

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

TIMOTHY A. EIRICH, AARON RENDOS :
AND COUDERSPORT AREA EDUCATION :
ASSOCIATION ¹ :
 :
 :
 v. : Case No. PERA-C-07-348-E
 :
 :
 COUDERSPORT AREA SCHOOL DISTRICT :

PROPOSED DECISION AND ORDER

On August 8, 2007, the Coudersport Area Education Association (Union) filed a charge of unfair practices (Charge) with the Pennsylvania Labor Relations Board (Board) alleging that the Coudersport Area School District (District) violated Section 1201(a)(1), (2), (5) and (9) of the Public Employe Relations Act (PERA) by denying statutory rights to a teacher and his union representative when the Coudersport Elementary School building principal allegedly refused to permit the Union building representative to attend a pre-observation meeting between the principal and the teacher in the morning of April 11, 2007.

On September 12, 2007, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing take place on October 26, 2007 in State College, Pennsylvania. As a result of two continuance requests, one by each of the parties, the examiner scheduled the hearing for February 8, 2008. The hearing was held on that date at the State College Municipal Building. During the hearing, both parties in interest were afforded a full and fair opportunity to present testimonial and documentary evidence and cross-examine witnesses. Also during the hearing, the Union withdrew its causes of action under Section 1201(a)(2), (5) and (9). (N.T. 4). Both parties timely filed post-hearing briefs.

The examiner, based upon all matters of record, makes the following findings of fact.

FINDINGS OF FACT

1. The District is a public employer within the meaning of Section 301(1) of PERA. (N.T. 4).
2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 4).
3. Aaron John Rendos is a non-tenured professional employe who teaches fifth and sixth grade at the Coudersport Elementary School. The 2007-2008 school year is his fourth year of employment at the District.² (N.T. 6).
4. Sherri Cowburn is the building principal for the Coudersport Elementary School. The 2006-2007 school year was the first year of employment at the District for Ms. Cowburn. (N.T. 53).
5. Ms. Cowburn gave Mr. Rendos an unsatisfactory observation rating for the first half of the 2006-2007 school year, i.e., between August 23, 2006 and January 17, 2007. She formally observed Mr. Rendos on January 8, 2007. She held two follow-up meetings with Mr. Rendos to discuss his evaluation on February 16th and 21st of 2007. The unsatisfactory rating was approved and signed by Superintendent George A. Nuffer, III, on

¹ The examiner amended the caption to include two individual complainants, both of whom were included in the caption of the charge of unfair practices and have standing.

² Mr. Rendos testified on page six of the notes of testimony that he teaches social studies, but on page thirty-three of the notes of testimony, Mr. Eirich testified that Mr. Rendos teaches math.

March 2, 2007. On March 29, 2007, Mr. Rendos filed a grievance (Grievance) through the Union contesting the unsatisfactory rating. (N.T. 6-7, 45; Union Exhibit A-1).

6. Timothy A. Eirich is a professional employe who teaches fifth grade math at the Coudersport Elementary School. He has been the Union representative for the building for the past fifteen years. On April 3, 2007, a meeting was held in an attempt to resolve the Grievance. Present at the Grievance meeting were Mr. Eirich, Union President Joseph Gagat, Mr. Robinson and Mr. Nuffer. On April 4, 2007, the Grievance was resolved. The terms of the Grievance resolution were that Mr. Rendos's unsatisfactory observation would remain part of his record, but Ms. Cowburn would perform a second observation procedure with a pre-observation conference, followed by a second observation, which in turn would be followed by a post-observation conference. The purpose of the pre-observation meeting was to require Ms. Cowburn to "give clear, concise direction to the teachers involved to improve and make corrections in their instructional techniques." (N.T. 9, 18, 19-20, 25-27, 41; Union Exhibit A-2; District Exhibit D-1).

7. Some time between April 4, 2007 and April 6, 2007, Mr. Rendos received notice to report to Ms. Cowburn's office for a pre-observation conference at 8:45 on the morning of April 11, 2007. On Friday, April 6, 2007 and again sometime during that weekend, Mr. Rendos contacted Mr. Eirich and asked Mr. Eirich to provide representation at the pre-observation conference. On Monday, April 9, 2007, Mr. Rendos again reminded Mr. Eirich of the April 11, 2007, meeting. The time of 8:45 was selected because it was during Mr. Rendos's planning period. Mr. Rendos was aware that, as a non-tenured teacher, he could be discharged for two unsatisfactory ratings. (N.T. 7-9, 19-20, 29, 45)³.

8. Mr. Rendos and Mr. Eirich arrived together at Ms. Cowburn's office for the scheduled meeting on the morning of April 11, 2007, and Mr. Rendos brought materials with him to make a presentation to Ms. Cowburn. Ms. Cowburn asked Mr. Eirich why he was present at the meeting given the fact that Mr. Eirich was scheduled to be teaching a class. Mr. Eirich informed Ms. Cowburn that another teacher covered his class. Ms. Cowburn warned Mr. Eirich three times to return to his class and then informed Mr. Eirich that he would be written up for insubordination if he did not return to class. Following this exchange, Messrs. Rendos and Eirich met privately and thereafter requested that the meeting be rescheduled for a time after school. Ms. Cowburn agreed, and the pre-observation conference was indeed held at approximately 4:00 in the afternoon on April 11, 2007. Mr. Eirich attended the entire afternoon meeting. Ms. Cowburn and Mr. Rendos did not address the proposed content or substance of the meeting during the attempted pre-observation conference in the morning. During the morning attempt to meet, Mr. Eirich was present taking notes. Mr. Eirich and Mr. Rendos departed from Ms. Cowburn's office in the morning of April 11, 2007 together.⁴ (N.T. 10-11, 15-17, 24, 30-31, 37, 50-52, 55-57).

9. The Coudersport Elementary School has an established procedure when a teacher scheduled to teach a class must attend a scheduled meeting that will last longer than a bathroom break. That procedure requires the teacher to notify the office of the need for classroom coverage. Then the office arranges for the classroom coverage. When the type of teacher meeting involves school counselors, sometimes the counselor will arrange for the classroom coverage. The school does not condone a teacher leaving a classroom of students to cover another classroom. Teachers with their own classroom schedule may be utilized to cover another classroom when they have double planning period and are not leaving a classroom full of students to cover another classroom. Ms. Cowburn also utilizes building substitutes to cover a teacher's classroom when that teacher must attend a meeting. Ms.

³ Page nine, line fifteen of the notes of testimony contains a typographical error. Mr. Rendos's testimony is recorded as stating that he was "well aware that two satisfactories would result in dismissal." The term "satisfactories" as quoted should state "unsatisfactories."

⁴ On pages 32-34 of the notes of testimony, Mr. Eirich's testimony indicates that Mr. Rendos displayed his materials in preparation for the meeting and that substantive discussions occurred during the brief morning meeting. However, Ms. Cowburn's testimony conflicts with Mr. Eirich's on this point. Although she acknowledges that Mr. Rendos brought and displayed materials for the meeting, she confidently testified on pages 52 and 55 that no one got into the content of the meeting and no one addressed the matters contained in District Exhibit D-1, which contained the subjects to be addressed during the pre-observation meeting. The only matters discussed during the morning meeting were the logistics of representation. Based on the demeanor, confidence, specificity, candor and detail of the testimony, I credit Ms. Cowburn's testimony over Mr. Eirich's and find that the parties did not discuss or address the substantive matters planned for the pre-observation hearing.

Cowburn also utilizes the response-to-intervention teacher to cover classes as needed, when a teacher needs coverage for his/her class, because she has more flexibility in her schedule.⁵ (N.T. 48).

10. Mr. Eirich did not comply with the building approved protocol for arranging for classroom coverage during the pre-observation hearing scheduled for the morning of April 11, 2007. Mr. Eirich privately arranged for his own classroom coverage without notifying the office. This other teacher left her own students unattended while checking in on Mr. Eirich's students, as her time was split between two classrooms. (N.T. 29-31, 48).

DISCUSSION

In its charge of unfair practices, the Union alleges that Principal Cowburn refused to permit Union representative Eirich to attend the April 11, 2007, pre-observation hearing "ordering him back to his classroom and leaving Mr. Rendos unrepresented in violation of well-understood Weingarten rights." (Specification of Charges ¶ 5). In its brief, the Union argues that Mr. Rendos was legally entitled to have Mr. Eirich represent him at the pre-observation hearing. The pre-observation meeting constituted an investigatory interview within the meaning of Weingarten and Mr. Eirich was Mr. Rendos's representative of choice and was reasonably available.

Mr. Rendos

Public employes whose collective bargaining rights are governed and protected by PERA enjoy Weingarten protections. Commonwealth of Pennsylvania, Office of Administration v. PLRB, 591 Pa. 176, 916 A.2d 541 (2007); PLRB v. Conneaut School District, 12 PPER ¶ 12155 (Final Order, 1981). This protection affords a union employe "the right to have a union representative join him or her during an investigatory interview, which is an interview in which the employee reasonably believes that an investigation may result in discipline." Id. at 184, 916 A.2d at 546. The employee is entitled to his/her choice of representative, however that choice "is tempered by union representative's reasonable availability and the absence of extenuating circumstances." Id. at 193, 916 A.2d at 551.

To establish a violation of Weingarten protections, a complainant must satisfy the elements of a three-part conjunctive test. The Board articulated this standard in PLRB v. Township of Shaler, 11 PPER ¶ 11347 (Final Order, 1980).⁶ In Township of Shaler, the Board opined as follows:

First, the [c]omplainant must demonstrate that he reasonably believed that the interview might result in disciplinary action. Second, the [c]omplainant 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.

Id. at 559. The District contends that the pre-observation conference hearing was not an investigatory interview. The District argues that a reasonable person in Mr. Rendos's position would not believe that discipline could result from the April 11, 2007, pre-observation meeting because it was designed to prepare Mr. Rendos for a future classroom

⁵ Mr. Eirich testified that, since Ms. Cowburn has been building principal, she did not object when he "had made arrangements with teachers to cover my class because it was during the day in which I did not have a break. So I had to get coverage for my students." (N.T. 19). He also testified that "[i]t's often that when a teacher has to go to the bathroom or is called into and IEP meeting or an LED meeting for a teacher to walk back and forth to monitor the class." (N.T. 31). However, based on the demeanor, confidence, specificity, candor and detail of the testimony, I credit Ms. Cowburn's testimony over Mr. Eirich's and find that the Elementary School building follows a protocol requiring coverage for teachers, who are scheduled to teach class at a time when another meeting is scheduled requiring their attendance, to be arranged through the office so that a teacher or substitute who is free during the time period in question will be utilized to provide the coverage rather than removing a teacher from his/her classroom duties.

⁶ Although Township of Shaler involved a police employe under Act 111, the Board and the courts have long since applied the same standard in PERA cases. Office of Administration, supra.

observation rather than to evaluate or investigate him on past conduct. Therefore, argues the District, Mr. Rendos's Weingarten rights were not triggered, and he was not entitled to a Union representative for the conference.

However, as the Union argues in its post-hearing brief, the Board's decision in Conneaut, supra, specifically qualifies subsequent meetings in an evaluation process as subject to Weingarten protections. In Conneaut, the Board opined as follows:

This [Weingarten] rule should not be limited solely to investigatory interviews in anticipation of disciplinary action. We believe PERA mandates, as demonstrated by the caselaw reconciling contractual and Code rights, the right of a public employe to assistance and representation by his or her bargaining representative at any further meeting or interview beyond a first meeting to discuss or review a public employe's performance evaluation or rating. This right shall not impair the employer's right to initially meet with an employe to discuss a performance evaluation or rating without the participation of the bargaining representative. However, when a second or subsequent meeting between the employer and a public employe occurs, the employe shall have the right to assistance by the bargaining representative. As an obvious corollary, an employer may not condition such subsequent meetings on waiver of this right or otherwise discriminate against any employe for exercise of this right.

Conneaut, 12 PPER at 242. Mr. Rendos is a non-tenured teacher who knew that he could be discharged for two unsatisfactory ratings. The April 11, 2007, pre-observation meeting was the third meeting in this evaluation process that began on January 8, 2007. Mr. Rendos would be in jeopardy of termination as a result of a second unsatisfactory observation. The April 11, 2007 pre-observation meeting, therefore, constituted a "further meeting or interview beyond a first meeting to discuss or review a public employe's performance," Conneaut, 12 PPER at 242, which is entitled to Weingarten protection.

In discussing the necessary performance criteria for the upcoming performance rating and observation during the April 11, 2007 pre-observation meeting, Ms. Cowburn would be discussing Mr. Rendos's deficits during the last performance evaluation in order to help him obtain a satisfactory rating the second time around. In elementary school terms, the pre-observation meeting was an opportunity for Mr. Rendos to see the answers to the make-up test before taking it after failing the first test. The administration agreed to give him extra help to increase his chances of passing the make-up test. Mr. Rendos would not have been in the pre-observation meeting but for his unsatisfactory rating which placed his job in jeopardy. The pre-observation was indeed a continuation of an ongoing process that involved an unsatisfactory performance evaluation and the possibility of termination as a result. Although the District argues that Ms. Cowburn was not using the pre-observation meeting to "investigate" any past misconduct, the April 11, 2007, pre-observation meeting was indeed a subsequent meeting continuing an evaluation process and thereby constituting a Weingarten interview within the meaning of Conneaut, supra. Ms. Cowburn had two prior meetings with Mr. Rendos on February 16th and 21st, 2007, to discuss his unsatisfactory rating. Further meetings relating to improving or discussing his unsatisfactory rating qualify as Weingarten interviews during which Mr. Rendos is entitled to mutual aid and protection from a union representative.

The District also argues that, even if the pre-observation meeting triggered Weingarten protections, the meeting never took place and, therefore, Mr. Rendos's Weingarten rights could not have been violated. The record establishes that the following events occurred: Messrs. Rendos and Eirich arrived together at Ms. Cowburn's office for the scheduled meeting on the morning of April 11, 2007, and Mr. Rendos brought materials with him to make a presentation to Ms. Cowburn. Ms. Cowburn asked Mr. Eirich why he was present at the meeting given the fact that Mr. Eirich was scheduled to be teaching a class. Mr. Eirich informed Ms. Cowburn that another teacher covered his class. Ms. Cowburn warned Mr. Eirich three times to return to his class and then informed Mr. Eirich that he would be written up for insubordination if he did not return to class. Following this exchange, Messrs. Rendos and Eirich met privately and thereafter requested that the meeting be rescheduled for a time after school. Ms. Cowburn agreed, and the pre-

observation conference was indeed held at approximately 4:00 in the afternoon on April 11, 2007. Mr. Eirich attended the afternoon meeting. Ms. Cowburn and Mr. Rendos did not address the proposed content or substance of the meeting during the attempted pre-observation conference in the morning. During the morning attempt to meet, Mr. Eirich was present the entire time taking notes. At no time during the morning of April 11, 2007, was Mr. Rendos alone with Ms. Cowburn, and Eirich and Rendos departed from Ms. Cowburn's office in the morning of April 11, 2007 together. The pre-observation meeting, therefore, did not occur without Mr. Eirich the morning of April 11, 2007. The facts support the conclusion that there was no denial of representation and that Ms. Cowburn did not force Mr. Rendos to proceed without representation. Also, the meeting occurred from start to finish with Mr. Rendos's representative of choice after school. Accordingly, there is no Weingarten violation as a matter of law.

Alternatively, the District also maintains that Mr. Rendos's Weingarten rights did not include having Mr. Eirich present at the morning meeting. The District asserts that Mr. Eirich was not reasonably available at that time because he was scheduled to teach a class and he had not followed the established protocol for arranging for a District approved substitute for his class. An employee is entitled to the union representative of their choice during a Weingarten interview provided that the union representative is reasonably available and there are no extenuating circumstances preventing the employer from reasonably accommodating the employee's choice. Office of Administration, supra. The examiner agrees with the District that the record shows that Mr. Rendos's choice for union representation, Mr. Eirich, was not reasonably available for an 8:45 a.m. meeting in the morning of April 11, 2007.

The Coudersport Elementary School has an established procedure when a teacher scheduled to teach a class must attend a scheduled meeting that will last longer than a bathroom break. That procedure requires the teacher to notify the office of the need for classroom coverage. The office then arranges for the classroom coverage. When the type of teacher meeting involves school counselors, sometimes the counselor will arrange for the classroom coverage. The school does not condone a teacher leaving a classroom of students to cover another classroom. Teachers with their own classroom schedule may be utilized to cover another classroom when they have double planning period and are not leaving a classroom full of students to cover another classroom. Ms. Cowburn utilizes building substitutes to cover a teacher's classroom when that teacher must attend a meeting. Ms. Cowburn also utilizes the response-to-intervention teacher to cover classes as needed because she has more flexibility in her schedule. Mr. Eirich did not comply with the building approved protocol for arranging for classroom coverage during the pre-observation hearing scheduled for the morning of April 11, 2007. Mr. Eirich privately arranged for his own classroom coverage without notifying the office, which resulted in that teacher having to leave her students partially unattended while she monitored Mr. Eirich's students, a practice of which the District disapproves.

Mr. Eirich

In the Caption of the Charge of unfair practices, the Union includes, as a separate individual complainant, Mr. Eirich. Also, in paragraph seven of the Specification of Charges, the Union avers that "[t]he Principal's denial of Mr. Eirich's right to attend the meeting constitutes an unfair labor practice." (Specification of Charges, ¶ 7). To the extent that the Union is charging the District with unfair practices for denying statutory rights to Mr. Eirich, in addition to violating the Weingarten rights of Mr. Rendos, the Union, has not developed or provided the legal theory explaining how the record supports such a cause of action. Matters not argued before the examiner are waived. AFSCME Council 13 v. State System of Higher Educ., 32 PPER ¶ 32118 (Final Order, 2001). Commonwealth, Department of Public Welfare, 17 PPER ¶ 17042 (Final Order, 1986); City of Wilkes-Barre, 25 PPER ¶ 25196 (Final Order, 1994); Philadelphia school District, 25 PPER ¶ 25090 (Final Order, 1994).

Alternatively, Mr. Eirich did not follow a legitimate and reasonable building procedure that was obviously implemented to effectuate the educational mission and ensure the educational integrity of the District, which stands in loco parentis. Mr. Eirich

neglected to properly secure coverage of his class, thereby leaving his classroom partially unattended and drawing the attention of another teacher away from her class, without notice to or approval from the office. Mr. Eirich had ample time and opportunity to notify the office, which he did not do, and go through proper channels to secure coverage, via a District approved substitute, in order for him to attend the meeting. Had Mr. Eirich notified the office in advance, perhaps Ms. Cowburn could have simply rescheduled the meeting for after school (as she willingly did anyway) to accommodate Mr. Eirich's class schedule, and this entire matter could have been avoided. In this regard, Mr. Eirich was not reasonably available within the meaning of Office of Administration, supra, and Ms. Cowburn was within her managerial prerogatives to order him back to his class without violating Mr. Eirich's statutory rights under Section 1201(a)(1) of PERA.

CONCLUSIONS

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

1. The Coudersport Area School District is a public employer under PERA.
2. The Union is an employe organization under PERA.
3. The Board has jurisdiction over the parties hereto.
4. The District has not committed unfair labor practices within the meaning of Section 1201(a)(1).

ORDER

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

HEREBY ORDERS AND DIRECTS

That the charge is dismissed and the complaint is rescinded.

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 thirteenth day of May, 2008.

PENNSYLVANIA LABOR RELATIONS BOARD

Jack E. Marino, Hearing Examiner