COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNSYLVANIA STATE CORRECTIONS OFFICERS ASSOCIATION	:	
v.	:	Case No. PERA-C-02-83-E
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF CORRECTIONS GREENE SCI	:	

FINAL ORDER

On December 30, 2002, the Pennsylvania State Corrections Officers Association (Association) filed with the Pennsylvania Labor Relations Board (Board) timely exceptions to a December 12, 2002 Proposed Decision and Order (PDO). Pursuant to extensions of time granted to both parties by the Secretary of the Board, the Association filed a timely brief in support of its exceptions on January 31, 2003[1] and the Commonwealth filed a timely brief in response to exceptions on March 12, 2003. In the PDO, the Hearing Examiner concluded that the Commonwealth did not violate Section 1201(a)(1) and (5) by denying the Association's requests for information in advance of and during the pre-disciplinary conferences (PDCs) of three bargaining unit members. The Hearing Examiner explained that: (1) at the time the Association made its requests, none of the employes had been disciplined; (2) the Association failed to argue and prove that the information requested was relevant to its policing of the parties' collective bargaining agreement (CBA); and (3) the Association failed to cite any contractual provision to which the information allegedly relates. He further concluded that because PDCs are investigatory in nature, the Commonwealth has only a limited duty at that stage, to provide a general statement identifying the misconduct for which discipline may be imposed.

The Association's exceptions may be summarized as follows. The Hearing Examiner erred by: (1) misunderstanding, misinterpreting and misapplying the

[1] The Board's Rules and Regulations require a party to file exceptions and supporting brief within 20 calendar days of the PDO. Section 98.98(a)(1) provides that exceptions and briefs in support "will be deemed received upon actual receipt or on the date deposited in the United States mail, as shown on a United States Postal Form 3817 Certificate of Mailing enclosed with the statement of exceptions." The Secretary granted the Association's request for an extension to file its brief to January 31, 2003. Although the Board did not receive the brief until February 3, 2003, it arrived in an envelope bearing a United States Postal Service postmark of January 31, 2003, and was therefore timely. On February 11, 2003, the Board received a Form 3817 Certificate of Mailing from the Association. Because the Form 3817 was not enclosed with the Association's brief as required by the Rule, the Board cannot rely on it as evidence of timely deposit in the United States mail. However, the Board will accept the postmark in lieu of the Form 3817 as substantial compliance with Section 95.98. See, PSSU v. Commonwealth of Pennsylvania, Department of Public Welfare, 33 PPER ¶ 33174 (Order, 2002)(citing Wilkes-Barre Police Benevolent Association v. City of Wilkes-Barre, 32 PPER ¶ 32137 (Final Order, 2001)).

facts and the law in Finding of Fact 7; (2) concluding that PDCs are investigatory in nature; (3) incorrectly applying AFSCME, Council 13 v. Commonwealth of Pennsylvania Department of Corrections (Muncy), 17 PPER ¶ 17072 (Proposed Decision and Order, 1986), aff'd, 18 PPER ¶ 18057 (Final Order, 1987), aff'd, Commonwealth of Pennsylvania, State Correctional Institution (Muncy) v. PLRB, 541 A.2d 1168 (Pa. Cmwlth. 1987) and failing to consider the information requests made prior to the imposition of discipline; (4) relying on Officers of the Upper Gwynedd Township Police Department v. Upper Gwynedd Township, 31 PPER ¶ 31157 (Final Order, 2000) and Reading Education Association v. Reading School District, 23 PPER ¶ 23140 (Proposed Decision and Order, 1992) in concluding that the union members had not been disciplined at the time the information requests were made; (5) concluding that the information requests did not relate to the processing of grievances or consideration of whether grievances should be filed and concluding that the Association failed to demonstrate the relevancy of the information requested concerning potential discipline; (6) concluding that a union is not performing a collective bargaining function at an investigatory interview such as a PDC; and (7) concluding that the Commonwealth was only required to provide a general statement identifying the misconduct for which discipline may be imposed.

The unchallenged facts surrounding the Association's charge are as follows. Three Corrections Officers (Rhodes, Stewart and Crick) were charged with various code of ethics violations arising out of the same incident, including the alleged abuse of an inmate. The officers contacted Association business agent Diane DeMarco to request that she represent them at individual PDCs conducted by the Commonwealth. At the outset of the first PDC for Officer Rhodes, DeMarco requested copies of: (1) the three officers' written statements concerning the incident; (2) the inmate's statement; (3) the inmate misconduct report or DC-141 issued by Rhodes; and (4) the inmate's processing videotape. During the PDC, DeMarco requested copies of: (5) statements of other alleged witnesses, including a captain, a psychologist and another employe manning the post where the alleged abuse of the inmate occurred; (6) a videotape of the officers escorting the inmate that the captain observed on a video monitor; (7) the inmate's file; and (8) an extraordinary occurrence form or DC-121, which contained statements by the officers who transported the inmate to a Pittsburgh facility. The Commonwealth did not provide any of these materials at that time. The Commonwealth indicated that there was no videotape of what the captain witnessed on the monitor and that the inmate's file was unavailable because it had been transferred with the inmate to Pittsburgh. DeMarco made the same requests for information at the next two PDCs for Officers Stewart and Crick.

Officer Rhodes, the only officer to be disciplined as a result of the incident, received a five-day suspension and then filed a grievance. At the first step of the grievance procedure, DeMarco received copies of all of the requested materials, except the inmate processing video, the inmate's file and the DC-121. The only provision of the parties' CBA offered into evidence was Article 35, which outlines a three-step grievance procedure and provides as follows regarding Step 1:

> The parties agree the respective institutional/boot camp representative or official Agency designee and the Association counterpart must schedule and meet on a monthly Step 1 basis, if necessary, in order to attempt to resolve all outstanding grievances. At the Step 1 meeting, the parties will advise each other of the then known facts,

> including witnesses, and furnish copies of relevant reports or investigations upon which the party will rely in proving and/or supporting its respective position . . . .

(PDO, F.F. 4)(Respondent Exhibit 1)(emphasis added).

In its exceptions, the Association asserts that the Hearing Examiner erred in making this portion of Finding of Fact 7:

> At the outset of the PDC, an employer representative who was involved in the internal investigation of the charges against the employe presents a report concerning the results of the investigation. The employe, with or without assistance of a union representative, is then provided with the opportunity to respond to the charges. During PDCs, employes who are charged with misconduct are called upon to answer questions by the committee of Department representatives that presides over the proceeding.

(PDO, F.F. 7.) Yet, in its brief, the Association states that "the Hearing Examiner's finding is well supported by the record" and instead argues that "this accurate statement flies in the face of the Hearing Examiner's ultimate conclusion that a PDC is investigatory in nature." (Ass'n, Br. at 8.) The Board agrees that this finding (wherein the Hearing Examiner explains the investigatory process leading up to a PDC, the PDC format, the procedures followed and possible results following a PDC) is well supported by the record. The Board will address the Association's argument that this finding does not support the Hearing's Examiner's conclusion that the PDC is investigatory.

Because the Hearing Examiner found that the employer representative "presents a report concerning the results of the investigation" at the PDC, the Association asserts that the PDC is not part of the investigation, but rather that the PDC occurs only after the investigation is complete. The Board disagrees. When read as a whole, the finding reveals that the employer representative "who was involved in the internal investigation of the charges against the employee presents a report concerning the results of the investigation." (PDO, F.F. 7.) The Board does not read this sentence as supporting the Association's position. Results of portions of an ongoing investigation may be presented at any stage of that investigation. The Association does not challenge the Hearing Examiner's finding that "[i]n some cases, the Department has concluded based on matters raised at PDCs . . . that further investigation is necessary." (PDO, F.F. 7.) If the investigation was complete at some stage prior to the PDC, it certainly could not continue after. The Association's position misperceives the essential nature of the PDC, a proceeding where additional facts are gathered to thereafter decide the appropriate course of action by the employer – i.e. an investigatory proceeding. The more logical position is that reached by the Hearing Examiner - that the investigation does not conclude until after the PDC, when the Commonwealth decides whether the officer will be disciplined.

The Association, relying on a 1987 proposed decision and order, claims PDCs are not investigatory and the Hearing Examiner here erred by reaching a different result, citing AFSCME, Council 13 v. Commonwealth of Pennsylvania (Muncy), supra. Muncy, however, did not address the issue of whether PDCs were investigatory, but rather, whether the Commonwealth was obliged to provide the union with employe and inmate statements, investigative reports

and minutes of PDCs, requested first at the PDCs and again in letters following the imposition of discipline and the filing of grievances. The Board notes that the Association here similarly charged the Commonwealth with violating Section 1201(a)(1) and (5) of PERA by failing to provide information. The Association did not charge the Commonwealth with denying the employes' Weingarten right to union representation at an investigatory interview with the employer where the employe reasonably fears discipline. See, NLRB v. Weingarten, Inc., 420 U.S. 251, 95 S.Ct. 959 (1975); Commonwealth of Pennsylvania, Pennsylvania Emergency Management Agency (PEMA) v. PLRB, 768 A.2d 1201 (Pa. Cmwlth. 2001). Because the record presents neither an allegation nor evidence of a Weingarten violation, the Board will limit its analysis to the Association's refusal to supply information charge.

In evaluating such a charge, the Board is guided by well-established precedent. Pursuant to its statutory collective bargaining obligations, an employer is required to provide the union with information that is relevant to representing employes in negotiations for a future contract and policing the administration of the existing contract. PSSU, Local 668 v. Commonwealth of Pennsylvania, 17 PPER ¶ 17042, p. 108 (Final Order, 1986); NLRB v. Acme Industrial Company, 385 U.S. 432, 87 S.Ct. 565 (1967). The union is likewise entitled to information that it reasonably needs to properly process a grievance. Commonwealth of Pennsylvania v. PLRB, 527 A.2d 1097 (Pa. Cmwlth. 1987). There is no requirement that a grievance actually be pending at the time the information is requested. North Hills Education Association v. North Hills School District, 29 PPER ¶ 29063 (Final Order, 1998). However, where no grievance is pending, the information sought must at least relate to a matter which arguably on its face would be governed by the contract. Commonwealth v. PLRB, supra.

The hearing examiner in Muncy applied the same standard as the Hearing Examiner in the case before the Board:

> an employer is generally obligated to provide to a union requested information the union needs to intelligently carry out its collective bargaining function [citations omitted].[2] Whether or not an employer violates that obligation depends upon the facts of each case.

Muncy, 17 PPER at p. 190. Based upon the facts of that case, the hearing examiner concluded that the Commonwealth was under no obligation to provide employe or inmate statements at all, as they are not relevant to collective bargaining.[3] The Board reaches the same result here. In a similar case, AFSCME, Council 13 v. Commonwealth of Pennsylvania (Graterford), 19 PPER ¶

[2] The handling of grievances is part and parcel of collective bargaining. Section 903 of PERA provides that the arbitration of disputes or grievances arising out of the interpretations of the provisions of a collective bargaining agreement is mandatory. See, Chester Upland School District v. McLaughlin, 655 A.2d 651 (Pa. Cmwlth. 1995), aff'd 544 Pa. 199, 675 A.2d 1211 (1996); PLRB v. Bald Eagle Area School District, 499 Pa. 62, 451 A.2d 671 (1982).

[3] It is interesting that the Association argues that this case should be controlling, as it held that employe and inmate witness statements were not relevant and the Commonwealth was under no obligation to provide them to the union at all.

19039 (Final Order, 1988), the Board rejected the union's argument that it was entitled to all documents and investigative reports which were to be used in a PDC of an employe under investigation for providing false information. Like the Association here, the union argued that it was entitled to this information in order to prepare an adequate defense at the PDC. The only document or report used in the PDC was a report prepared by a state police trooper. The Board and its hearing examiner concluded that the report was actually a witness statement prepared by the trooper at the request of the Commonwealth to detail his knowledge of the misconduct for which the employe was under investigation. The Board adopted the NLRB position that "the principle set forth in Acme and related cases dealing with the statutory obligation to furnish information was not properly 'extended so as to require an employer to provide a union with statements obtained during the course of an employer's investigation of employe misconduct.'" Id. (citing Anheuser-Busch, Inc., 99 LRRM 1174, 1176, 237 N.L.R.B. 146 (1978)). Based upon these two cases, the Board affirms the Hearing Examiner's conclusion that the Association was not entitled to the officers' written statements, the inmate's statement, the statements of other witnesses, including the captain, a psychologist and the employe staffing the post where the alleged abuse of the inmate took place or the extraordinary occurrence form, which contained the statements of the officers who transported the inmate.

While the Association correctly notes that the hearing examiner in Muncy made no distinction between requests made before or after the PDC, the law is clear that once an employe has been disciplined and the union has either filed a grievance or is contemplating whether to file a grievance, the employer is obligated to provide information that is relevant to that grievance. In PSSU v. Commonwealth, supra, the union filed a grievance over alleged discipline of a bargaining unit member without just cause in violation of the parties' collective bargaining agreement. Noting that "it is not the role of the Board to determine the merit of the grievances . . . the Board must determine if the requested information is relevant to the grievance filed." Id., p. 108. The Board concluded that written allegations against an employe relied on by his employer to initiate an investigation, as well as the employer's final investigative report, were relevant to the grievance filed and would support the union's position that the employer imposed disciplinary action against the employe without following the prescribed contractual procedure. Similarly, the hearing examiner in Muncy concluded that the union met its burden of proving the relevancy of the investigative reports and names of witnesses in aiding it in carrying out its collective bargaining function. In reaching this result, he relied on an NLRB case, Transport of New Jersey, 233 N.L.R.B. 101, 97 L.R.R.M. 1204 (1977), where the union proved that the names and addresses of witnesses and the information which might be obtained from them were relevant to the issues raised by the union's grievance, and he concluded that "[t]he same result must obtain on the facts of record here." Muncy, 17 PPER at p. 190 (emphasis added). The Association has made no such showing of relevancy in this case regarding the misconduct report, the alleged videotapes or the inmate's file. Unlike Muncy and PSSU v. Commonwealth, there is no record evidence that an employe was disciplined or that a grievance was filed or being contemplated at the time the Association made its information requests. In affirming the Board's decision in Muncy, the Commonwealth Court explained:

> In order to succeed in its request for information, a party need only show that its request is factually relevant to the grievant's case [citations omitted]. In the matter herein, Grievant was suspended from his job pending

> investigation. The information requested by AFSCME was names of witnesses who had given statements against Grievant. Clearly, this information went to the crux of the Commonwealth's case against Grievant; and the Commonwealth's refusal to provide this information was in violation of the Act.

Commonwealth v. PLRB, 541 A.2d at 1170-1171. The Hearing Examiner distinguished Muncy by noting that because the information requests in that case were repeated after the employes were disciplined and grievances were filed, "the information was relevant to the processing of grievances, a circumstance where a union is clearly entitled to a broad range of potentially useful information." (PDO, p.6.) The Hearing Examiner explained that the only information requests of record in this case preceded the imposition of discipline. From this, he concluded that the information requests did not relate to the processing of the grievance or consideration of whether a grievance should be filed. The Board agrees and therefore dismisses the Association's exception to the Hearing Examiner's application of Muncy. Further, in PLRB v. Commonwealth of Pennsylvania, 9 PPER ¶ 9267 (Nisi Decision and Order, 1978), the Board explained that "[a]lthough there is surely a duty on the part of an employer to supply relevant information to aid in collective bargaining [citations omitted] there must be a specific request for existing material." Id., at 469. The Association did not prove that the alleged videotape of the officers escorting the inmate even exists, much less that either videotape was relevant. To the contrary, Captain Brian Coleman testified that no video surveillance tape was made of the inmate's escort through the institution, but rather that it was just viewed on a monitor. (N.T. 54.)

In a related vein, the Association excepts to the Hearing Examiner's reliance on Upper Gwynedd Township, supra. In that case, the Board again explained that while "there is no prerequisite that a grievance actually be pending at the time the information is requested . . . the information sought must at least relate to a matter which arguably on its face would be governed by the contract." Id., 31 PPER at 376-377. Under this standard, the Board concluded in Upper Gwynedd that there was no provision in the parties' contract that would support a grievance. The Association first attempts to distinguish the facts of that case, by asserting that "[o]f the utmost importance is the fact that, in Upper Gwynedd, there was no internal grievance procedure in existence between the union and the employer." (Ass'n, Br. at 14.) From this, the Association argues that absent a contract provision on discipline, the union waived the relevancy of the information it requested. It is interesting that the Association should point to a contractual grievance procedure as distinguishing these two cases. First, as the Hearing Examiner noted, the Association did not even introduce the parties' CBA into evidence at the hearing. Therefore, any argument that the Association proved that the information requested related to a matter governed by the contract is unsupported. Second, only one provision of the CBA was submitted (by the Commonwealth) and it contains a three step grievance procedure which requires at step one that "the parties will advise each other of the then known facts, including witnesses, and furnish copies of relevant reports or investigations upon which the party will rely on proving and/or supporting its respective position . . . ." (PDO, F.F. 4)(Respondent Exhibit 1.) At the time the information requests were made, no discipline had been issued and no grievances had been filed. At least under the parties' negotiated grievance procedure, the Commonwealth was not yet required to turn over any of the requested information. The Association

argues that "[i]t is essential that the union receive this information prior to the filing of the grievance so that they may fulfill their obligation as a bargaining representative." (Ass'n, Br. at 17.) While the Board has previously held that an employer is obliged to provide relevant information necessary for a party to evaluate whether to file a grievance, Graterford, PSSU v. Commonwealth, supra, the Board requires that the employer have at least taken the action the union could claim violated the contract by way of the grievance procedure. Here the Association made its demand for information while the Commonwealth was continuing its investigation and prior to the imposition of any discipline which would be the grievable matter. Accordingly, the requests for information were premature on the facts of record.

Likewise, the Board dismisses the Association's exception to the Hearing Examiner's reliance on Reading School District, supra, where the hearing examiner dismissed the union's charge alleging that the employer violated PERA by refusing to provide an audio tape of a meeting in which a school board member commented on the possible discharge of an employe. Because the employer had not disciplined the employe and the parties' contract only addressed discipline, the hearing examiner concluded that the information was not relevant to the processing of a grievance governed by the contract. The Association attempts to distinguish the two cases on the likelihood of discipline at the time the requests were made and argues that "the possibility of discipline being imposed once a matter reaches a PDC is not just possible, it is probable." (Ass'n, Br. at 16.) The Board disagrees with this statement for two reasons. First, the record reveals that of the three officers subjected to PDCs, only one was ultimately disciplined. Second, the record also reveals that in some cases, the Commonwealth has concluded based on matters raised at PDCs that discipline is unwarranted. At the time DeMarco made the requests for information, none of the unit members had been disciplined and as discussed above, the Association did not argue or prove that the information was required to enable it to process a grievance or a contemplated grievance governed by the parties' CBA. The Hearing Examiner did not err by analogizing the two cases and the Association's exception is therefore dismissed.

The Association next argues that the information requested was relevant because it was necessary for the union representative to "defend her officers" and "to 'cross-examine' the [Commonwealth's] case" at the PDCs. (Ass'n, Br. at 6-7.) The Board rejected this same argument in Graterford, supra, wherein it concluded that the union was not entitled to a witness statement in order to defend an employe at a PDC. Consistent with Weingarten, supra, the Board has never endorsed the position that an investigatory interview is an adversarial proceeding. To the contrary, in a recent decision the Board explained that union representatives are prohibited from converting investigatory interviews into adversarial confrontations. Pennsylvania State Corrections Officers Association v. Commonwealth of Pennsylvania, 33 PPER ¶ 33190 (Order Denying Motion for Reconsideration, 2002). See also, Weingarten, supra (presence of union representative need not transform the interview into an adversary contest). The Board will not require the Commonwealth to turn over information such as that requested by Demarco at the PDC so that the Association may do just that. The Association's argument that the requested information was relevant for adversarial reasons such as cross-examination at the PDC must be rejected.

The Association next excepts to the Hearing Examiner's conclusion that a union is not performing a collective bargaining function at an

investigatory interview such as a PDC. The Board has repeatedly explained, in cases involving these same parties, that "[t]he employer has no duty to bargain with the union representative at an investigatory interview." Pennsylvania State Corrections Officers Association v. Commonwealth of Pennsylvania, 33 PPER ¶ 33177 (Final Order, 2002)(citing Weingarten, supra, 420 U.S. at 260, 95 S.Ct. at 965); Pennsylvania State Corrections Officers Association v. Commonwealth of Pennsylvania, 33 PPER ¶ 33157 (Final Order, 2002); Pennsylvania State Corrections Officers Association v. Commonwealth of Pennsylvania, Case No. PERA-C-02-31-E (Final Order, 2003). Because there is no duty to bargain at an investigatory interview, the Association is not performing a collective bargaining function at a PDC and this exception is dismissed.

Having established that the PDCs conducted by the Commonwealth for Officers Rhodes, Crick and Stewart were investigatory interviews, the Hearing Examiner appropriately analyzed what information the Commonwealth was obligated to turn over at this stage in its investigation. The Hearing Examiner properly relied upon Pacific Telephone and Telegraph, 262 N.L.R.B. 1048, 110 L.R.R.M. 1141 (1982), an NLRB case holding that prior to an investigatory interview, the employer "does not have to reveal its case, the information it has obtained, or even the specifics of the misconduct to be discussed. A general statement as to the subject matter of the interview, which identifies to the employee and his representative the misconduct for which discipline may be imposed will suffice." Id., 262 N.L.R.B. at 1049. The Board affirms the Hearing Examiner's conclusion that the Commonwealth did not violate Section 1201(a)(1) or (5) of PERA when it denied the Association's requests for information in advance of the PDCs, because it was only required to provide a general statement identifying the misconduct for which discipline may be imposed at this stage of the investigatory process. The Association's remaining exceptions are therefore dismissed.

After a thorough review of the exceptions, briefs and all matters of record, and in order to effectuate the policies of the Public Employe Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions be and the same are dismissed, and the Proposed Decision and Order be and the same 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 fifteenth day of April, 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.