

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNSYLVANIA STATE :
TROOPERS ASSOCIATION :
 :
 :
 v. : Case No. PF-C-09-96-E
 :
 COMMONWEALTH OF PENNSYLVANIA :
 PENNSYLVANIA STATE POLICE :
 :

FINAL ORDER

The Pennsylvania State Troopers Association (Association) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) on April 30, 2012, to a Proposed Decision and Order (PDO) issued by the Hearing Examiner on April 10, 2012. In the PDO, the Hearing Examiner concluded that the Commonwealth of Pennsylvania, Pennsylvania State Police (Commonwealth) did not violate Section 6(1)(a) of the Pennsylvania Labor Relations Act (PLRA), as read in pari materia with Act 111, by denying Corporal Edmund Fret union representation during an interview with the Bureau of Integrity and Professional Standards, Internal Affairs Division (IAD).¹ Following an extension of time granted by the Secretary of the Board, the Association timely filed a brief in support of the exceptions on May 9, 2012. The Commonwealth filed a brief in response to the exceptions on May 29, 2012. The facts of this case, as found by the Hearing Examiner, are summarized as follows.

On Wednesday, July 22, 2009, Sergeant Jeffrey Patrick Balut, with the IAD, conducted interviews of Corporal Fret and Trooper Jeffrey Winters as part of an investigation of another Corporal. (FF 6). Trooper Winters requested a union representative based on the fact that another trooper threatened to expose him to investigation if he did not say what he was "supposed to" during the interview. (FF 6). Corporal Scott R. Walck, an Association station representative, served as the union representative for Trooper Winters during his interview. (FF 7). At the conclusion of the interview with Trooper Winters, Sergeant Balut informed Corporal Walck that Balut needed to interview Corporal Fret. (FF 7).²

Corporal Walck and Sergeant Balut separately drove to the location where Corporal Fret was conducting school bus inspections. (FF 8). Upon arrival at the bus transportation building, Sergeant Balut informed Corporal Walck that he was not permitted to be present during the interview with Corporal Fret. Corporal Fret requested union representation, and Sergeant Balut responded that he was under orders to ensure that Corporal Fret did not have a representative during the interview. (FF 9). Sergeant Balut told Corporal Fret that he was the subject of the interview, but not the subject of the investigation. Corporal Fret asked Sergeant Balut: "am I going to get disciplined if I say something that comes out?" Sergeant Balut replied: "I don't know, but if you do you could grieve it later." (FF 10). Before the questioning of Corporal Fret began, Corporal Walck was asked to witness that Sergeant Balut had given Corporal Fret his administrative warnings. (FF 9).³

¹ The Hearing Examiner also dismissed the Association's claim under 6(1)(e) of the PLRA because an alleged violation of the rights under National Labor Relations Board v. J. Weingarten, Inc., 420 U.S. 251, 95 S. Ct. 959 (1975), is not a violation of the employer's duty to bargain. Commonwealth of Pennsylvania, Office of Administration v. PLRB, 591 Pa. 176, 916 A.2d 541 (2007).

² Corporal Fret's IAD interview was previously scheduled for Friday, July 24, 2009, but due to time limits on IAD investigations, the interview had to be completed by July 22, 2009. (FF 7).

³ During the six years that Sergeant Balut was assigned to IAD, it was "outside the norm" to give an administrative warning to a person who was not the subject of the investigation. The administrative warning was not usually given to witnesses in an investigation unless they asked for it. Corporal Fret did not ask to have an administrative warning read to him. (FF 15).

The administrative warning given to Corporal Fret expressly provides, in relevant part, as follows:

Since this is an administrative matter within the Pennsylvania State Police, you are required to answer questions truthfully and completely or you may be subjected to administrative action. You do have the right to have a union representative with you during such questioning. If during the course of the interview, you have reason to believe that your statements could result in administrative action being initiated against you, union representation will be provided upon request.

(FF 11).⁴ Corporal Fret wrote on the bottom of the administrative warning that his "[Association] Rep [was] only allowed to witness [his] admin warnings." (FF 12). After witnessing the administrative warning, Corporal Walck was asked to leave the interview. (FF 9). Corporal Fret was then asked by Sergeant Balut whether he had overheard statements allegedly made by the Corporal who was under investigation.⁵

Based on the evidence presented, the Hearing Examiner found that Corporal Fret was being interviewed as a witness and was not the subject of the IAD investigation. Therefore, the Hearing Examiner determined that Corporal Fret was not entitled to union representation under Weingarten. Thus, the Hearing Examiner concluded that the Commonwealth did not violate Section 6(1)(a) of the PLRA by denying Corporal Fret's request for union representation during his interview.

The Board has recognized the right of an employe to be accompanied by a union representative during an investigatory interview in which the employe reasonably fears that discipline may be imposed by the employer. Office of Administration, supra.; Cheltenham Township Police Association v. Cheltenham Township, 36 PPER 4 (Final Order, 2005). Whether the employe's fear of discipline is reasonable is measured on an objective, rather than subjective, standard. Amalgamated Transit Union, Local 85 v. Port Authority of Allegheny County, 22 PPER ¶22010 (Final Order, 1990). Further, the interview with the employer must be investigatory, in that it was calculated to form the basis for taking disciplinary action against the employe because of past misconduct. Commonwealth of Pennsylvania, Pennsylvania Emergency Management Agency v. PLRB, 768 A.2d 1201 (Pa. Cmwlth. 2001); Sayre Area Education Association v. Sayre Area School District, 36 PPER 54 (Final Order, 2005); Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia, 38 PPER 183 (Final Order, 2007).

The Association argues on exceptions that the Hearing Examiner erred in holding that Weingarten rights only attach when the employer is interviewing an employe who is being investigated for misconduct. The Association cites to Fraternal Order of Police, E.B. Jermyn Lodge 2 v. City of Scranton, 40 PPER 136 (Final Order, 2009), to argue that the interview need not concern past misconduct of the employe for a Weingarten right to arise. In City of Scranton, two female police officers were asked to attend a meeting with city officials to discuss the resolution of their grievance against the chief of police. As the Board noted in that case, once that topic was discussed, the subject of that meeting then changed dramatically. The city then began inquiring about a hostile work environment. When the employes could not recall the names of others who had made comments about them, the meeting took yet another turn. The employes being interviewed were then accused of lying and were repeatedly questioned about their previous answers. The Board found that because at that point the employes were being interviewed about lying to their employer, for which they could be disciplined, the employes then had a right to obtain union representation. Contrary to the Association's claim, City of Scranton holds that in order for the Weingarten right to arise during an interview, the

⁴ The IAD regulations further provide that any "[p]ersonnel interviewed in regards to an investigation, who have reason to believe their statements could result in administrative action being taken against them, shall be afforded union representation if requested." (FF 16).

⁵ Under Pennsylvania State Police regulations, Corporal Fret would have been subject to discipline if he refused to participate in an IAD interview. (FF 13).

employee must be questioned about his or her misconduct, the answers to which could result in discipline.

Indeed, the Board has consistently held that to constitute an investigatory interview for purposes of Weingarten, the employee being interviewed must be the subject of the investigation into that employee's misconduct. City of Scranton, supra. As the Commonwealth Court noted in AFSCME, Council 13 v. PLRB, 514 A.2d 255, 259 (Pa. Cmwlth. 1986), "the [Board] did not intend the Weingarten rule to extend beyond individual encounters with his or her employer in which performance was an issue in the discussion and had a specific bearing on that employee's job security."

For example, as found in AFSCME, Council 13 v. Commonwealth of Pennsylvania, Department of Health, 24 PPER 24019 (Proposed Decision and Order, 1992), the right to union representation does not attach to an interview conducted to ascertain the merits of an employee's complaint, because the interview is not part of the disciplinary process for that employee. Further, in Pennsylvania State Troopers Association v. Commonwealth of Pennsylvania, Pennsylvania State Police, 41 PPER 128 (Proposed Decision and Order, 2010) (PSP), as here, the Association alleged that employees should be entitled to union representation at any interview with the employer because the employee's statements may be perceived as a violation of Pennsylvania State Police regulations. In rejecting the Association's argument in PSP, the Hearing Examiner correctly held that employees do not have the right to union representation at every meeting with the employer, and that in order to be an investigatory interview, the meeting must have been calculated to form the basis for taking disciplinary action because of the employee's misconduct.

The Association argues that the interview with Corporal Fret was investigatory, and he held a reasonable fear that discipline could be taken against him as a result of his answers. Therefore, the Association asserts that Weingarten rights should attach to the July 22, 2009 interview.

The Association mistakenly relies on Pennsylvania State Troopers Association v. PLRB, 39 A.3d 616 (Pa. Cmwlth. 2012), to assert that Corporal Fret had a reasonable belief that his answers during the interview could result in his being disciplined. Unlike here, the employees in PSTA never requested union representation and brought their own misconduct, their unauthorized investigation, to the attention of the employer, which led to the disciplinary proceedings against them. As noted in Department of Health, supra, an employee is not entitled to a Weingarten representative in a non-investigatory interview until after the employee raises their own misconduct for which they may be disciplined. Accord, City of Scranton, supra. Here, there is no evidence that Corporal Fret admitted to or was questioned about any misconduct by him, or was anything but a witness during the interview.

The Association also claims that the administrative warnings gave rise to a reasonable fear of discipline, and expressly provided that Corporal Fret was entitled to union representation during the interview. However, as the Hearing Examiner correctly noted, the giving of the administrative warning would not automatically transform an interview of a witness into an investigatory meeting calculated to form the basis of disciplinary action for purposes of Weingarten. Here, given Sergeant Balut's assurances that Corporal Fret was only a witness, the circumstances of the interview would not pose a reasonable fear of discipline under Weingarten. Furthermore, the administrative warnings correctly provide that if the questioning becomes accusatory concerning the employee's truthfulness or completeness in his or her responses, the employee would then have the right to request union representation. City of Scranton, supra. At no time during the interview did Sergeant Balut question or accuse Corporal Fret of being untruthful or evasive in his answers. As such, the interview never became investigatory, entitling Corporal Fret to a Weingarten representative.

It is apparent from the record that in the interview at issue, Corporal Fret was nothing more than a witness in another corporal's disciplinary proceeding. Indeed, at the beginning of the interview, Balut advised Corporal Fret that he was a witness, not the subject of the investigation. Further, at no time during the interview did Sergeant Balut

question Corporal Fret about the veracity of his answers, or otherwise become accusatory regarding the completeness of Corporal Fret's responses. As such, Sergeant Balut's questioning of Corporal Fret was not an investigatory interview for purposes of asserting a Weingarten right.

After a thorough review of the exceptions and all matters of record, the Hearing Examiner did not err in finding that Corporal Fret was not entitled to a Weingarten representative during his interview with Sergeant Balut. Therefore, the Hearing Examiner did not err in concluding that the Commonwealth did not violate Section 6(1)(a) or (e) of the PLRA, by denying Corporal Fret's request for union representation. Accordingly, the Association's exceptions shall be dismissed, and the PDO made final.

ORDER

In view of the foregoing and in order to effectuate the policies of Act 111 and the Pennsylvania Labor Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed by the Pennsylvania State Troopers Association are hereby dismissed, and the April 10, 2012 Proposed Decision and Order, be and hereby is 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, James M. Darby, Member, and Robert H. Shoop, Jr, Member, this seventeenth day of July, 2012. 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.