COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNSYLVANIA STATE TROOPERS ASSOCIATION	:	
v.	:	Case No. PF-C-09-105-E
COMMONWEALTH OF PENNSYLVANIA PENNSYLVANIA STATE POLICE	:	

PROPOSED DECISION AND ORDER

On August 26, 2009, the Pennsylvania State Troopers Association (Union) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair practices alleging that the Commonwealth of Pennsylvania, Pennsylvania State Police (Commonwealth) had violated Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA) as read with Act 111. On September 11, 2009, the Secretary of the Board issued a no-complaint letter and on October 1, 2009, the Union filed exceptions to that letter. On December 15, 2009, the Board issued an order to the Secretary for further proceedings.

The Secretary, on December 24, 2009, issued an order and notice of hearing directing that a hearing be held on March 17, 2010, in Harrisburg, Pennsylvania. Granted continuance requests moved the hearing date to April 27, 2010, when both parties were afforded a full opportunity to present evidence and to cross-examine witnesses. At the close of the Union's case, the Commonwealth moved to dismiss the charge for failure to establish a *prima facie* case. Each party filed a post-hearing brief.

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

FINDINGS OF FACT

1. Five bargaining unit members were accused of cheating on a trooper to corporal promotional exam. They were Andrea Young, Michael Gownley, Michael Hinkle, Curtis Getz, and Chat Berstler. All five were disciplined by the Commonwealth. Hinkle, Berstler and Getz were Commonwealth witnesses at the grievance hearings for Young and Gownley. To that end, each of the three took part in two preparatory interviews held by Lt. Edgardo Colon, Andrea Reynolds assistant counsel for the State Police, and Sarah Eicher from the Commonwealth Office of Administration. Getz had a preparatory meeting with Ed Phillips. The sole purpose of these interviews was to prepare each as a witness for the Commonwealth at the grievance arbitration of other bargaining unit members. (N.T. 8-10, 19-25, 31, 33-37, 40-42,58-59; Union Exhibit 1, 2, 3).

2. None of the three asked for Union representation at any of the preparatory meetings. Interviewees were assured by the Commonwealth representative conducting the interview that it was merely a preparation for their testifying for the Commonwealth at another bargaining unit member's grievance arbitration. (N.T. 21-22, 25-26, 28, 34-35, 37, 38, 41, 42, 59).

DISCUSSION

The Union charges the Commonwealth with violating the standard set forth in NLRB v. J. Weingarten, Inc., 420 U.S. 251, 88 LRRM 2689 (1975), when it interviewed three bargaining unit members without any union representation. The Commonwealth parries this charge by arguing that the interviews were not investigatory, and, in any case, the three did not ask for Union representation. A review of Weingarten and its progeny shows why this charge is dismissed in its entirety, pursuant to the Commonwealth's motion.

Pennsylvania public employes have the right to union representation, upon request, at an investigatory interview that they reasonably believe may result in discipline. Commonwealth of Pennsylvania, Office of Administration v. PLRB, 848 A.2d 1063 (Pa. Cmwlth. 2004), *rev'd.* 591 Pa. 176, 916 A.2d 541 (2007).

Three factors must be proved to establish a Weingarten violation: there must be an investigatory interview; the employe must request union representation; and the employer must hold the interview and deny the employe's request. Id.

Initially, I am not convinced that these meetings were investigatory in nature. These interviews were to prepare the three as Commonwealth witnesses in up-coming grievance arbitrations for other bargaining unit members. The charge recites two interviews with each of three bargaining unit members; Hinkle on July 17 and 24, 2009, Getz on July 27 and August 4, 2009, and Berstler on July 17 and August 21, 2009.

The Union's argument for these interviews being investigatory is that "[i]f any of the [bargaining unit] members gave a statement, or a portion of a statement which conflicted in any way with any prior statements, a completely independent violation of [Pennsylvania State Police] Regulations would occur." (Union's post-hearing brief at 9).

By this definition, any interview of bargaining unit members would require Union representation, just in case they said something different from what they might have said in the past. Employes do not have the right to union representation at every meeting with the employer. The definition of an investigatory interview is more stenotic than the Union proposes.

To be an investigatory interview, "the meeting must have been *calculated* to form the basis for taking disciplinary or other job affecting actions against [the employe] because of past misconduct." Sayre Area Education Association v. Sayre Area School District, 36 PPER 54 at 153 (Final Order, 2005)(emphasis added). In other words, the meeting must be designed or intended to form the basis for taking discipline. These meetings were simply to prepare these Commonwealth witnesses for grievance arbitration testimony.[1]

Moreover, the Board has made it clear "that where the employer gives the employe reasonable assurances that they will not be disciplined as a result of their answering the employer's questions, generally the employe should rely on that representation and not have any fear of discipline. In that case there would be no right to a Weingarten representative." Fraternal Order of Police E. B. Jermyn Lodge 2 v. City of Scranton, 40 PPER 136 at 447 (Final Order, 2009).

Hinkle and Berstler asked if they needed Union representation at their July 17, 2009, meetings. Both were told by the Commonwealth's interviewer, Reynolds, that they would not need Union representation because the meetings were not investigatory, but were merely to prepare them as Commonwealth witnesses for another bargaining unit member's grievance arbitration. Berstler, at his August 21, 2009, interview never even brought up Union representation because as he testified, "[i]n the first one I was told I didn't need one, so I just figured I wouldn't need one for the second one, as well." (N.T. 37). At his July 27, 2009, interview, Getz never even inquired about a Union representative because, as he candidly testified, "I didn't think I needed one."(N.T. 41).

In point of fact, none of the three bargaining unit members ever asked for Union representation at any of the interviews in question. Albeit, two of them asked the Commonwealth interviewer if the interviewer thought they needed Union representation, but none of them made the simple and direct request to have Union representation present, if the interview were to continue. Even if these interviews were investigatory in nature (which they were not), the employes' failure to expressly ask for Union representation acts as a waiver of those rights set forth in the Weingarten decision. Beaver County Community College, 17 PPER ¶ 17035 (Proposed Decision and Order, 1986), 17 PPER ¶ 17121 (Final Order, 1986).

The Union argues in its post-hearing brief that a July 16, 2009, letter from Union's counsel to the Commonwealth, Union Exhibit 4, "demanded union representation" at these interviews. (Union's post-hearing brief at 9). In fact, it did not. What the letter does say is that the Union "will instruct its members to request a union representative." Either the Union did not actually do so, or the members simply disregarded that advice. And, of course, "the right to representation at an investigatory interview is an

[1] In its post-hearing brief, the Commonwealth quotes from a July 16, 2009, letter from the Commonwealth to the Union. That letter was attached to the Union's charge of unfair practices, but was never introduced into the record. Therefore, it is improper for me to consider its contents in my decision, and I have not done so. Aaron Chambers v. Commonwealth of Pennsylvania, Department of General Services,37 PPER 139 (Final Order, 2006).

individual right and does not involve the collective bargaining rights of the union." International Brotherhood of Painters and Allied Trades Local Union 1968 v. Erie City School District, 38 PPER 98 at 279 (Final Order, 2007).

In an effort to skirt the fatal fact that none of the three bargaining unit members asked for Union representation, the Union calls my attention to a Pennsylvania Supreme Court decision in which the Court decided whether a death row inmate, convicted of the first degree murder of his four-year old step-daughter, had made a non-custodial statement that should have been construed as "an expression of a desire" to be represented by counsel. Commonwealth v. Sherwood, 603 Pa. 92, 982 A.2d 483 (Pa. 2009). While the Court found no Fifth or Sixth Amendment violations, and upheld the conviction, it did find that the defendant's remark, "I feel like I should have an attorney," constituted "a valid request for counsel." 603 Pa. at 121, 982 A.2d at 501.

From this, the Union argues, "[a]s the statement 'I feel like I should have an attorney' constitutes 'an expression of a desire for the assistance of an attorney,' then the inquiries of Hinkle and Berstler constitute the same." (Union's post-hearing brief at 8-9).

The Union, without blushing, actually asks me to find that Hinkle's and Berstler's merely asking the interviewer's opinion about whether they might need union representation, is equivalent to a criminal defendant, being questioned by police as a suspect in his step-daughter's murder, telling them he feels like he should have an attorney. This argument is so excogitated that I am reminded of Oliver Wendell Holmes's observation that lawyers spend a great deal of their time shoveling smoke.

Because there were no investigatory interviews, and because even if these interviews were investigatory, the three bargaining unit members waived their Weingarten rights by not asking for Union representation, this charge is dismissed.

CONCLUSIONS

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

1. The Commonwealth is the Commonwealth under Act 111, and an employer under Section 3(c) of the PLRA.

2. The Union is a labor organization within the meaning of Section 3(f) of the PLRA as read with Act 111.

3. The Board has jurisdiction over the parties hereto.

4. The Commonwealth has not committed unfair labor practices in violation of Section 6(1)(a) and (e) of the PLRA as read with Act 111.

ORDER

In view of the foregoing and in order to effectuate the policies of the PLRA and Act 111, the Examiner

HEREBY ORDERS AND DIRECTS

that the charge of unfair labor practices filed to the above case number is dismissed and the complaint issued thereon rescinded.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed pursuant to 34 Pa. Code § 95.98 within twenty (20) days of the date hereof, this decision and order shall become and be absolute and final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania this twenty-ninth day of September, 2010.

PENNSYLVANIA LABOR RELATIONS BOARD

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TIMOTHY TIETZE, Hearing Examiner