

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

WILLIAM C. PLOUFFE, JR. :
 :
 v. : Case No. PERA-C-09-459-E
 :
 STATE SYSTEM OF HIGHER EDUCATION :
 KUTZTOWN UNIVERSITY :
 F. JAVIER CEVALLOS :
 SHARON PICUS :
 ANNE ZAYAITZ :

FINAL ORDER

William C. Plouffe, Jr. (Complainant) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) on June 10, 2010, challenging a Proposed Decision and Order (PDO) issued on May 21, 2010. In the PDO, the Board's Hearing Examiner concluded that the State System of Higher Education, Kutztown University (University) did not violate the Complainant's Weingarten¹ rights under Section 1201(a)(1) of the Public Employe Relations Act (PERA). The Hearing Examiner also determined that the University did not violate Section 1201(a)(2) or (4) of PERA. On June 28, 2010, the University filed a response to the exceptions and a supporting brief.

The Hearing Examiner's findings of fact are summarized as follows. In 2008, the University hired the Complainant as a faculty member in the Criminal Justice Department. In the spring of 2009, the Complainant filed a complaint with Dr. Carlos Vargas-Aburto, the Provost of the University, about a hiring matter within the Criminal Justice Department. Provost Vargas-Aburto referred him to the Office of Social Equity.

By July 2009, the Office of Social Equity upheld the Complainant's complaint. There were rumors on campus that the Criminal Justice Department was going to try to get the Complainant fired. The Complainant heard the rumors and a number of professors also told him as much.

In July 2009, the Chair of the Criminal Justice Department requested that Anne Zayaitz, the Acting Dean of the College of Liberal Arts and Sciences, meet with all of the faculty members of the department except for the Complainant. Dean Zayaitz denied the Chair's request as unfair to the Complainant and consulted with Sharon Picus, the Director of Human Relations. Dean Zayaitz thereafter met with each faculty member of the Criminal Justice Department, including the Complainant, to find out what was going on in the department.

On July 14, 2009, the Complainant received an e-mail from Anne Imschweiler, Dean Zayaitz's Administrative Assistant, stating that Dean Zayaitz wished to meet with the Complainant on Thursday, July 16, 2009 or Friday, July 17, 2009. The Complainant consulted with Dr. Paul Quinn, Sr., local President of his bargaining representative, the Association of State College and University Faculties (APSCUF), and Dr. Ruth Perkins, APSCUF's Grievance Chair, who advised the Complainant to discover the nature of the meeting in order to ascertain whether it was a disciplinary meeting. The Complainant thereafter e-mailed Ms. Imschweiler, scheduling the meeting for Thursday, July 16, 2009, and inquiring as to the nature of the meeting.

On July 15, 2009, Ms. Imschweiler e-mailed the Complainant as follows:

Will,

Dr. Zayaitz has been very busy and hopes to have time to look at your Prof. Dev. Application and give it to you when you come in tomorrow at noon.

¹ The Board has adopted the rule set forth in NLRB v. Weingarten, Inc., 420 U.S. 251, 95 S. Ct. 959 (1975), that employes have the right to union representation at investigatory interviews that they reasonably believe may result in discipline. Commonwealth of Pennsylvania, Office of Administration v. PLRB, 591 Pa. 176, 916 A.2d 541 (2007).

The Complainant verified with Dean Zayaitz's office staff that the meeting would be about his professional development application and informed President Quinn and Grievance Chair Perkins about the nature of the meeting. The Complainant subsequently rescheduled the meeting to Friday, July 17, 2009.

On July 16, 2009, Ms. Imschweiler e-mailed the Complainant as follows:

Will,

For the meeting tomorrow at noon Dr. Zayaitz would like to discuss: 1) your Professional Development proposal; and, 2) your perceptions of what is going on in your department.

On July 17, 2009, Dean Zayaitz met with the Complainant. The Complainant had not read Ms. Imschweiler's July 16, 2009 e-mail before the meeting with Dean Zayaitz. At the meeting, Dean Zayaitz and the Complainant discussed his professional development application, how to proceed with a disabled student and problems in the Criminal Justice Department. The Complainant did not request union representation. On October 9, 2009, the University discharged the Complainant.

The Complainant filed a Charge of Unfair Practices on November 16, 2009, alleging that the University violated Section 1201(a)(1), (2) and (4) of PERA by denying his request for union representation at the July 17, 2009 meeting with Dean Zayaitz. A hearing was held before the Board's Hearing Examiner on March 22, 2010, 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.

In the PDO, the Hearing Examiner concluded that Dean Zayaitz credibly testified that the Complainant did not request union representation at their July 17, 2009 meeting. Therefore, the Hearing Examiner determined that the Complainant failed to establish that the University violated Section 1201(a)(1) of PERA by denying the Complainant his Weingarten rights. The Hearing Examiner further stated that the Complainant lacked standing to allege a violation of Section 1201(a)(2) against the University. The Hearing Examiner also concluded that the Complainant failed to establish a violation of Section 1201(a)(4) because he did not show that the University had discriminated against him for filing an affidavit, petition or complaint with the Board or for providing information or testimony before the Board. Thus, the Hearing Examiner dismissed the Charge.

In his exceptions,² the Complainant initially argues that the Hearing Examiner erred by failing to make various findings of fact. The Hearing Examiner must set forth those findings that are relevant and necessary to support the conclusion reached, but need not make findings summarizing all of the evidence presented. Page's Department Store v. Velardi, 464 Pa. 276, 346 A.2d 556 (1975). The Board finds that the Hearing Examiner made the findings that are necessary to support the proposed decision, and that the Complainant's suggested findings of fact are not necessary or relevant. Therefore, the Hearing Examiner did not err in failing to make the additional findings offered by the Complainant.

The Complainant next challenges the Hearing Examiner's finding that Dean Zayaitz credibly testified that the Complainant did not request union representation during their July 17, 2009 meeting. The Complainant alleges that the Hearing Examiner failed to consider the evidence that demonstrated Dean Zayaitz's lack of credibility.³

² The Complainant does not challenge the Hearing Examiner's decision under Section 1201(a)(2) and (4) of PERA.

³ The Complainant also requests that the Board consider as additional evidence an affidavit of Dr. Quinn that is attached to the Complainant's exceptions and concerns the Hearing Examiner's credibility determinations. When a request to reopen the record for additional evidence is made, the party making such a request must establish that the evidence to be admitted (1) is new; (2) could not have been obtained at the time of the hearing through the exercise of due diligence; (3) is relevant and non-cumulative; (4) is not for the purpose of impeachment; and (5) is likely to compel a different result. Teamsters Local #205 v. Peters Creek Sanitary Authority, 34 PPER 27 (Final Order, 2003). The Complainant has failed to demonstrate that any of the five criteria have been met and, therefore, the Complainant's request to reopen the record is denied.

It is the function of the hearing examiner, who is able to view the witnesses' testimony first-hand, to determine the credibility of the witnesses and weigh the probative value of the evidence presented at the hearing. Mt. Lebanon Education Association v. Mt. Lebanon School District, 35 PPER 98 (Final Order, 2004). The hearing examiner may accept or reject the testimony of any witness in whole or in part. Pennsylvania State Corrections Officers Association v. Commonwealth of Pennsylvania Department of Corrections Pittsburgh SCI, 34 PPER 134 (Final Order, 2003). The Board will not disturb the hearing examiner's credibility determinations absent the most compelling of circumstances. Id.

In crediting the testimony of Dean Zayaitz over the testimony of the Complainant, the Hearing Examiner stated as follows:

Notably, Dr. Quinn, whose credibility is not in dispute, testified not only that Professor Plouffe told him that Dean Zayaitz had denied his requests for union representation but also that Dean Zayaitz told him that Professor Plouffe had never requested union representation. (N.T. 51, 56-57). Thus, Dr. Quinn's testimony supports Dean Zayaitz's version of events as much as it does Professor Plouffe's. Moreover, nothing in the record suggests that Dean Zayaitz had a stake in the outcome of her meeting with Professor Plouffe as he did or that she had any reason to deny any request for union representation he may have made. Indeed, Dr. Quinn testified that Dean Zayaitz has always been respectful in dealing with him as APSCUF's president[.] (N.T. 55). Furthermore, her testimony that she only discussed with counsel whether or not Professor Plouffe had requested union representation (N.T. 31, 42) was creditworthy.

(PDO, p. 5). The Complainant presents no compelling reasons warranting the reversal of the Hearing Examiner's credibility determinations. Therefore, the Board must reject the Complainant's request that it credit his testimony over that of Dean Zayaitz on the issue of whether the Complainant requested union representation.

Concerning the Complainant's allegations that the University violated his Weingarten rights, an employe is entitled to assistance from a union representative in an investigatory interview upon request when the employe has a reasonable expectation that disciplinary action may result. Indiana Area Education Association, PSEA/NEA v. Indiana Area School District, 34 PPER 133 (Final Order, 2003). Because the Complainant did not request union representation, the Hearing Examiner properly concluded that the University did not violate Section 1201(a) (1) of PERA.

After a thorough review of the exceptions and all matters of record, the Board shall dismiss the exceptions and make the Proposed Decision and Order final.

In view of the foregoing and in order to effectuate the policies of the Public Employee Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed by William C. Plouffe, Jr. are hereby dismissed, and the May 21, 2010 Proposed Decision and Order be and the same is hereby made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, Anne E. Covey, Member and James M. Darby, Member, this twentieth day of July, 2010. 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.