

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNSYLVANIA STATE CORRECTIONS :
OFFICERS ASSOCIATION :
 :
 v. : Case No. PERA-C-02-31-E
 :
 COMMONWEALTH OF PENNSYLVANIA :

FINAL ORDER

On July 15, 2002, the Pennsylvania State Corrections Officers Association (Association) filed with the Pennsylvania Labor Relations Board (Board) timely exceptions to a Proposed Decision and Order (PDO) dated June 26, 2002. Pursuant to an extension of time, the Association filed a brief in support of its exceptions and the Commonwealth of Pennsylvania (Commonwealth) filed a timely brief in response on September 5, 2002. In the PDO, the Hearing Examiner granted the Commonwealth's motion to dismiss the Association's Charge of Unfair Practices; concluded that Corrections Officer Donald Vogel did not have the right to be represented by Officer Craig Panko, rather than Officer Paul Lennert at a counseling session; and declined to decide whether the "counseling session" conducted by the Commonwealth constituted an investigatory interview within the meaning of PLRB v. Conneaut School District, 10 PPER ¶ 10082 (Nisi Decision and Order, 1979), aff'd, 12 PPER ¶ 12155 (Final Order, 1981) and PLRB v. Township of Shaler, 11 PPER ¶ 11347 (Nisi Decision and Order, 1980)(adopting the rule of law in National Labor Relations Board (NLRB) v. Weingarten, Inc., 420 U.S. 251; 95 S.Ct. 959 (1975)).

In its exceptions, the Association asserts that the Hearing Examiner erred by (1) concluding generally that an employee does not have the right to choose his/her union representative in a Weingarten setting; (2) concluding that the Association did not demonstrate that Officer Panko was readily available to represent Officer Vogel; (3) granting the Commonwealth's Motion to Dismiss; (4) failing to conclude that the counseling session was an investigatory interview; and (5) concluding that the Commonwealth did not violate Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA).

Neither the Association nor the Commonwealth excepted to the Hearing Examiner's findings of fact, which are summarized as follows. On November 13, 2001, Officer Vogel was called to Captain Soroko's office for a counseling session. Before entering the Captain's office, he met with a member of the Association's local executive board, Officer Paul Lennert. When he entered the office, Officer Vogel requested to be represented by Officer Panko instead of Officer Lennert and his request was denied. This request was made in the presence of Officer Lennert, who offered to relieve Officer Panko so that he could represent Officer Vogel. The Captain rejected Officer Lennert's offer and insisted that he stay to represent Officer Vogel.

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

ADDITIONAL FINDINGS OF FACT

5. Prior to the counseling session, Officer Vogel was aware that Officer Panko had been counseled for missing roll calls and that Captain Soroko referred to Officer Vogel's roll call record while counseling Officer Panko. (N.T. 12, 19-20, Commonwealth Ex. 1.)

6. At the time of the counseling session, Officer Panko was a union steward for the Association, but Officer Lennert was not. (N.T. 9, 12-13, 15.)

7. At the counseling session, Captain Soroko accused Officer Vogel of being late for roll call fifteen times and Officer Vogel responded that there was no truth to the accusation. At the end of the meeting, Captain Soroko indicated that he possessed records to prove that Officer Vogel had been late for roll call and told Officer Vogel "you will get my decision later." Officer Vogel was not disciplined as a result of the alleged missed roll calls. (N.T. 11-12, Commonwealth Ex. 1.)

DISCUSSION

The Board will first address the Association's exception regarding whether or not Officer Vogel's counseling session constituted an investigatory interview under Weingarten, *supra*. 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. In Township of Shaler, *supra*, the Board explained "it is clear that the evil sought to be remedied in Weingarten is a situation in which an employee is compelled to involuntarily participate in an investigatory or disciplinary-related interview without the benefit of a union representative being present." *Id.*, 11 PPER at 560.

The Commonwealth claims that the November 13, 2001 meeting was not one contemplated by the Weingarten rule. The Commonwealth places undue emphasis on the absence of "questions" posed to Officer Vogel during the session. In Fraternal Order of Police Lodge #9 v. City of Reading, 26 PPER ¶ 26172 (Final Order, 1995), the Board explained "the 'confrontation' contemplated by the [United States Supreme] Court is the potential adverse impact of discipline on the employee, not the manner in which information is elicited by the employer." *Id.*, at 400. The Commonwealth Court has explained that "[i]n order for Weingarten rights to attach . . . the meeting must have been an investigatory interview, i.e., the meeting must have been calculated to form the basis for taking disciplinary or other job-affecting actions against [the employee] because of past misconduct." Commonwealth of Pennsylvania, Pennsylvania Emergency Management Agency (PEMA) v. PLRB, 768 A.2d 1201, 1205 (Pa. Cmwlth. 2001). The Board is satisfied that the counseling session conducted by Captain Soroko meets this test.

During the session, Captain Soroko accused Officer Vogel of past misconduct - being late for roll call on 15 occasions - and Captain Soroko also indicated that he had not yet decided what discipline, if any, Officer Vogel would receive for this past misconduct - "[w]e have my records that will prove it and you will get my decision later." (N.T. 12). Officer Vogel testified that there was "a threat of disciplinary action coming toward me." (N.T. 13.) The Board recognizes that the employee's fear that the

investigation will result in disciplinary action must be reasonable and not merely subjective for Weingarten rights to attach. See, Weingarten, supra, 420 U.S. at 257-258, 95 S.Ct at 963-964.

Investigatory interviews can take several forms, usually in the form of questions and answers. However, an investigatory interview can take the form of an employer asking an employe to submit a written memorandum concerning alleged misconduct. Fraternal Order of Police, Lodge #9 v. City of Reading, 26 PPER ¶ 26172 (Final Order, 1995). Likewise, an investigatory interview can take the form of an accusation or statement designed to determine if the employe denies the accusation or statement. Similarly in PEMA, supra, the Commonwealth claimed that an interview was not investigatory and therefore not encompassed by Weingarten, where the Commonwealth prepared a dismissal letter before the interview took place. In PEMA, the Board and the Commonwealth Court rejected the Commonwealth's argument that the interview was not investigatory because [1] "the meeting was for the purpose of discussing [the employe's] work performance . . . [2] there was at least some discussion between [the employe] and [the supervisor]" 31 PPER at 84, and [3] [the employer gave the employe] an opportunity to respond and factor[ed] his responses into the employer's decision." 768 A.2d 1206.

In this case, Captain Soroko accused Officer Vogel of engaging in conduct which if true could reasonably subject him to discipline. Like PEMA, supra, the Board is satisfied that the counseling session was for the purpose of discussing Vogel's work performance and there was at least some discussion between Vogel and Soroko. Vogel was given the opportunity to respond and answered the accusation by denying that he engaged in the conduct. Captain Soroko told Vogel that he would get his decision later, which supports a conclusion that Vogel's responses at the counseling session would be factored into the Commonwealth's decision. As in PEMA and Reading, supra, we see no difference in this form of inquiry, which elicited Officer Vogel's denial, and a direct question to Vogel regarding whether he was late for roll call. Further, the Board is satisfied that Officer Vogel's fear of discipline was reasonable, based upon Captain Soroko's statement that he had records to prove Vogel was late for roll call fifteen times and would receive his decision later. The Commonwealth presented no evidence to refute the reasonableness of Officer Vogel's fear of discipline. In Pennsylvania Nurses Association v. Western Psychiatric Institute and Clinic, 17 PPER ¶ 17225 (Proposed Decision and Order, 1986), the Hearing Examiner explained that an "employer can effectively rebut employe claims that they believed that discipline might result from a meeting with the employer by demonstrating that the employes were assured that no discipline would result from the meeting." Id., at 618. The Commonwealth neither called witnesses nor produced documentary evidence to demonstrate that Officer Vogel had reason to believe that he would not be disciplined as a result of the counseling session. Nor did the Commonwealth present evidence that as a rule, counseling sessions do not result in discipline. Instead, the Commonwealth argues in its brief that "[d]isciplinary action was never considered" (Commonwealth, Br. at 11.) Because the Board finds neither testimonial nor documentary support in the record for this declaration or the Commonwealth's conveying it timely to Vogel, the Commonwealth's conclusory statement is rejected and the Association's exception is sustained.

The Board will address the Association's remaining exceptions together. As the Board explained in Township of Shaler, supra, three elements must be met in order to establish a violation of the Weingarten right:

First, the Complainant must demonstrate that he reasonably believed that the interview might result in disciplinary action. Second, the Complainant must request that a union representative be present and that such request must be denied. Finally, that subsequent to the employer's denial of representation, the employer must compel the employe to continue with the interview.

Township of Shaler, 11 PPER at 559. First, as discussed above, the confrontation between Officer Vogel and Captain Soroko at the counseling session was of the type contemplated by the United States Supreme Court in Weingarten, supra, as adopted by the Board in Conneaut, supra, and Township of Shaler, supra. Officer Vogel reasonably believed that the counseling session might result in disciplinary action and his right to union representation attached. The first element was met.

Second, there is no dispute that Officer Vogel requested to be represented at this counseling session by his union steward, Officer Panko, and there is likewise no dispute that this request was denied. The Association asserts that Officer Vogel's request and the Commonwealth's denial satisfy the second element of the Charge of Unfair Practices. While maintaining its position that Officer Vogel was not entitled to any union representation, the Commonwealth counters that even if Weingarten applied, Officer Lennert was present as Officer Vogel's union representative and the Association did not prove "that the Commonwealth had any obligation to permit Panko to attend the counseling session with Vogel." (Commonwealth, Br. at 6.)

The Board rejects the Commonwealth's argument, having recently addressed the same issue in Pennsylvania State Corrections Officers Association v. Commonwealth of Pennsylvania (Corrections Officers), ___ PPER ___ (Case No. PERA-C-01-398-E)(Final Order, 2002). The Board formally adopted the position of the National Labor Relations Board and held that in a Weingarten situation, an employe is entitled to an available representative of the employe's choice, absent extenuating circumstances, citing 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. 1011, 133 L.R.R.M. 1069 (1989); District 1199P, SEIU v. Commonwealth of Pennsylvania Department of Public Welfare, 32 PPER ¶ 32177 (Proposed Decision and Order, 2001); AFSCME v. Commonwealth of Pennsylvania Department of Corrections, Greene SCI, 32 PPER ¶ 32131 (Proposed Decision and Order, 2001); Gridley Union High School Teachers Association v. Gridley Union High School District, 12 PERC 19143 (Calif. PERB Proposed Decision, 1988).

The Commonwealth argues that because Captain Soroko had counseled Officer Panko for being late for roll call, special circumstances existed to preclude Officer Vogel from selecting Panko as his representative. (Commonwealth, Br. at 7). The Commonwealth cites no authority to support its argument that this disqualifies Officer Panko or inhibits his ability to act as Officer Vogel's union representative under Weingarten.

The Board notes that in Boling v. Commonwealth of Pennsylvania, Department of Public Welfare (Mayview State Hospital II), 18 PPER ¶ 18096 (Final Order, 1987), the Board concluded that an employe was not entitled to his choice of representative when that representative was not present at the job site and a qualified union steward was present and provided. In 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), the NLRB similarly refused to find a violation of an employe's rights, where the employe insisted on a shop steward who was on vacation. The NLRB explained that "there is nothing in the Supreme Court's opinion in Weingarten which indicates that an employer must postpone interviews with its employees because a particular union representative, here the shop steward, is unavailable either for personal or other reasons for which the employer is not responsible." Coca-Cola Bottling Co., 227 N.L.R.B. at 1276. The Commonwealth argues that the Association did not prove that Officer Panko was "present and available to assist [Officer] Vogel." (Commonwealth, Br. at 6.) However, as the Board explained in Corrections Officers, simply because the employe's chosen union representative may have to be called from his or her work station to represent the employe at the investigatory interview, does not necessarily make that representative "unavailable". Under typical Weingarten circumstances the "available" representative is a fellow employe who is at work and on duty at the time the need arises. Indeed, as the above cited precedent indicates, it is advantageous that the chosen representative is at work and available to assist and the Commonwealth showed no extenuating circumstances (e.g. unwarranted disruption of services) as required by Corrections Officers. The Association presented testimony that Officer Lennert offered to relieve Officer Panko, so that he could represent Officer Vogel, which indicates that Officer Panko was at the job site and therefore available. The Commonwealth did not prove that its refusal to provide Officer Vogel with his choice of representative was based upon Officer Panko's unavailability. For instance, the Commonwealth did not present evidence that Officer Panko was unavailable because he not present at the job site, as in Mayview State Hospital, supra, or that he was unavailable because he was on vacation, as in Coca-Cola Bottling Co., supra. Thus, the Board concludes that Officer Panko was "available" and accordingly, the second element set forth in Township of Shaler, supra, was met.

Finally, there is no dispute that the counseling session continued after the Commonwealth denied Officer Vogel's request that Officer Panko represent him. Officer Vogel testified that after his request for representation was denied, Captain Soroko accused him of missing roll call fifteen times and indicated that Vogel would get his decision later. Therefore, the final element set forth in Township of Shaler, supra, was met.

As to the fifth designation of error by the Association above noted, there is no evidence of the Commonwealth committing an unfair practice under Section 1201(a)(5). The Association's exception to the Hearing Examiner's alleged failure to find such a violation is dismissed. "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. Accordingly, this exception must be dismissed.

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 and set aside the Proposed Decision and Order, in part, 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. Conclusion number 4 of the Proposed Decision and Order is hereby vacated and set aside.

5. That the Commonwealth of Pennsylvania has committed unfair practices in violation of Section 1201(a)(1) of PERA.

6. That the Commonwealth of Pennsylvania has not committed unfair practices in violation of Section 1201(a)(5) 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, dismissed in part, and the Order on pages 3 and 4 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 Members L. Dennis Martire and Anne E. Covey, this twenty-eighth day of January, 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.

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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