

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PA STATE CORRECTIONS OFFICERS ASSOCIATION :
: :
v. : Case No. PERA-C-06-289-E
: :
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF CORRECTIONS :
FOREST SCI :

PROPOSED DECISION AND ORDER

On June 22, 2006, the Pennsylvania State Corrections Officers Association (Association) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair practices alleging that the Commonwealth of Pennsylvania (Commonwealth) violated section 1201(a)(1) of the Public Employe Relations Act (Act) by denying Officer Steven Dietrick's request to be represented by Officer Vincent Schaffer at an investigatory interview. On August 18, 2006, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on November 1, 2006. A hearing examiner thereafter continued the hearing at the request of both parties.

On January 24, 2007, the hearing was held. Both parties were afforded a full opportunity to present evidence and to cross-examine witnesses. On March 22, 2007, each party filed a brief by hand-delivery or deposit in the U.S. Mail.

The hearing examiner,¹ on the basis of the evidence presented by the parties at the hearing and from all other matters of record, makes the following:

FINDINGS OF FACT

1. On May 31, 2001, the Board certified the Association as the exclusive representative of a bargaining unit that includes corrections officers employed by the Commonwealth at the State Correctional Institution at Forest (SCI-Forest). (Case No. PERA-R-01-153-E)
2. On June 3, 2006, a corrections officer at SCI-Forest (Officer Dietrick) asked a steward for the Association (Officer Schaffer) how to "put on paper" a problem he had with Lt. Shufesky. Officer Schaffer provided Officer Dietrick with a form known as a witness statement to prepare for the filing of a grievance. Officer Dietrick prepared the statement. Officer Schaffer signed the statement as the investigating officer for the Association. (N.T. 7, 12, 15, 19-21)
3. A deputy superintendent at SCI-Forest (Barone) informed Lt. Ernest Mongelluzzo that Officer Schaffer "possibly influenced" Officer Dietrick "in preparing false statements" and directed Lt. Mongelluzzo to investigate the matter. (N.T. 25-27)
4. On June 13, 2006, Lt. Mongelluzzo conducted an investigatory interview of Officer Dietrick. Before the investigatory interview began, Lt. Mongelluzzo asked Officer Dietrick if he wanted union representation. Officer Dietrick requested union representation by Officer Schaffer. Officer Schaffer was two minutes away at the time. Lt. Mongelluzzo denied the request. Lt. Mongelluzzo conducted the investigatory interview with another representative of the Association (Officer Wonderling) as Officer Dietrick's union representative. (N.T. 7-12, 16, 27-28)
5. The Commonwealth never disciplined Officer Dietrick. (N.T. 13)

DISCUSSION

PSCOA has charged that the Commonwealth committed an unfair practice under section 1201(a)(1) by denying Officer Dietrick's request to be represented by Officer Schaffer at

¹ On April 12, 2007, the Board reassigned this case to the hearing examiner.

an investigatory interview. According to the Association, Officer Dietrick had the right to choose Officer Schaffer as his union representative for the investigatory interview even though the Commonwealth was investigating both of them for the same incident at the time. The Association contends that the basis for the Commonwealth's investigation of Officer Schaffer was too nebulous to support a finding that an extenuating circumstance justified the Commonwealth's denial of Officer Dietrick's request. The Association also contends that the investigatory interview involved a statement Officer Dietrick made in connection with the filing of a grievance and therefore was void *ab initio* because Officer Dietrick had the right to file a grievance without reprisal.

The Commonwealth contends that the charge should be dismissed because Officer Dietrick had no right to choose his union representative under the state of the law at the time of the investigatory interview and because he had no right to choose Officer Schaffer as his union representative under the current state of the law. According to the Commonwealth, because it was investigating Officer Dietrick and Officer Schaffer for the same incident at the time of the investigatory interview, an extenuating circumstance justified its denial of Officer Dietrick's request to be represented by Officer Schaffer.

In Commonwealth of Pennsylvania, Office of Administration v. PLRB, ___ Pa. ___, 916 A.2d 541 (2007), the court held that:

"the Weingarten right of an individual employee, that is, the right to obtain a representative to accompany the employee during an interview when the employee reasonably fears that discipline may be imposed by the employer, includes the right to have the union representative of his or her choice, if the assisting union representative is reasonably available and absent extenuating circumstances."

___ Pa. at ___, 916 A.2d at ___ (footnote omitted). In so holding, the court reversed the lower court, which held that an individual employee had no right to choose his or her union representative for an investigatory interview. 848 A.2d 1043 (Pa. Cmwlth. 2004). Thus, under the current state of the law, Officer Dietrick had the right to choose Officer Schaffer as his union representative for the investigatory interview if Officer Schaffer was reasonably available and absent extraordinary circumstances.

No merit is found in the Commonwealth's contention that the charge should be dismissed because Officer Dietrick had no right to choose his union representative under the state of the law at the time of the investigatory interview. To find otherwise would result in the application of law that no longer prevails.

There is no dispute that the interview was investigatory and that Officer Schaffer was reasonably available. The dispositive question, then, is whether or not the Commonwealth established an extenuating circumstance justifying its denial of Officer Dietrick's request to be represented by Officer Schaffer.

In Commonwealth of Pennsylvania, Office of Administration, supra, the court did not define the phrase "absent extenuating circumstances." In Commonwealth of Pennsylvania, Department of Public Welfare, Norristown State Hospital, 32 PPER ¶ 32177 (Proposed Decision and Order 2001), however, a hearing examiner found that a conflict of interest may be an extenuating circumstance justifying the denial of an employee's request to be represented by a particular union representative. In that case, the Commonwealth denied an employee's request to be represented by a union representative who had reported the incident under investigation, but the hearing examiner found that the union representative's knowledge of the incident was second-hand and that the Commonwealth therefore had not proven a conflict of interest. Thus, the hearing examiner concluded that no extenuating circumstance justified the Commonwealth's denial of the request.

According to the Commonwealth, the extenuating circumstance justifying its denial of Officer Dietrick's request to be represented by Officer Schaffer was that Officer Dietrick and Officer Schaffer were under investigation for the same incident at the time of the interview. As the Commonwealth points out, its investigator (Lt. Mongelluzzo) testified that Officer Schaffer's presence at the investigatory interview "could possibly taint the investigation" by giving Officer Schaffer and Officer Dietrick time "to

cooperate their stories" (N.T. 29). As set forth in finding of fact 3, however, the record only shows that the Commonwealth believed that Officer Schaffer had "possibly influenced" Officer Dietrick "in preparing false statements." Thus, as was the case in Commonwealth of Pennsylvania, Department of Public Welfare, Norristown State Hospital, supra, the Commonwealth did not prove a conflict of interest. No extenuating circumstance justifying the Commonwealth's denial of Officer Dietrick's request to be represented by Officer Schaffer is apparent under the circumstances.

Giving the foregoing, there is no need to address the Association's contention that the investigatory interview was void *ab initio* because Officer Dietrick had the right to file a grievance without reprisal.

CONCLUSIONS

The hearing examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds:

1. The Commonwealth is a public employer under section 301(1) of the Act.
2. The Association is an employe organization under section 301(3) of the Act.
3. The Board has jurisdiction over the parties.
4. The Commonwealth has committed an unfair practice under section 1201(a)(1) of the Act.

ORDER

In view of the foregoing and in order to effectuate the policies of the Act, the hearing examiner

HEREBY ORDERS AND DIRECTS

that the Commonwealth shall:

1. Cease and desist from interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of the Act.
2. Take the following affirmative action which the hearing examiner finds necessary to effectuate the policies of the Act:
 - (a) Post a copy of this decision and order within five (5) days from the effective date hereof in a conspicuous place readily accessible to its employes 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 order by completion and filing of the attached affidavit of compliance.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty days of the date hereof, this order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this nineteenth day of April 2007.

PENNSYLVANIA LABOR RELATIONS BOARD

Donald A. Wallace, Hearing Examiner

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April 19, 2007

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COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF CORRECTIONS, FOREST SCI
Case No. PERA-C-06-289-E

Enclosed is a copy of my proposed decision and order.

Sincerely,

DONALD A. WALLACE
Hearing Examiner

Enclosure

cc: Donald Adams
Frank Fisher, Esquire
Percy Poindexter
Jeffrey A. Beard
Bridget E. Clarke, Esquire
Don McNany
Timothy Musser