COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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

FINAL ORDER

On March 31, 2004, the Commonwealth Court, vacated and remanded the Final Order of the Pennsylvania Labor Relations Board (Board) issued July 15, 2003, for reconsideration in light of that Court's decision issued two days earlier in Commonwealth of Pennsylvania, Office of Administration v. Pennsylvania Labor Relations Board, 848 A.2d 1063(Pa. Cmwlth., 2004) (PSCOA).[1] Cheltenham Township v. Pennsylvania Labor Relations Board, 846 A.2d 173 (Pa. Cmwlth. 2004). The underlying issue presented in this case is whether the public employer violated an employe's Weingarten right[2] in an investigatory interview when it denied representation by an attorney retained by the union where the employe had a reasonable expectation of discipline. It is beyond dispute that Pennsylvania has adopted Weingarten in the public sector, and the issue presented here is the appropriate application of the Weingarten rule to the facts presented on this record.

The Commonwealth Court affirmed the Board's holding that the Township violated Section 6(1)(a) of the PLRA by refusing to allow a union retained Weingarten representative to assist an employe at an investigatory interview. Nevertheless, the Commonwealth Court vacated the Board's order to allow the Board the opportunity to reexamine its position in light of the Court's decision in PSCOA, in which the Court held that Weingarten rights are an extension of the collective bargaining process. The Board welcomes this opportunity to reexamine its position on Weingarten in light of these recent decisions from the Commonwealth Court.

Following the remand order, to assist the Board in its reconsideration, the Secretary of the Board requested the parties to file supplemental briefs on the issues raised by the Commonwealth Court. On May 24, 2004, the Cheltenham Township Police Association (Association) filed its supplemental brief asserting that PSCOA misinterpreted Weingarten, but that even under the Court's holding, the Board should reaffirm its finding of an unfair labor practice. On May 27, 2004, Cheltenham Township (Township) filed a letter brief also asserting that the Commonwealth Court misinterpreted Weingarten,

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[1] Application for Reargument en banc denied May 24, 2004, *petition for allowance of appeal,* 531 MAL 2004 (filed June 23, 2004). As of the issuance of this Final Order, the Board's Petition for Allowance of Appeal is pending with the Pennsylvania Supreme Court.

[2] National Labor Relations Board v. J. Weingarten, Inc., 420 U.S. 251, 95 S.Ct. 959 (1975), holding that an employe has the right to assistance of a union representative at an interview with the employer where the employe has a reasonable fear that discipline may result from the investigation.

and again arguing that the Board's holding that an attorney may act as a Weingarten representative is not in accord with Weingarten. After a thorough review of the matters raised by the Commonwealth Court in the remand order, the briefs, exceptions, and all matters of record, pursuant to the remand, the Board issues this Final Order.

As a preliminary matter, because the Commonwealth Court vacated the prior Final Order, the Board readopts and incorporates the Findings of Fact set forth in the Proposed Decision and Order of April 28, 2003, as amended in the July 15, 2003 Final Order, as if repeated at length herein.

It had long been established in Pennsylvania, beginning with PLRB v. Conneaut School District, 10 PPER ¶ 10092 (Nisi Decision and Order, 1979), aff'd, 12 PPER ¶ 12155 (Final Order, 1981) (decided under PERA) and PLRB v. Township of Shaler, 11 PPER ¶ 11347 (Nisi Decision and Order, 1980)(decided under Act 111 and the PLRA), that the right of "employes" to engage in lawful "concerted activities for the purposes of … mutual aid and protection" encompassed an individual employe's right to assistance at an employer conducted investigatory interview when the employe had a reasonable expectation that discipline might be imposed based on the interview results. In reaching this result, the Board primarily relied on virtually identical statutory language in Section 7 of the National Labor Relations Act as well as on the United States Supreme Court's decision in Weingarten.

Section 5 of the PLRA provides "Rights of Employes. – Employes shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representative of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection."[3] 43 P.S. §211.5 (emphasis added). In language nearly identical in all material respects, Section 7 of the National Labor Relations Act, provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

29 U.S.C. §157 (emphasis added).[4]

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[3] Recognizing that police officers and fire fighters are entitled to the same right to enagage in mutual aid and protection as other public employes, our Supreme Court held that Act 111 and the PLRA are statutes to be read *in pari materia*. Philadelphia Fire Officers Association v. Pennsylvania Labor Relations Board, 470 Pa. 550, 369 A.2d 259 (1977).

[4] PERA contains a virtually identical grant of employe rights in Section 401, which states:

> It shall be lawful for public employes to organize, form, join or assist in employe organizations or to engage in lawful concerted

In interpreting this language, the United States Supreme Court in Weingarten acknowledged that:

> respondent employer's denial of an employee's request that her union representative be present at an investigatory interview which the employee reasonably believed might result in disciplinary action constituted an unfair labor practice in violation of § 8 (a)(1) of the National Labor Relations Act, amended, 61 Stat. 140, because it interfered with, restrained, and coerced the individual right of the employee, protected by § 7 of the Act, "to engage in . . . concerted activities for . . . mutual aid or protection . . . ."

Weingarten, 420 U.S. at 252, 95 S. Ct. at 961 (emphasis added). At the outset of its landmark decision, the United States Supreme Court extrapolated and approved five numbered principles from the National Labor Relation Board's holding in Weingarten, including "*First*, the right inheres in § 7's guarantee of the right of employees to act in concert for mutual aid and protection[,]" Id., at 256, "*Fourth*, exercise of the right may not interfere with legitimate employer prerogatives[,]" Id. at 258, and "*Fifth*, the employer has no duty to bargain with any union representative who may be permitted to attend the investigatory interview." Id. at 259. Indeed, in Slaughter v. NLRB, 794 F.2d 120, 126 (3rd Cir. 1986) the Third Circuit Court of Appeals noted "that the Weingarten right is rooted in §7's protection of concerted activity, not §8(a)(5)'s guarantee of the right to bargain collectively." Thus, the Board had consistently dismissed claims that an employer violated its collective bargaining duty by denying an employe a Weingarten representative, and instead ground Weingarten unfair practice claims on Section 6(1)(a) of the PLRA and Section 1201(a)(1) of PERA, which protect employes in the exercise of the right to engage in concerted activity for mutual aid and protection. *E.g.* Pennsylvania State Corrections Officers Association v. Commonwealth of Pennsylvania, 33 PPER ¶ 33177 (Final Order, 2002), *affirmed*, 826 A.2d 932 (Pa. Cmwlth. 2003).

While the Board may not create rights or prohibited practices where none exist under statute, *see* Salvation Army Case, 349 Pa. 105; 36 A.2d 479 (1944), when it comes to defining labor policy and what constitutes an unfair labor practice within the meaning of the PLRA or PERA, the courts have generally deferred to the Board's application and understanding of the prohibited practices set forth in the Pennsylvania labor statutes. Whittaker Borough v. Pennsylvania Labor Relations Board, 556 Pa. 559; 729 A.2d 1109 (1999); American Federation of State, County and Municipal Employees, Council 13, AFL-CIO v. Pennsylvania Labor Relations Board, 616 A.2d 135 (Pa. Cmwlth. 1992). Thus, with the exception of PSCOA, since Conneaut School District, the Commonwealth Court has consistently affirmed the Board's final orders

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> activities for the purpose of collective bargaining or other mutual aid and protection or to bargain collectively through representatives of their own free choice and such employes shall also have the right to refrain from any or all such activities, except as may be required pursuant to a maintenance of membership provision in a collective bargaining agreement.

expressly relying on the Supreme Court's holding in Weingarten to recognize an employe's right to representation at investigatory interviews as arising out of the employe's right to engage in mutual aid and protection within the meaning of Section 401 of PERA and Section 5 of the PLRA. American Federation of State, County and Municipal Employes v. Pennsylvania Labor Relations Board, 514 A.2d 255 (Pa. Cmwlth. 1986); City of Reading v. Pennsylvania Labor Relations Board, 689 A.2d 990 (Pa. Cmwlth. 1987); Pennsylvania Emergency Management Agency (PEMA) v. Pennsylvania Labor Relations Board, 768 A.2d 1201 (Pa. Cmwlth. 2001); Commonwealth of Pennsylvania v. Pennsylvania Labor Relations Board, 826 A.2d 932 (Pa. Cmwlth. 2003); and Duryea Borough Police Department v. PLRB, ___ A.2d ___, No. 772 C.D. 2004 (Pa. Cmwlth. filed October 14, 2004). Indeed, in remanding this case, the Commonwealth Court, quoting the United States Supreme Court's language from Weingarten, recognizes that the right to union representation at investigatory interviews arises from the right of a public employe "to engage in concerted activities for the purpose of . . . mutual aid or protection." 43.P.S. § 211.5; 43 P.S. §1201.401. Moreover, previously, in PEMA, where the employer claimed the individual employe lacked standing to assert Weingarten rights through intervention in the charge initiated by his union, the Commonwealth Court dismissed the appeal, affirming the Board's determination that the affected employe was "the real party in interest", since the dispute was one over the "employee's Weingarten rights." PEMA, 768 A.2d at 1205.

However, in PSCOA, the Commonwealth Court states:

> Nothing in PERA gives the Board the power to vest in any particular employee any particular collective bargaining rights because PERA is a collective bargaining statute vesting all rights in a union, and only it and no individual employee has any individual collective bargaining right *vis-à-vis* the employer. Although the [PLRB] has premised its rights on the same sections Weingarten did, as can be seen, those sections and those rights have nothing to do with the rights of individual employees but the rights of the union. The Weingarten rule rests solely on the provisions of PERA that involve collective bargaining rights giving the union the right to be present to protect its interests; however, nothing in Weingarten confers any individual rights.

PSCOA, 848 A.2d at 1068. In its remand order in Cheltenham Township, the Court appears to support the traditional view of Weingarten:

> Naturally, we begin our analysis with Weingarten, where the United States Supreme Court held that employees have the right, if they so request, to a union representative or union steward during investigatory interviews conducted by their employers where the employee reasonably believes that discipline might result from the interview. The Court fashioned what are now commonly known as "*Weingarten* rights" from the language of Section 7 of the National Labor Relations Act (NLRA), 29 U.S.C. § 157, which grants employees the right to "engage in other concerted activities for the purpose of ... mutual aid or protection." Id. The Court explained this phrase as follows:
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> > When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they

> engage in a 'concerted activity' for 'mutual aid or protection,' although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is 'mutual aid' in the most literal sense, as nobody doubts.

Weingarten, 420 U.S. at 261 (quoting Houston Contractors Association. v. National Labor Relations Board, 386 U.S. 664, 668-69, 18 L. Ed. 2d 389, 87 S. Ct. 1278 (1967)). The Court also noted that exercising the right to representation serves as a balance of power in the workplace:

> The Board's construction [of Section 7 of the NLRA] also gives recognition to the right when it is most useful to both employee and employer. A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. A knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview.

Weingarten, 420 U.S. at 262-63. Because the language under Section 7 of the NLRA and Section 5 of the PLRA is identical, *see* 43 P.S. § 211.5, the Board has adopted Weingarten. Pennsylvania Labor Relations Board v. Conneaut School District, 12 Pa. Pub. Empl. Rep. P12155 (Final Order, 1981).

Cheltenham Township, 846 A.2d at 176-177. The Commonwealth Court's holding in PSCOA that PERA is a collective bargaining statute vesting "all rights in a union," is not consistent with the United States Supreme Court's holding in Weingarten, the Court's subsequent remand opinion and order in Cheltenham Township, and the right of employes to engage in mutual aid and protection as previously recognized. Merely characterizing the NLRA, PERA, PLRA and Act 111 as "collective bargaining statutes" does not support the notion that employes covered by those statutes have no rights under them.[5] While the Board readily

[5] There is a consistent body of law historically followed by both the Pennsylvania Supreme and Commonwealth Courts that evidence the clearly established principle that PERA and the PLRA grant enforceable rights to individual employes. Pennsylvania Labor Relations Board v. Zelem, 459 Pa. 399, 329 A.2d 477 (1974); Hollinger v. Department of Public Welfare, 469 Pa. 358, 365 A.2d 1245 (1976); Pennsylvania Labor Relations Board v. Fabrication Specialists, 477 Pa. 23, 383 A.2d 802 (1978); Martino v. Transport Workers' Union of Philadelphia, Local 234, 505 Pa. 91, 480 A.2d 242 (1984); Pennsylvania Labor Relations Board v. Rizzo, 344 A.2d 744 (Pa. Cmwlth. 1975); Giovinazzo v. Pennsylvania Labor Relations Board, 415 A.2d 1267 (Pa. Cmwlth. 1980); Biviano v. Pennsylvania Labor Relations Board, 430 A.2d 708 (Pa.

agrees, and has consistently held that individual employes have no collective bargaining rights, *e.g.* Maggs v. Pennsylvania Labor Relations Board, 413 A.2d 453 (Pa. Cmwlth. 1980), the simple fact is that laws such as the NLRA, PERA, and the PLRA grant certain other rights to individuals, including the right to engage in concerted activity for the purpose of mutual aid and protection, (which the U.S. Supreme Court clearly and expressly sought to protect in Weingarten). The Commonwealth Court, in PSCOA, characterized the Board's position as an attempt to "vest … collective bargaining rights … [in] individual employe[s]," however, the Board has consistently applied its long standing and careful history of distinguishing between an individual employe right to engage in mutual aid and protection and collective (i.e. union) right to bargain, recognized and affirmed in the Commonwealth Court's subsequent decision in Cheltenham Township.

We believe the interests of the employer, the union and the employe whose rights are at issue are best served by the approach set forth in the Commonwealth Court's *en* banc decision in Cheltenham Township rather than the prior PSCOA panel decision. First, the employer's interest in a Weingarten interview is specific and focused, and has nothing to do with collective bargaining. By nature, a Weingarten interview is an employer initiated investigatory interview of an employe,[6] where the employer has reason to suspect employe misconduct that may result in serious discipline, including dismissal. The interview itself is an exercise of managerial prerogative (the employer's right to supervise, discipline, and if necessary to discharge employes for cause) and is not, as the Supreme Court points out in Weingarten, affected by the right of employes to collectively bargain through their representative. It is the Board's experience that usually some pre-interview investigation has been undertaken by the employer and the interview serves the employer's interest in confronting the employe with the employer's information and hearing the employe's version before it decides to impose discipline. The interview assists the employer in hearing from the employe directly and can avoid poor managerial decisions regarding employe discipline, where an ounce of informed prevention through the interview is

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Cmwlth. 1981); Burse v. Pennsylvania Labor Relations Board, 425 A.2d 1182 (Pa. Cmwlth. 1981); Pennsylvania Labor Relations Board v. Chappelle, 441 A.2d 521 (Pa. Cmwlth. 1982); Philadelphia Housing Authority v. Pennsylvania Labor Relations Board, 461 A.2d 649 (Pa. Cmwlth. 1983); Repko v. Pennsylvania Labor Relations Board, 513 A.2d 518 (Pa. Cmwlth. 1986); and Hazelton Area Education Association v. Pennsylvania Labor Relations Board, 503 A.2d 71 (Pa. Cmwlth. 1988); PEMA, supra.

[6] The PSCOA panel decision relied on Section 606 of PERA (which authorizes individuals to initiate contact directly with the employer outside the collective bargaining process) as support for the view that individuals have no bargaining rights. Although the Board agrees, and has uniformly held that individuals cannot assert bargaining rights, we believe Section 606 has little or no bearing on Weingarten matters. Section 606 provides, consistent with PLRB and Commonwealth Court authority (Maggs, supra), that the union is the exclusive representative of the employes for collective bargaining -- but of course, Weingarten itself clearly establishes that in an investigatory interview no bargaining takes place and no bargaining rights are at issue. Further, the right granted individuals in Section 606 to approach an employer about an employment matter has nothing to do with an employer initiated investigatory interview of the employe where discipline may result.

worth a pound of expensive cure through subsequent "just cause" grievances over poorly informed management decisions. The entire purpose of Weingarten is to provide the employe's account of the circumstances to assist the employer in making an informed decision about discipline in order to avoid unnecessary post-discipline grievance/arbitration litigation.

As recognized by the United States Supreme Court in Weingarten, and quoted by the Commonwealth Court in Cheltenham Township:

> The Board's construction [of Section 7 of the NLRA] also gives recognition to the right when it is most useful to both employee and employer. A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. A knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview.

Weingarten, 420 U.S. at 262-63; Cheltenham Township, 846 A.2d at 177. The observation of the Weingarten right as enunciated by the United States Supreme Court, and adopted by the Board, avoids unwarranted after the fact grievances, the unnecessary expenditure of tax dollars for grievance/arbitration litigation and potentially costly back pay awards.

This principle is aptly demonstrated in the facts of an appeal the Commonwealth Court decided just prior to Cheltenham. In Commonwealth of Pennsylvania, supra, the Commonwealth Court affirmed the Board order where following the employer's questioning, when the nervous employe provided evasive responses, the employe consulted with his representative who urged the employe to fully disclose surrounding circumstances which obviated a less than fully informed managerial decision and a potential grievance/arbitration was avoided. This is precisely what the Supreme Court contemplated in Weingarten where timely intervention assists a thorough investigation where all sides of the matter are explored before a management decision is made. As the Supreme Court aptly notes, the goal is to avoid the expensive and wasteful grievance/arbitration where a fully informed managerial decision minimizes arbitrary disciplinary decisions.

The view in PSCOA that the Weingarten representative is present to protect the union's right in any subsequent grievance/arbitration if discipline is imposed, was an argument specifically rejected by the Supreme Court in Weingarten:

> Respondent suggests nonetheless that union representation at this stage is unnecessary because a decision as to employee culpability or disciplinary action can be corrected after the decision to impose discipline has become final. In other words, respondent would defer representation until the filing of a formal grievance challenging the employer's determination of guilt after the employee has been discharged or otherwise disciplined. At that point, however, it becomes increasingly difficult for the employee to vindicate himself, and the value of representation is correspondingly diminished. The employer may then be more concerned with justifying his actions than re-examining them.

Weingarten, 420 U.S. at 263-64. Casting the Weingarten right in collective bargaining terms for the purpose of preserving the union's role in a subsequent grievance/arbitration, in reality, defeats the real nature and purpose of the representation -- to assist a reluctant and nervous employe which inevitably provides help to the employer at a time when assistance is most helpful to the employe and employer, and may obviate the grievance. Weingarten, 420 U.S. at 262-63. Indeed, the Board believes it is the fundamental nature of an investigation to discover all the facts before taking action.

We further believe that casting Weingarten as a right solely possessed by the union, as collective bargaining representative, will weaken the managerial prerogative nature of such interviews. The Supreme Court was careful to expressly support the managerial prerogative nature of such an interview and reject any notion that collective bargaining or collective bargaining rights play a part in Weingarten. Weingarten, where properly observed by both sides, is neither a means by which the employe and his/her representative can undermine or negate management's investigation, nor is it support for an employer's single minded purpose or interest in building a case against an employe regardless of the facts. Regarding Weingarten rights as an extension of the bargaining process upsets the balance the United States Supreme Court struck in trying to protect both management's prerogative to conduct such interviews on its terms, and the right of the employe to have the mutual aid and assistance of his/her representative during the interview.

Viewing Weingarten as a collective bargaining matter empowering the union in its capacity as collective bargaining representative, will, we believe, have the unintended consequence of weakening the employer's managerial prerogatives in the Weingarten process. Characterizing a matter as part and parcel of collective bargaining rights generally establishes a right and duty to collectively bargain. Pennsylvania Labor Relations Board v. State College Area School District, 461 Pa. 494, 337 A.2d 262 (1975). If Weingarten is considered a bargaining matter, then, while management has a right to hire, fire and direct its workforce, it would have an obligation to collectively bargain over the wage, hour and working condition impact of the exercise of managerial prerogatives. Lackawanna County Detectives' Association v. Pennsylvania Labor Relations Board, 762 A.2d 792 (Pa. Cmwlth. 2000). Under an impact bargaining analysis this right normally would include reasonable notice of the matter under investigation, the right to certain information,[7] and likely a duty to negotiate time and place of interviews which would afford that a union designated representative (such as an attorney who is not present at the worksite) to attend on behalf of the union. We believe Weingarten as an extension of collective bargaining would unnecessarily entangle management in a bargaining process not envisioned by Weingarten, or the Board in its precedent following Weingarten.

[7] The law is well established that the union has a right to information reasonably necessary to carrying out its bargaining obligations. Commonwealth v. Pennsylvania Labor Relations Board, 527 A.2d 1097 (Pa. Cmwlth. 1987); Pennsylvania Labor Relations Board v. Community Mental health Center of Beaver County, 8 PPER 114 (Nisi Decision and Order, 1977).

A Weingarten investigatory interview should be an exercise of managerial prerogative to direct and manage the employer's workforce, with the representative present merely to assist the employe in the interview, and not pursuant to any present or prospective collective bargaining interest. Management should retain the right, unfettered by collective bargaining or the collective bargaining representative, to schedule and conduct the interview using legitimate investigative techniques, (*e.g*. surprising the interviewee with information, keeping the interviewee off balance in questioning, etc.) and retain the exclusive province to evaluate the results of its investigatory interview. Regarding Weingarten solely as an employe right to engage in mutual aid and protection, and not as a collective bargaining right, vests the employer with discretion regarding the circumstances of the interview (when it will be conducted, advance notice, the representative must be available at the worksite[8]). These managerial rights will be blunted or thwarted by casting Weingarten as a collective bargaining matter involving only "union rights," since, it will bring to bear the statutorily conferred right the union possesses in the collective bargaining process to be present and consulted by the employer in good faith.

In PSCOA Commonwealth Court cautions that certain distinctions exist between collective bargaining in the public and private sectors of employment. Since the inception of PERA in 1970 the Board has taken a cautious approach toward application of federal authority, including Weingarten, *see e.g.* American Federation of State County and Municipal Employees v. Department of Transportation, 16 PPER ¶ 16,019 (Final Order, 1984), *affirmed*, American Federation of State County and Municipal Employees v. Pennsylvania Labor Relations Board, 514 A.2d 255 (Pa. Cmwlth. 1986) (declining to extend Weingarten protections to employes undergoing desk audits),[9] consulting federal labor law decided in the private employment sector where public and private sector issues are the same or similar, *e.g.* Pennsylvania Labor Relations Board v. Altoona Area School District, 480 Pa. 148; 389 A.2d 553 (1978), and not where public and private sector policies differ. *E.g.* American Federation of State County and Municipal Employees,

[8] The Board sustained the employe's right to designate Jeffrery Kolansky, Esquire merely because the employer provided advance notice to the employe of the time and place of the interview, such that Kolansky was present and available at the interview. Had the employer provided no advance notice, and Kolansky was unavailable, another representative would have been required if the employe desired representation.

[9] In PSCOA, Commonwealth Court states that the Board "extended" Weingarten to allow the employe's choice of a representative (in lieu of the representative summoned by the employer) without adequate explanation for its following recent federal precedent. Anheuser-Busch, Inc. and International Brotherhood of Teamsters, 337 NLRB No. 2 (2001), *affirmed*, Anheuser-Busch, Inc. v. National Labor Relations Board, 338 F.3d 267 (4th Cir. 2003), *cert. denied*, ___ U.S. __, 2004 U.S. LEXIS 2575 (No. 03-949, April 5, 2004)(holding that an employe may select from among the available union representatives). However, the Board did not consider the result in PSCOA, or for that matter Cheltenham Township, as an "extension" of Weingarten rights because the facts of both cases fall squarely within the statutory grant of the right of mutual aid and protection, and the original articulation of the rule in both Weingarten and Conneaut School District, supra.

Council 13 v. Pennsylvania Labor Relations Board, 529 A.2d 1188 (Pa. Cmwlth. 1987). We note that in relevant particulars the grant of individual employe rights in Section 7 of the NLRA, Section 5 of the PLRA, and Section 401 of PERA are virtually identical, as expressly noted by the Commonwealth Court in Cheltenham Township. The Board believes that where our legislature, thirty-five years after passage of the NLRA, enacts similar rights applicable to public employes in virtually identical statutory terms, it is reasonable to believe that it intended the same meaning to be attached to statutory terms applicable in Pennsylvania. In addition, the policy and purpose of Weingarten is applicable to both private and public sector employers, who share a common interest in making a fully informed decision before disciplining an employe. Indeed our Supreme Court has reviewed dozens of Board final orders where a party challenged reliance on federal authority in the public sector as inappropriate and has virtually, without exception, affirmed that reliance. *See e.g.* Whitaker Borough, supra; Pennsylvania Labor Relations Board v. Mars Area School District, 480 Pa. 295, 389 A.2d 1073 (1978); Pennsylvania Labor Relations Board v. Employees' Committee of the Wilkinsburg Sanitation Department, 463 Pa. 521; 345 A.2d 641 (1975); Commonwealth of Pennsylvania, Department of Corrections v. Pennsylvania Labor Relations Board, 541 A.2d 1168 (Pa. Cmwlth. 1988); Altoona Area School District, supra.

The issue then is not wholesale disregard of federal experience, but rather on a case by case basis, whether there exists a meaningful difference between governmental and private sector employment regarding the matter at issue. Here the issue is defining the parameters of a mechanism which balances and protects management's interest in conducting a full inquiry of the facts, while protecting the employe's right under Section 401 of PERA and Section 5 of the PLRA to have the assistance of a representative in an investigatory interview where there exists a reasonable expectation that discipline may follow. For the reasons above stated, we believe the Weingarten right, as applied by the Board, serves the interests of both the employer in facilitating an unimpeded, full, timely inquiry of the facts before imposing discipline, and the interests of the employe in obtaining effective, timely assistance when it is most needed.

In striking this balance the Board has stated that a representative must be available at the worksite at the designated time, Boling v. Commonwealth of Pennsylvania, Department of Public Welfare (Mayview State Hospital II), 18 PPER ¶ 18096 (Final Order, 1987) and cannot obstruct or disrupt management's questioning, Pennsylvania State Correctional Officers Association v. Commonwealth of Pennsylvania, 33 PPER ¶33,177 (Final Order, 2002), *affirmed sub nom*, Commonwealth of Pennsylvania, supra. An employe is not entitled to representation where there is no reasonable expectation that discipline may follow, AFSCME, supra, and is not entitled to a representative where a meeting is convened to announce or impose discipline already determined by the employer. American Federation of State, County and Municipal Employees v. Commonwealth of Pennsylvania, 18 PPER ¶18029 (Final Order, 1986). The employer is under no duty to counsel employes as to right to representation under Weingarten. Community College of Beaver County, Society of the Faculty v. Beaver County Community College, 17 PPER ¶17121 (Final Order, 1986). The employer may decline to interview the employe as part of its investigation, or may even cancel an interview if the employe exercises his/her Weingarten right.

Further, it has been expressed on occasion, by advocates and the courts, that inadequate consideration is given to the fact that labor relations decisions in the public sector impact the public trust vested in

government. In this regard, the Commonwealth Court has observed that the grievance arbitration process, particularly the inability of a reviewing court under Pennsylvania State Police v. Pennsylvania State Troopers' Association (Betancourt), 540 Pa. 66, 656 A.2d 83 (1995) to effectively review grievance awards on appeal, may disserve that public trust through grievance awards reversing discipline and discharge of persons who should not be employed in government because they violated that public trust. Pennsylvania State Police v. Pennsylvania State Troopers Association (Smith), 698 A.2d 688 (Pa. Cmwlth. 1997) and Pennsylvania State Police v. Pennsylvania State Troopers Association (Johnson), 698 A.2d 686 (Pa. Cmwlth. 1997), *affirmed,* 559 Pa. 586, 741 A.2d 1248 (1999). It is precisely because grievance arbitration awards under Act 111 must be affirmed unless they mandate the performance of an illegal act, and the mere failure to draw their essence from the contract is insufficient, Bensalem Township v. Bensalem Township Police Benevolent Association, Inc., 803 A.2d 239 (Pa. Cmwlth. 2002), *appeal dismissed,* 849 A.2d 1152 (Pa. 2004), that it is vitally important, and cost effective in minimizing often fruitless attempts to reverse grievance awards on appeal, that an Act 111 employer make a sound, well informed decision regarding the imposition of discipline. The Board believes those concerns are better served by a fully informed managerial decision prior to discipline, in part through observation of Weingarten rights in investigatory interviews, rather than by minimizing the employe's opportunity to effectively relate his side of the situation until after discipline is imposed. If the resulting grievance arbitration award is fully binding on the employer, its interests are best served by a fully informed decision to impose discipline in the first place.[10] The public interest is not served by viewing Weingarten interviews as mere ammunition gathering events for unions to litigate unnecessary, and potentially costly, grievances and arbitrations. Public employers, unions, public employes, and the public in general, are best served by a full and candid investigation into the surrounding facts before discipline is imposed (and not after) to obviate resort to an unnecessary and costly grievance and arbitration procedure where public funds are expended to justify challenged managerial decisions about employe discipline.

Weingarten, where properly observed by both sides is neither a means by which the employe and his/her representative can undermine or negate management's investigation, nor is it support for an employer's single minded purpose or interest in building a case against an employe regardless of the facts. Neither party is served by such an approach, and the Board believes its policies adopted on a case by case approach and reaffirmed here today, strike an appropriate balance between managerial prerogatives and employe rights.

After a thorough review of the remand order of the Commonwealth Court, the supplemental briefs, and all matters of record, the Board shall adopt the Findings of Fact set forth in the Proposed Decision and Order of April 28, 2003, as amended by the Final Order of July 15, 2003, and also adopt the Conclusions of Law therein.

[10] Weingarten does not provide an employe with any additional job security once the interview is completed. Any contractual or property rights a public employe possesses or does not possess are unaffected by Weingarten rights.

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 readopts the Findings of Fact, as amended, and the Conclusions of Law, as previously adopted in the Final Order of July 15, 2003.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania, pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, and Anne E. Covey, member, this eighteenth day of January, 2005. 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.