

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNSYLVANIA STATE CORRECTIONS :
OFFICERS ASSOCIATION :
:
v. : Case No. PERA-C-08-1-E
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF CORRECTIONS :
ALBION SCI :

PROPOSED DECISION AND ORDER

On January 2, 2008, the Pennsylvania State Corrections Officers Association (Union) filed a Charge of Unfair Practices with the Pennsylvania Labor Relations Board (Board). In the charge, the Union alleged that on November 30, 2007, the Commonwealth of Pennsylvania, Department of Corrections (Commonwealth), Albion State Correctional Institution (Albion), violated Section 1201(a)(1) of the Public Employee Relations Act (PERA). The Union specifically alleged that the Commonwealth engaged in unfair practices when the Commonwealth conducted an investigatory interview with Kenneth Bensur and denied him the Weingarten¹ representative of his choice when the requested individual was working and on the premises at the time.

On January 11, 2008, the Secretary of the Board issued a Complaint and Notice of Hearing directing that a hearing take place on Friday, February 15, 2008, in Harrisburg, Pennsylvania. After several continuances, the hearing was held on Friday, July 10, 2009, in Harrisburg, Pennsylvania. At the hearing, both parties in interest were afforded a full and fair opportunity to present testimonial and documentary evidence and cross-examine witnesses. 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 Commonwealth is a public employer within the meaning of Section 301(1) of PERA. (N.T. 5; PERA-R-01-153-E, Order and Notice of Election).
2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 5; PERA-R-01-153-E, Order and Notice of Election).
3. On November 25, 2007, an inmate escaped from Albion by hiding in a garbage or "pig slop" barrel from Dietary Services. (N.T. 12, 20).
4. Mr. Bensur is a Correctional Food Service Instructor in Dietary Services at Albion. On November 30, 2007, FSI Bensur worked the 11:30 a.m. to 7:30 p.m. shift. (N.T. 6-7).
5. During roll call on that date, Bensur's manager informed him that he was to report to the Deputy's Complex to meet with representatives from the Office of Professional Responsibility (OPR). (N.T. 7).
6. Bensur then telephoned the Control Center and spoke with Lieutenant Ryan Szelewski and requested a Union representative for his meeting with OPR officials. (N.T. 7-8, 30).
7. On November 30, 2007, Lieutenant Szelewski was the Control Lieutenant for the 6:00 a.m. to 2:00 p.m. shift. The Control Lieutenant is responsible for ensuring that there is a full roster of correctional officers, and he schedules relief coverage for

¹ NLRB v. Weingarten, 420 U.S. 251 (1975).

breaks and approves leave. It is the responsibility of the Control Lieutenant to provide Union representatives and coordinate replacement coverage for them. (N.T. 27-28, 31).

8. Szelewski asked Bensur who he would like to have as his Union representative, and Bensur responded that he wanted Sergeant James Morgan. (N.T. 8).

9. At the time, Sergeant Morgan was working his post at the Sally Port. (N.T. 8-10, 13-14).

10. The Sally Port is a highly restricted area of the institution where there is an opening in the perimeter for trucks, pedestrians and contractors to enter and exit the prison after being searched. The escaped inmate exited through the Sally Port. (N.T. 10, 14, 19, 32-33).

11. Sally Port personnel are required to thoroughly search pedestrians with metal detectors. They are required to search through any tools and record the tools that will be taken into the institution. Those same tools are inspected again upon departure to ensure that the tools match the list of ingoing tools. All vehicles entering the Sally Port are searched for weapons. Correctional officers assigned to the Sally Port must follow procedures for inspecting the pig slop barrels. (N.T. 19-21).

12. Sally Port personnel are required to receive and possess specialized training. The Sally Port must have at least one sergeant at all times and, since the November 25, 2007 escape, an additional correctional officer has been required. (N.T. 32-33).

13. When Bensur requested Morgan, Szelewski informed Bensur that Morgan was at the Sally Port and that it would take some time for Morgan to be relieved. Szelewski also informed Bensur that Sergeant Jeremiah Robertson (now a Lieutenant), who was the Union Treasurer at the time, was immediately available. (N.T. 8, 31, 42, 48-49).

14. At no time did Szelewski indicate that Morgan was unavailable or that Bensur could not have Morgan. He indicated only that it would take some time to relieve Morgan from the Sally Port and that Robertson was immediately available. At no time did Bensur state that he definitely wanted Morgan or that he wanted only Morgan. Szelewski would have provided Morgan, but Bensur would have to wait fifteen to twenty minutes for him. Bensur indicated to Szelewski that he was satisfied with Robertson. Bensur did not express any dissatisfaction. (N.T. 31, 37, 42-43).²

15. On November 30, 2007, the head of security for the Department of Corrections as well as the Corrections Emergency Response Team were present at Albion investigating the escape. Robertson was the training sergeant who was assigned to provide scheduled relief to Morgan in the Sally Port and only a sergeant could replace Morgan. (N.T. 32-37; Union Exhibit 1).

16. Robertson received the call from Szelewski at approximately noon when he was in the Sergeants' Office in the Deputy's Complex. This location is in the same building as the OPR meeting, three or four security doors and 150 to 200 yards from the Sally Port. Relieving Morgan in the Sally Port would have required Robertson to walk and obtain clearance through the security doors, use the radio to obtain access to the Sally Port, have Sergeant Morgan appear on camera visible to Control, contact Control to affirm the takeover of the Sally Port and then have Morgan repeat the journey in reverse and obtain clearances through the security doors. The parties stipulated and agreed that the OPR meeting began at approximately 12:30 p.m. (N.T. 13-14, 32-33, 37, 44, 49-50).

17. Sergeant Robertson did not have to be relieved to attend the OPR meeting. Robertson met with Bensur within five minutes from receiving Szelewski's call. There was enough time for Bensur and Robertson to meet and discuss representation before the OPR meeting at the Deputy's Complex. Robertson represented Bensur at the OPR meeting. The OPR

² I credit the testimony of Lieutenant Szelewski and not the testimony of Bensur regarding Szelewski's representation about the status and availability of Morgan at the time of Bensur's request.

meeting endured for approximately ninety minutes. At no time did Bensur express any objection to Robertson about his representation. Bensur was subsequently disciplined. (N.T. 9-11, 49-51).

DISCUSSION

The Union argues that the Commonwealth violated Bensur's Weingarten rights by failing to provide the representative of his choice--Sergeant Morgan--for his interview with OPR. (Union's Brief at 5-6). The Union further contends that Sergeant Morgan was reasonably available because it would have taken only fifteen to twenty minutes for Robertson to relieve Morgan and Robertson was already scheduled to relieve Morgan. (Union Brief at 6). The Union maintains that the fact that Bensur accepted Robertson's representation does not excuse the Commonwealth's failure to relieve Morgan and make him available. (Union Brief at 6).

The Board has adopted NLRB v. Weingarten, 420 U.S. 251 (1975) wherein the United States Supreme Court held that an employe has the right to union representation, upon request, at an investigatory interview. PLRB v. Conneaut School District, 12 PPER ¶ 12155 (Final Order, 1981); PLRB v. Township of Shaler, 11 PPER ¶ 11347 (Nisi Decision and Order, 1980). In a Weingarten case, the complainant has the burden of establishing the following:

[T]hat 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.

Township of Shaler, 11 PPER at 559. The Weingarten protection is a right held by the individual employe and a violation of that right constitutes a violation of Section 1201(a)(1) of PERA. Commonwealth of Pennsylvania, Office of Administration v. PLRB, 591 Pa. 176, 916 A.2d 541 (2007). Moreover, an individual's right to union representation at an investigatory interview includes the right for an employe to have the union representative of his choice at the interview if that chosen representative is reasonably available and absent extenuating circumstances. Commonwealth, Office of Administration, 591 Pa. at 192-193, 916 A.2d at 551.

The Commonwealth does not dispute that the OPR interview constituted an investigatory interview with a reasonable expectation of discipline giving rise to Weingarten protections, including Bensur's right to choose his own Union representative. The Commonwealth, however, maintains that the facts of record simply do not support the charge. Rather the facts, argues the Commonwealth, establish that Lieutenant Szelewski at no time denied Bensur his choice of Sergeant Morgan. Also, the Commonwealth maintains that extenuating circumstances dictated that Morgan could not be available any sooner than fifteen minutes. I agree with the Commonwealth.

The record supports the conclusion that Lieutenant Szelewski at no time denied Bensur the Weingarten representative of his choice, Sergeant Morgan. There were necessary logistical and practical obstacles preventing the Commonwealth from providing Morgan immediately. The necessities of securely operating the prison and the Sally Port after an escape required the Control Lieutenant to follow and apply certain prescribed, necessary protocols for relieving Morgan in the Sally Port. Those procedures required a mere fifteen to twenty minute delay. Szelewski simply informed Bensur that Robertson was involved with the Union and he was immediately available. Szelewski also informed Bensur that some time was necessary to obtain Morgan from the Sally Port knowing that he had to be relieved by Robertson, cleared through the security doors and protocols and he had to walk the 200 hundred yards to the Deputy's Complex for the interview. The fifteen-to-twenty minute delay was a reasonable amount of time under the circumstances. Szelewski was willing to provide Morgan, but the relief process and the security doors and clearances at Albion would prevent Morgan from getting to Bensur any sooner than fifteen to twenty minutes. Bensur did not at any time object to the delay. He did not repeat or reiterate that he wanted Morgan. He did not state or emphasize that he had to have

Morgan. He did not at any time express a willingness to wait the fifteen to twenty minutes. Bensur also did not at any time object to Robertson or his representation.

In this vein, the record shows that the Commonwealth did not deny Bensur's request for Morgan. The delay of fifteen to twenty minutes to provide Morgan was beyond the Commonwealth's control, given the necessary security obstacles and protocols in place soon after an escape, which constituted extenuating circumstances excusable under Commonwealth, supra. The assertion that Bensur may have settled for Robertson because he believed that he could not wait the twenty minutes for Morgan is speculative and not of record. Moreover, Bensur's decision whether to wait was beyond the control of the Commonwealth given the immutable security protocols and distances between Bensur and Morgan. Therefore, a reasonable person would not believe that the Commonwealth's inability to provide Morgan in less than twenty minutes in these circumstances would interfere with the exercise of employe rights under the statute. Robertson received the call at noon to be a Weingarten representative for Bensur. The OPR meeting did not begin until 12:30. Robertson's pre-interview meeting with Bensur was brief. There was plenty of time for Bensur to wait for Morgan if he chose to do so. Waiting fifteen minutes for Morgan or selecting Robertson was not the mythical choice of Scylla and Charybdis. Rather, Benson had a free choice between two equally competent Weingarten representatives without any coercion. Bensur exercised that free choice given to him by the Commonwealth and freely chose Robertson over Morgan; he thereby enjoyed the Weingarten representative of his own choosing. Accordingly, the Commonwealth has not engaged in unfair practices, and the charge is hereby dismissed.

CONCLUSIONS

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

1. The Commonwealth of Pennsylvania, Department of Corrections, Albion SCI is a public employer under PERA.
2. The Pennsylvania State Corrections Officers Association is an employe organization under PERA.
3. The Board has jurisdiction over the parties hereto.
4. The Commonwealth has not committed unfair 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 (20) days of the date hereof, this order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this sixth day of October, 2009.

PENNSYLVANIA LABOR RELATIONS BOARD

Jack E. Marino, Hearing Examiner