as amended by the above discussion.

ORDER

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 above case number be and the same are hereby sustained in part, dismissed in part and the Proposed Decision and Order is affirmed as amended 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 fifteenth day of July, 2003. 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.

