

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

TEAMSTERS LOCAL 107 :
 :
 v. : Case No. PERA-C-08-193-E
 :
 NORTHAMPTON BUCKS COUNTY MUNICIPAL :
 AUTHORITY :

PROPOSED DECISION AND ORDER

On May 21, 2008, Teamsters Local 107 (Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against the Northampton Bucks County Municipal Authority (Authority) alleging that the Authority violated Section 1201(a) (1) and (3) of the Public Employee Relations Act (PERA).¹

On June 12, 2008, the Secretary of the Board issued a Complaint and Notice of Hearing in which the matter was scheduled for hearing on July 29, 2008, in Doylestown, Pennsylvania. After a series of continuance requests were granted, the hearing was scheduled, and took place, on July 9, 2009, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Both parties filed post-hearing briefs.

The Examiner, on the basis of the testimony presented at the hearing and from all other matters and documents of record, makes the following:

FINDINGS OF FACT

1. The Authority is a public employer.
2. The Union is an employe organization.
3. The parties stipulated and agreed that: Mark Chapman was the shop steward for the Union at the Authority's facility; that on or about April 11, 2008 Thomas Zeuner, the Authority's executive director, sent Chapman a document titled, "MEETING TO CONSIDER DISCIPLINE." This notice accused Chapman of being atrabilious on more than one occasion. (N.T. 4; Joint Exhibit 1).
4. The parties stipulated and agreed that the April notice contained "proposed charges that would follow the Loudermill decision that is referred to in paragraph 12 of them. They are the actual proposed charges that will become charges after the Loudermill hearing. That was the intent of this meeting." (N.T. 5, 6; Joint Exhibit 1).²
5. The parties stipulated and agreed that on April 21, 2008 counsel for the Authority sent counsel for the Union a letter "outlining the position of the Authority." (N.T. 6; Joint Exhibit 2).
6. The parties stipulated and agreed that the hearing the Authority referred to in Joint Exhibit 1 was scheduled and held on May 15, 2008. (N.T. 8).
7. The parties stipulated and agreed that at the close of the May 15, 2008 meeting Zeuner told Chapman that he, Zeuner, "would consider the discussion and then decide whether to impose discipline or not." (N.T. 10).
8. At the May 15, 2008 meeting, the Authority refused Chapman's request to have Anthony Frasco, a non-employe, Union representative attend the meeting. (N.T. 8; Joint Exhibit 2).

¹ Because the Union presented no evidence of a violation by the Authority of Section 1201(a) (3) of PERA, that portion of the charge is dismissed.

² This language is quoted directly from the record.

9. The parties stipulated and agreed that Chapman was not disciplined at the end of the May 15, 2008 meeting. Rather, Chapman was suspended for two days without pay pursuant to a letter dated May 30, 2008 from the Authority. (N.T. 10; joint Exhibit 4).

DISCUSSION

The Union charges the Authority with violating Section 1201(a)(1) and (3) of PERA when it refused to allow the Union's Business Agent to represent Chapman, the Union Steward, in a meeting that the Union alleges Chapman reasonably believed would result in discipline. The legal basis for the Union's charge is that the Authority violated the rule as set forth in NLRB v. J. Weingarten, Inc., 420 U.S. 251, 95 S. Ct. 959, 43 L. Ed. 171 (1975).

The Authority counters this allegation by asserting that the meeting was not one to which Weingarten is applicable. Rather, according to the Authority, the meeting was one ruled by the legal principles set forth in Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 494 (1985).

Despite the Authority's novel argument, it did violate Section 1201(a)(1) of PERA when it refused to allow Chapman Union representation during an investigatory interview that Chapman reasonably believed might result in discipline.. A review of the Weingarten decision and applicable Board law shows why the Authority's argument fails.

Essentially, Weingarten provides that a bargaining unit member has a right to union representation during an investigatory interview that the bargaining unit member reasonably believes could result in discipline. The clous here are whether Chapman participated in an investigatory interview, and whether he reasonably believed that the interview could result in discipline.

The Authority first argues that the May 15, 2008, interview was not investigatory. A look at Board precedent as applied to these facts, however, belies that assertion.

Chapman was given a memorandum from Zeuner, titled, "MEETING TO CONSIDER DISCIPLINE." In numbered paragraph 12, the memo recites that "[b]efore *possibly* imposing discipline upon you, I will give you and your employe, Union representative an opportunity to meet with me and go over these matters. This will *also* serve as your **Loudermill** meeting." (italic emphasis added).

This memo further informed Chapman, in the penultimate paragraph that he could "present witnesses, documents or other evidence you believe I should consider." And, in numbered paragraph 14, Zeuner wrote Chapman, "[a]fter hearing your side and consideration of [sic] any evidence you wish to provide, I will consider and impose, if warranted, appropriate discipline."

Clearly, from these statements Zeuner was giving Chapman the opportunity to present witnesses and other evidence that could ameliorate Zeuner's perception of the underlying events. Zeuner, as gleaned from this writing, was undecided about whether or not to impose discipline, and would decide that issue after he considered the evidence Chapman presented. This means that the meeting was, despite Zeuner's protestations otherwise, investigatory in nature.

Moreover, the Board has found that even in a situation where the employer meted out discipline as set forth in a letter of discipline, drafted *before* meeting with the employee, that meeting was investigatory in nature.

In Pennsylvania Emergency Management Agency 31 PPER ¶ 31034 (Final Order, 2000) (PEMA), *aff'd sub nom. Commonwealth of Pennsylvania Emergency Management Agency v. PLRB*, 768 A.2d 1201 (Pa. Cmwlth. 2001), the employer called a meeting with the employee who it wanted to discipline. Before the meeting was held, the employer drafted a letter of discharge. Nevertheless, at the meeting the employer gave the employe an opportunity to respond to the charges. During the meeting, after the employe had responded to the charges, the employer held a private, ten- minute recess, after which it decided to present the employe with the previously drafted dismissal letter.

In ruling that those facts constituted an investigatory meeting, the Board noted that the employer, even though it penned the dismissal letter before the meeting, still retreated for a private conference before it tendered that letter to the employee. That private conference, reasoned the Board, meant that the employer was considering the employee's statements from the meeting, and, hence, the meeting was investigatory.

The Board further opined that "[i]f a meeting goes beyond merely informing the employee of the previously made disciplinary decision and becomes investigatory in nature, the right to union representation will attach." PEMA, 31 PPER at 84, *but see Pennsylvania Fish Commission*, 17 PPER ¶ 17102 (Amended Proposed Decision and Order, 1986), 18 PPER ¶ 18029 (Final Order, 1986) (meeting during which employer merely informed employee of previously determined discipline did not give rise to the necessity of union representation). At the Authority's May 15, 2008 meeting with Chapman, however, it did not inform him of any disciplinary decision, but, rather offered him the opportunity to present information that the Authority would "consider."

In point of fact, the Authority's written notice to Chapman about the meeting (Joint Exhibit 1), made it clear that the Authority had not yet decided whether to discipline Chapman, but was reserving that decision to hear what Chapman might present at the meeting.

The Authority did not discipline Chapman at the end of the May 15, 2008 meeting. Rather, fifteen days later, on May 30, 2008, the Authority sent him a letter of suspension. These facts, as applied to the Board's decisions in PEMA, and Pennsylvania Fish Commission lead to the conclusion that the Authority's May 15, 2008 meeting with Chapman was investigatory.

Having determined that the May 15, 2008 meeting was investigatory, we must next decide whether Chapman had a reasonable expectation that this meeting might result in discipline. Weingarten, *supra*.

After a plain reading of the Authority's notice sent to Chapman before the May 15, 2008 meeting, it is hard to imagine Chapman could have thought anything other than that discipline was a distinct dénouement of the meeting. The very title of Chapman's meeting notice is captioned "MEETING TO CONSIDER DISCIPLINE."³ (Joint Exhibit 1).

Further, that document contains references to "[b]efore possibly imposing discipline upon you," and "I [Zeuner] will consider and impose, if warranted, appropriate discipline." (Joint Exhibit 1, Paragraph 12, 14). Moreover, in a letter from the Authority's Counsel to the Union's Counsel, written before the May 15, 2008 meeting, it states that the Authority will, decide "whether to file some or all of the charges" after the Authority "receives Mr. Chapman's responses and the meeting is over." (Joint Exhibit 2, p.2). Based on these facts, of course Chapman reasonably believed that discipline might result from this meeting.⁴

Having determined that the May meeting triggered Chapman's Weingarten rights, one other issue needs to be addressed. And, that is the Authority's refusal to allow Chapman the Union representative of his choice, based upon the fact that the selected representative was not an employee of the Authority, although that representative was otherwise immediately available.

The law is perfectly clear that the employee in a Weingarten setting has the absolute right to select the available representative of his or her choice, even if the selected representative is not a fellow employee. Cheltenham Township Police Association v. Cheltenham Township, 36 PPER 4 (Final Order, 2005), Commonwealth of Pennsylvania, Office of Administration v. PLRB and Pennsylvania State Corrections Officers Association, 591 Pa. 176, 916 A.2d 541 (2007).

³ Despite the title, "MEETING TO CONSIDER DISCIPLINE," typed all in capital letters at the head of this document, in its post-hearing brief, the Authority refers to this document in quotation marks, as the "Notice of Charges," as though that were the formal title. The words "Notice of Charges" appear nowhere on the document.

⁴ The parties have also stipulated that, "[a]t the time of the hearing [on May 15, 2008][,] Mr. Chapman reasonably believed that discipline might be imposed." (N.T. 9).

Having established that Chapman participated in an investigatory meeting that he reasonable believed might result in discipline, and was denied his choice of available Union representation, we now turn to the applicable remedy. The Union does not ask for any remedy, either in its charge or in its post-hearing brief.

Nevertheless, the Board has adopted the remedy as set forth by the National Labor Relations Board in Kraft Foods, 251 NLRB 598 (1980). The essence of Kraft Foods is that "once a Weingarten violation has been established, the burden shifts to the employer to establish that it did not impose discipline based upon information that it obtained at the unlawful interview." Duryea Borough Police Department v. Duryea Borough, 35 PPER 23 at 76 (Final Order, 2004) (citing PEMA, 768 A.2d at 1206). Absent that showing by the employer, a make-whole remedy is appropriate. Id.

The record does show that the Authority was reserving the decision of whether to discipline Chapman until it heard his side of the story. The Authority has presented no evidence that it did not base its decision on any information it obtained at the May 15, 2008 meeting.⁵ Consequently, the condign remedy is to rescind Chapman's two-day suspension. It is so ordered.

CONCLUSIONS

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

1. The Authority is an employer within the meaning of section 301(1) of PERA.
2. The Union is an employe organization within the meaning of section 301(3) of PERA.
3. The Board has jurisdiction over the parties hereto.
4. The Authority has committed unfair practices within the meaning of Section 1201(a) (1) of PERA.
5. The Authority has not committed unfair practices within the meaning of Section 1201(a) (3) of PERA.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the Authority shall:

1. Cease and desist from interfering, restraining or coercing employes in the exercise of the rights guaranteed under Article IV of PERA.
3. Take the following affirmative action which the Hearing Examiner finds necessary to effectuate the policies of PERA:
 - (a) Immediately rescind Chapman's two-day suspension without pay and remove any and all references to the suspension from his personnel records;
 - (b) Immediately make Chapman whole for any lost wages and all other emoluments of employment;
 - (c) Post a copy of this Decision and Order within five (5) days of the date hereof and have the same remain so posted for a period of ten (10) consecutive days; and

⁵ The Authority argued exclusively in its brief that the May 15, 2008 meeting was governed by Loudermill, and that the protections under Weingarten were therefore inapplicable. Consequently, the Authority never addressed whether or not it based its decision to discipline Chapman on any information it received at the May 15, 2008 meeting. While the Authority's position was that it had finalized the decision to discipline Chapman before the May meeting, the evidence indicates otherwise.

(d) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this decision and order by completion and filing of the attached affidavit.

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 decision and order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this eighth day of December 2009.

PENNSYLVANIA

LABOR RELATIONS BOARD

TIMOTHY

TIETZE, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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AUTHORITY :

AFFIDAVIT OF COMPLIANCE

The Authority hereby certifies that it has ceased and desisted from violations of Section 1201(a) (1) of PERA; that it has rescinded Chapman's two-day suspension and removed any reference to it from his personnel records; that it has made Chapman whole for any lost wages and all other emoluments of employment; and that it has served a copy of this affidavit on the Union at its principal places of business.

Signature/Date

Title

SWORN AND SUBSCRIBED to before me
The day and year first aforesaid

Signature of Notary Public