COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

CRAIG TROY BENNETT	:	
	:	
v.	:	Case No. PERA-C-02-169-E
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COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF CORRECTIONS	:	

FINAL ORDER

Craig Troy Bennett (Complainant) filed timely exceptions on June 8, 2005, with the Pennsylvania Labor Relations Board (Board) from a Proposed Decision and Order (PDO) issued May 19, 2005. In the PDO, the Hearing Examiner concluded that Commonwealth of Pennsylvania, Department of Corrections (Commonwealth) had not committed unfair labor practices within the meaning of Section 1201(a)(1) and (3) of the Public Employe Relations Act (PERA) by discriminating against Complainant for his participation in protected activities.

Complainant's exceptions are difficult to decipher; however, it appears that Complainant argues the following. The Hearing Examiner erred by 1) failing to find and conclude that the Commonwealth violated Section 1201(a)(1) and (3) of PERA by discriminating against Complainant for his participation in protected activities, 2) failing to find that the Commonwealth violated Complainant's right to representation by his collective bargaining representative, Pennsylvania State Corrections Officers' Association (Union), and 3) failing to find that the Commonwealth violated Section 1201(a)(1) and (3) of PERA by refusing to permit Complainant's attorney from speaking at his pre-disciplinary conference.

The Hearing Examiner's findings of fact may be summarized as follows. Complainant worked as a correctional officer for the Commonwealth since 1993, and at the time of his termination in December 2001, he served as a Union shop steward. By letter dated December 12, 2001, the Commonwealth informed Complainant that he was suspended without pay pending investigation of allegations that he filed a fraudulent worker's compensation claim and violated certain, enumerated sections of the Department of Correction's code of ethics. By letter dated January 16, 2002, after holding a pre-disciplinary conference on January 4, the Commonwealth informed Complainant of his termination for violations of the Department of Correction's code of ethics.

Complainant's exceptions fail to comply with the criteria set forth in Section 95.98 of the Board's Rules and Regulations for a statement of exceptions. However, the Board will consider exceptions to a proposed decision and order that do not conform to the Board's rules if they are stated with sufficient specificity to permit meaningful review. See, *e.g.*, PLRB v. Lawrence County, 12 PPER ¶ 12312 (Final Order, 1981). Therefore, the Board will address Complainant's exceptions that are sufficiently specific to permit meaningful review.

In his exceptions, Complainant alleges that the Hearing Examiner erred in failing to conclude that the Commonwealth fired him for his participation in protected activities. The law is well established that

the charging party in a discrimination case has the burden of proving (1) that the employe engaged in protected activity, (2) that the employer was aware of the protected activity, and (3) that the employer took adverse action against the employe because of a discriminatory motive or anti-union animus. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). While Complainant established his participation in protected activities (serving as Union shop steward) and the Commonwealth's knowledge of this activity, the Hearing Examiner concluded based on the record that Complainant never established a nexus between his participation in protected activities and his termination. As the Hearing Examiner stated in his discussion:

> Bennett alleges that the Commonwealth's investigation of his actions was "flimsy" and "shoddy" (N.T. 153, 154), and that the Commonwealth didn't follow the proper disciplinary procedures (N.T. 154). Moreover, Bennett asks, "is this a basis upon which to dismiss a nine year veteran with a very good record...?" (N.T. 150). In urging that the Commonwealth really terminated Bennett for his protected activity as a union official, Bennett's argument is, basically, "What other reason could there be...?" (N.T. 157). These arguments are better suited for an arbitrator than a hearing examiner, for it is the arbitrator who decides the contractual validity and the fundamental fairness of a termination[1]. The hearing examiner's narrow purview is whether or not the Act has been violated, in this case, by the Commonwealth. Bennett has simply failed to prove a prima facie case. There is insufficient proof that the Commonwealth's actions were motivated by other than the reasons set forth in the notice of termination.[2]

(PDO, p.3). Our review of the record also discloses no evidence that would satisfy the third requirement of the St. Joseph's Hospital burden of proof, and we therefore dismiss the exceptions.

Complainant next argues that the Hearing Examiner erred by failing to find that the Commonwealth violated his right to Union representation, an issue not addresses in the PDO. An examination of the record reveals one possible instance where this issue may be relevant. During the hearing before the Board, Complainant testified that he attempted to contact the Union leadership from the employer's workplace and during working hours to discuss the incident that caused his alleged injury. (N.T. 54). The Commonwealth never challenged or

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[1]Bennett's discharge was taken to grievance arbitration, and, on June 26, 2003, the arbitrator returned Bennett to his former position, turning his termination into a disciplinary suspension from the date of discharge to the date of the arbitration award, without pay or contractual benefits. In returning Bennett to Commonwealth employment, the arbitrator found Bennett to have committed the acts the Commonwealth alleged, but faulted the Commonwealth for not considering Bennett's prior nine-year employment record in it's decision. (Employer Exhibit 1, p. 10)

[2]A charge of discrimination can also be sustained when it is shown that the employe in question was the victim of disparate treatment by the employer. City of Reading v. PLRB, 568 A.2d 715 (Pa. Cmwlth. 1989). Bennett makes no disparate treatment argument here.

rebutted this testimony, raising no issue of credibility for the Hearing Examiner to resolve. In support of this argument, Complainant cites to the "Weingartern Act." The Board assumes that Complainant intended to cite to NLRB v. Weingarten, Inc., 420 U.S. 251 (1975), which has been adopted by the Board and the Courts. See Commonwealth of Pennsylvania, Pennsylvania Emergency Management Agency v. PLRB, 768 A.2d 1201 (Pa. Cmwlth. 2001). These cases hold that a public employe has the right to representation at an investigatory interview with his or her employer, which the employe reasonably believes may result in the imposition of discipline. Since Complainant never alleged that the Commonwealth refused his request for Union representation at an investigatory interview, Complainant's Weingarten rights were never implicated or violated. Therefore, this exception is dismissed.

Next, Complainant alleges that the Hearing Examiner erred in failing to find that the Commonwealth violated PERA by refusing to allow Complainant's attorney from speaking at his pre-disciplinary conference. The Board has previously held that a member of a bargaining unit does not possess a statutory right to be represented by a personal attorney at a pre-disciplinary conference. See Cheltenham Township Police Association v. Cheltenham Township, 36 PPER 4 (Final Order, 2005). Therefore, the Commonwealth's refusal to permit Complainant's attorney from speaking at the pre-disciplinary conference did not constitute a violation of PERA. Therefore, this exception is dismissed.

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 final.

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 in the above-captioned matter be and the same are hereby dismissed and the Proposed Decision and Order be and the same is hereby made absolute and final.

SIGNED, SEALED, DATED and MAILED this sixteenth day of August, 2005.

PENNSYLVANIA LABOR RELATIONS BOARD

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L. DENNIS MARTIRE, CHAIRMAN

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ANNE E. COVEY, MEMBER

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JAMES M. DARBY, MEMBER