

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE :
WILLIAMSPORT LODGE NO. 29 :
v. : Case No. PF-C-12-113-E
CITY OF WILLIAMSPORT :

PROPOSED DECISION AND ORDER

On September 27, 2012, the Fraternal Order of Police, Williamsport Lodge No. 29 (Union or FOP), filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) alleging that the City of Williamsport (City) violated Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA), as read with Act 111. The Union specifically alleged that the City unlawfully denied Officer Nathan Moyer his requested FOP representative during an investigatory interview. On October 26, 2012, the Union filed an amended charge alleging that the City again violated Section 6(1)(a) and (e) of the PLRA, on October 7, 2012, when it advised Officer Moyer that he would be the subject of an additional investigation and gave him fifteen minutes to obtain his requested Union representative.

On October 12, 2012, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on November 9, 2012, in Harrisburg, on the original charge. On November 1, 2012, the Secretary of the Board issued a complaint and notice of hearing consolidating the two charges for hearing purposes and directing that a hearing also be held on November 9, 2012, in Harrisburg, for the amended charge. During the hearing on that date, both parties were afforded a full and fair opportunity to present evidence and cross-examine witnesses. Both parties filed post-hearing briefs.

The examiner, based upon all matters of record, makes the following findings of fact.

FINDINGS OF FACT

1. The City is a political subdivision and a public employer under Act 111, as read with the PLRA. (N.T. 6-7).
2. The Union is a labor organization under the PLRA, as read with Act 111. (N.T. 6-7).
3. Nathan Moyer was a patrol officer for the City's Bureau of Police who mostly worked the midnight-to-eight a.m. shift. (N.T. 11-12).
4. Kevin Stiles is an agent for the Bureau of Police who performs criminal and internal investigations. (N.T. 12).
5. Timothy Miller is a Captain for the Bureau of Police. He is the Commander of the Special Response Team (or SWAT Team) and the Investigations Division Manager. He also supervises internal investigations and personnel in record keeping. (N.T. 17, 43-44).
6. On September 4, 2012, Captain Miller asked Agent Stiles to investigate how an open condom was placed in the trunk of a patrol car. On September 7, 2012, at 3:45 p.m., Officer Moyer was on his way to "line-up" before beginning to work an evening shift, when Agent Stiles approached him and told him that they needed to talk. Agent Stiles did not reveal the subject matter of the conversation at this time. (N.T. 11-12, 26-27, 44).
7. Agent Stiles escorted Officer Moyer to an interrogation room where criminal suspects are interviewed. Once in the interrogation room, Agent Stiles informed Officer Moyer that he was conducting a "fact-finding" investigation that was

non-criminal and internal in nature. During this explanation, Agent Stiles told Officer Moyer that the Chief could order Moyer to submit to a polygraph. (N.T. 12, 27; Joint Exhibit 1).

8. When Agent Stiles told Officer Moyer that the interview was being monitored by Captain Miller, Officer Moyer asked if the interview was being recorded. At that time, Agent Stiles told Officer Moyer that the interview was being recorded. (N.T. 14, 31; Joint Exhibit 1).
9. Immediately after learning that the interview was being recorded, Officer Moyer requested an FOP representative. Agent Stiles responded that Officer Moyer could not have a Union representative because the investigation was not criminal in nature and **Garrity** did not apply.¹ Agent Stiles further said: "we don't even know if you did anything wrong right now. This is strictly a[n] administrative investigation." Agent Stiles again warned Officer Moyer that the Chief could order a polygraph. (N.T. 13-16; Joint Exhibit 1).
10. The policies and procedures manual for the Bureau of Police requires that a member be advised of the internal investigation against them before they are actually questioned and that a Union representative be provided during internal interviews. (N.T. 31, 50).
11. During his employment at the Bureau of Police, Officer Moyer was involved in two other non-criminal investigations. Both times, Moyer was given a requested Union representative. (N.T. 13; Joint Exhibit 1).
12. Agent Stiles then proceeded to tell Officer Moyer that an open condom had been found in one of the patrol vehicles back in July 2012. Agent Stiles then asked Officer Moyer about his personal relationship with a female officer (Officer Jane) also employed by the City's Bureau of Police. Officer Moyer responded that they were friends. (N.T. 16; Joint Exhibit 1).
13. Agent Stiles then asked if they had been anything more than friends in the past few months and Moyer responded that they had "hung out" outside of work. Agent Stiles then asked if he had gone to her residence in a nearby municipality, and Officer Moyer responded in the affirmative. Agent Stiles then asked if Officer Moyer engaged in sexual intercourse with Officer Jane at her residence and Officer Moyer responded in the affirmative. (Joint Exhibit 1).
14. Officer Moyer told Agent Stiles that he did not remember how many times he engaged in sexual intercourse with Officer Jane or how many times he and Officer Jane were partnered up in the same patrol vehicle. (Joint Exhibit 1).
15. Agent Stiles then asked Officer Moyer if, at anytime while he and Officer Jane were on duty together, they had any sexual interaction including kissing. Officer Moyer admitted to kissing Officer Jane on duty, but he expressly denied having any on-duty oral or vaginal sex with her. (Joint Exhibit 1).
16. Agent Stiles again referred to the condom and told Officer Moyer that it was fully unrolled without any packaging material.
17. Captain Miller then interrupted the interview and called Agent Stiles outside of the interrogation room. Captain Miller credibly testified as follows:

I pulled Kevin [Stiles] outside because I didn't want to reprimand him in front of the other people, to tell him, you made a mistake, he's entitled to his union rep, because I knew he was given some advice from Captain Orwig. So I pulled him outside in

¹ Garrity v. New Jersey, 385 U.S. 493, 87 S.Ct 616, 17 L. Ed.2d 562 (1967).

the hallway because I didn't want to reprimand him in front of the other officers, understanding that he made a huge mistake.

(N.T. 46).

18. While outside the room, Captain Miller informed Agent Stiles that he had made a mistake and that Officer Moyer was entitled to his Union representative. Agent Stiles then re-entered the interrogation room with Captain Miller, at which time, both Captain Miller and Agent Stiles stood over Officer Moyer while Moyer remained seated. Officer Moyer was physically looking up to the two high-ranking investigating officers at this time. Agent Stiles then told Officer Moyer that if "you want a representative **here**, you can have a representative **here**. He just can't ask any questions." On the video, Captain Miller leaned over and whispered something unrecorded to Officer Moyer that embarrassed Officer Moyer and to which he responded "that's ridiculous." Captain Miller then said: "It's your call, it's your life. I'm not going to tell you, no, that you can't have one. But you know what I mean; I gotta give you that opportunity. I have to do that." (N.T. 17, 46; Joint Exhibit 1).
19. Then Agent Stiles told Officer Moyer that: "there's only a limited amount of people that know, at least, of the condom." At that time, Captain Miller held up four fingers. (N.T. 18; Joint Exhibit 1).
20. In response, Officer Moyer stated: "I personally don't care who knows about that cause it wasn't mine." Captain Miller responded: "That's the only reason we're here." (Joint Exhibit 1).
21. Agent Stiles then stated that the officer who found the condom looked back in the police logs to determine who had the patrol car last and discovered that Officer Moyer and Officer Jane partnered together in that vehicle and subsequently discovered their romantic relationship. (Joint Exhibit 1).
22. After some discussion about investigating Officer Moyer, Agent Stiles said to Officer Moyer: "There's only a few more questions I have. If you don't want anybody in here that's fine." We're almost at the end." Officer Moyer responded: "I have no issue with the condom." To which Agent Stiles responded: "And that's what we're here for." Captain Miller then stated: "If you want to have somebody here for the last few questions, we'll go over what we already asked you, but that's up to you." (N.T. 19; Joint Exhibit 1).
23. Officer Moyer responded that if Agent Stiles asks questions he did not like, he would ask for a Union representative. To which Captain Miller responded: "that's fair." Captain Miller Left the interrogation room and Agent Stiles closed the door and summarized the facts about an officer finding a "fully extended" and "what appeared to him to be a fairly fresh condom" in the trunk of a patrol car and that the officer later determined that Officer Moyer and Officer Jane were partnered in that car and two months later that same officer learned of their romantic relationship. (N.T. 19; Joint Exhibit 1).
24. Agent Stiles again asked Officer Moyer about any oral or vaginal sex while on duty. Officer Moyer denied anything but kissing on duty. Agent Stiles informed Officer Moyer that he had already spoken to Officer Jane and that she corroborated Officer Moyer's account that they had only kissed on duty. (Joint Exhibit 1).
25. Agent Stiles then asked Moyer if he would pass a polygraph if the question was whether he and Officer Jane had any sexual intercourse, or anything like that, on duty. Officer Moyer confirmed that he would pass that polygraph. (Joint Exhibit 1).
26. Agent Stiles then asked Officer Moyer if he had any knowledge of how a used condom **may** have gotten in the trunk of a patrol car. (Joint Exhibit 1).

27. Officer Moyer was eventually terminated. He was charged with five different offenses. The charges included allegations that Officer Moyer allegedly lied during the September 7, 2012, interview and withheld knowledge of sexual conduct. (N.T. 21).
28. Officer Moyer was not made aware that any of the answers that he gave before he was offered a Union representative would be disregarded. (N.T. 22-23).
29. The parties stipulated and agreed to the following:

Members shall be permitted to have a **Weingarten** representative, upon request during administrative interviews. Members shall be afforded a reasonable amount of time given the circumstances to arrange for a **Weingarten** representative and shall be afforded an opportunity to meet with their representative prior to the interview.

DISCUSSION

Bargaining unit Police officers in the Commonwealth of Pennsylvania have a right to union representation during investigatory interviews, also known as a **Weingarten** right. **Township of Shaler**, 11 PPER ¶ 11347 (Nisi Decision and Order, 1980). Both the Supreme Court and the Commonwealth Court of Pennsylvania have applied the United States Supreme Court decision in **National Labor Relations Board v. J. Weingarten, Inc.**, 420 U.S. 251, 95 S.Ct. 959 (1975) to unionized Pennsylvania public employees covered by both Act 111 and the Public Employee Relations Act. **Commonwealth of Pennsylvania, Office of Administration v. PLRB**, 591 Pa. 176, 916 A.2d 541 (2007); **Pennsylvania State Troopers Association v. PLRB**, 2013 Pa. Commw. Lexis 230 (Pa. Cmwlth. 2013). In the **State Troopers** case, Judge McGinley writing for the Court noted the following:

In **Weingarten** the United States Supreme Court determined that employees have a right to union representation in an "investigatory interview" where the employee "reasonably believes the investigation may result in disciplinary action" and where that right does not interfere with the employer's legitimate prerogative to continue his investigation without interviewing the employee. In order to exercise that right, the employee must request union representation. **Weingarten**, 420 U.S. at 256-260.

State Troopers, 1454 C.D. 2012, 2013 Pa. Commw. Lexis 230. The **State Troopers** Court also relied on its prior decision in **Pennsylvania Emergency Management Agency v. PLRB (PEMA)**, 768 A.2d 1201 (Pa. Cmwlth. 2001) and opined that "in order for **Weingarten** rights to attach . . . the meeting must have been [an] investigatory interview, i.e., the meeting must have been calculated to form the basis for taking disciplinary or other job affecting actions against [the employe]." **State Troopers, supra** (quoting **PEMA**, 768 A.2d at 1205).

The record in this case demonstrates that the **Weingarten** right attached to the Moyer interview of September 7, 2012. Agent Stiles undoubtedly conducted an investigatory interview and Officer Moyer reasonably feared that the investigation may result in discipline. Clearly, the interview was investigatory because Agent Stiles said he was conducting a "fact-finding" investigation. The investigatory nature of the interview was further revealed to Officer Moyer when Agent Stiles told him that "we don't even know if you did anything wrong right now. This is strictly an administrative investigation." (F.F. 9).

The fact that Officer Moyer was brought to an interrogation room, where criminals are interrogated, and told that Captain Miller was recording and monitoring the interview imposed a reasonable fear of discipline upon Officer Moyer. These fears were further compounded by Agent Stiles' twice warning Officer Moyer that the Chief could order him to take a polygraph. Indeed, the City, in its post-hearing brief, "concedes that the

interview in question was investigatory in nature, and that Officer Moyer reasonably believe[d] that the interview might lead to the imposition of discipline against him." (City's Post-hearing Brief at 5). Also, the record, which includes an audio-visual recording of the September 7, 2012 interview, establishes that, once Agent Stiles informed Officer Moyer of the recording of the interview, Officer Moyer clearly requested an FOP representative. The record also establishes that Agent Stiles denied that request under the rationale that, because the investigation was administrative and not criminal, **Garrity** protections did not apply and, as such, Officer Moyer was not entitled to a Union representative. Indeed, Captain Miller testified that, by denying Officer Moyer his **Weingarten** representative (which is not a **Garrity** representative) Agent Stiles "made a huge mistake."

After Agent Stiles denied Officer Moyer his requested Union representative, he proceeded with his investigative questioning of Officer Moyer. Agent Stiles told Officer Moyer that an open condom had been found in one of the patrol vehicles back in July 2012 and asked Officer Moyer about his personal relationship with Officer Jane. After telling Agent Stiles that they were friends, Agent Stiles specifically asked Moyer if they were more than friends and if they had sexual intercourse at her residence. Officer Moyer admitted to having a sexual relationship with Officer Jane outside of work. In response to further interrogation from Agent Stiles, Officer Moyer stated that he did not know how many times he had sexual relations with Officer Jane and he did not know how many times he was partnered with her on duty in a patrol vehicle. Agent Stiles then asked whether Officer Moyer and Officer Jane engaged in sexual interaction while on duty, including kissing. Officer Moyer admitted that they had kissed while on duty, but he denied having any on-duty oral or vaginal sex with her. After all this interrogation and investigation, Captain Miller interrupted the interview. At this point, Officer Moyer's **Weingarten** rights were violated.

Yet the City maintains the "position that Officer Moyer's **Weingarten** rights were protected." The City argues the following:

the Complainant cites **City of Reading v. PLRB**, 689 A.2d 990 (Pa. Cmwlth. 1997) for the proposition that the City had three options once Captain Miller interrupted the investigatory interview, namely 1) suspend the interview for a reasonable period of time so that the employee could secure representation; 2) stop the interview all together; or 3) explain that the employee has a choice to continue unrepresented, or not be interviewed at all.

(City's Post-hearing Brief at 5 (citing Union's Post-hearing Brief at 5)). The City further contends as follows:

Despite the Complainant's contentions that the City violated the rule articulated in **City of Reading**, in fact, the City complied with this mandate. Captain Miller stopped the investigatory interview, informed Officer Moyer that he was entitled to union representation, and told Officer Moyer that he would be re-asked the questions previously asked. Despite, Captain Miller's attempt to provide Officer Moyer with a union representative, **Officer Moyer refused union representation at that time.**

(City's Post-hearing Brief at 5) (emphasis original).

However, the **City of Reading** standard was not triggered by Captain Miller's interruption of the interview. It was triggered by Officer Moyer's request for an FOP representative. When Agent Stiles declined to grant Officer Moyer's request and proceeded with his interrogation of Officer Moyer's romantic relationship with Officer Jane, he violated the mandate of **City of Reading** and Officer Moyer's **Weingarten** rights.

Moreover, the City's claim that Captain Miller attempted to provide Officer Moyer with a **Weingarten** representative but he refused representation after the break is not

supported by the record. Waiving statutory rights under the collective bargaining laws of this Commonwealth must be intentional, clear, express and unequivocal. **Penn Hills Municipal Employees Organization v. Penn Hills Municipality**, 34 PPER 135 (Final Order, 2003). This Board has already recognized that a **Weingarten** representative is present to assist the employe and provide counsel. In this capacity, the representative may attempt to clarify certain questions for the subject employe or clarify certain facts and/or suggest other employes who may have knowledge of those facts. The employer, however, has the right to insist that the factual answers to the employer's questions come solely from the subject employe. **Commonwealth of Pennsylvania**, 33 PPER at 413-414.

The audio-visual recording of the interview reveals that Officer Moyer was unable to intentionally and voluntarily waive his **Weingarten** right because Agent Stiles misrepresented to him the proper, lawful role of a **Weingarten** representative. Agent Stiles told Officer Moyer that, although he could have a representative present, "[h]e just can't ask any questions." The whole point of a **Weingarten** representative is to seek clarification when necessary as long as he does not transform the interview into a confrontational or adversarial proceeding. **Commonwealth**, 33 PPER at 413-414. Told of this diminished role, a reasonable person in Officer Moyer's position would believe that a representative would be no more than mere companionship during the interrogation rather than one who provides assistance and counsel.

Moreover, the extended conversation about an FOP representative coerced Officer Moyer into later declining a representative, which also prevented Officer Moyer from knowingly and voluntarily waiving his right to a **Weingarten** representative. The video shows that, after the interruption, both Captain Miller, and Agent Stiles stood over Officer Moyer while he remained seated. Officer Moyer was clearly double-teamed while physically looking up to the two high-ranking investigating officers. On the video, Captain Miller leaned over and whispered something unrecorded to Officer Moyer that clearly embarrassed Officer Moyer and to which he responded "that's ridiculous." Shortly thereafter, Agent Stiles told Officer Moyer that "there's only a limited amount of people that know, at least, of the condom." And Captain Miller held up four fingers. In other words, Captain Miller and Agent Stiles were implying that they did not want anyone else to know about the condom and that obtaining a representative would require sharing the information with the representative and possibly other Union members or officers.

Agent Stiles then casually stated: "There's only a few more questions I have. If you don't want anybody in here that's fine." We're almost at the end." Officer Moyer responded: "I have no issue with the condom." To which Agent Stiles responded: "And that's what we're here for." Captain Miller then stated: "If you want to have somebody here for the last few questions, we'll go over what we already asked you, but that's up to you." The message to Officer Moyer here was: There are only a few more limited questions about the condom, of which you claim to have no knowledge, so let us just get this over with. The exchanges between Captain Miller and Agent Stiles, on one side, and their statements to Officer Moyer, on the other, made Moyer feel like he should just cooperate to get the interrogation over with and that he should not involve any more people because only four people knew of the condom.² However, Agent Stiles did not limit his questions to the condom but re-asked questions about his sexual relationship with Officer Jane on and off duty.

Additionally, I have found no Board cases ruling on whether an employer may cure a **Weingarten** violation by providing a representative after already denying the requested representative and conducting a substantial interrogation, as here. However, I conclude that it was not possible to cure the violation in this case because Officer Moyer had already provided substantive information in response to a significant number of personal questions about his sexual activity both on and off duty. Officer Moyer already provided those answers while deprived of the assistance and counsel of a representative. Officer Moyer would not be able to change his answers if, after subsequent counsel, he realized

² At least seven people at this point knew of the condom: 1) Officer Jane who had already been interviewed; 2) the officer who found the condom; 3) that officer's lieutenant to whom he reported it; 4) Captain Miller; 5) Agent Stiles; 6) Officer Moyer; and 7) the Chief who was contacted during the September 7, 2012, interview of Moyer.

he misunderstood the question as originally asked, for fear of reprisal or discipline. It does not cure the violation to re-ask the same questions with assistance from a representative when those questions were already answered without the benefit of representation.

Accordingly, the City engaged in unfair labor practices in violation of Section 6(1)(a) when it deprived Officer Moyer of his requested **Weingarten** representative during the September 7, 2012 investigatory interview which was not cured by the manner in which they offered him a representative after conducting most of the interview.

The policies and procedures manual for the Bureau of Police provides that an officer must be advised of the internal investigation against them before they are actually questioned and that a Union representative must be provided during the interval interview. This term and condition of employment was clearly violated during the investigatory interview of Officer Moyer. However, the Board has held that bargaining violations must affect the bargaining unit and not just one employee. This individual misapplication of the policies and procedures manual is, therefore, more appropriately remedied through the grievance procedure. Also, the Union has not otherwise shown how the City violated Section 6(1)(e) when it deprived Officer Moyer of his requested FOP representative during the September 7, 2012 investigatory interview. Accordingly, the cause of action under Section 6(1)(e) is dismissed. Also, the parties resolved the amended charge by entering the stipulation contained in Finding of Fact No. 28.

REMEDY

In its post-hearing brief, the Union states the following:

The FOP does not seek the broad remedial measure of reinstatement because Moyer was terminated only partially due to the September 7, 2012 investigatory interview. Because Moyer's termination also stems from other matters unrelated to the interview, the FOP seeks a more narrow and specific remedy. Moyer cannot be terminated for any reason arising out of his statements made during the September 7, 2012 interview.

(Union's Post-hearing Brief at 7). Officer Moyer was subsequently terminated after being charged with five different offenses. The uncontradicted evidence of record is that the charges supporting dismissal contained allegations that Officer Moyer withheld knowledge of sexual conduct and that he allegedly lied during the September 7, 2012 interview. To the extent that these charges provided any support for discharge or any other discipline, those charges are hereby dismissed and the level of discipline, if any, must be re-evaluated on the remaining charges and allegations.

CONCLUSIONS

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

1. The City is a political subdivision and an Act 111 public employer.
2. The Union is a labor organization within the meaning of the PLRA, as read in **pari materia** with Act 111.
3. The Board has jurisdiction over the parties hereto.
4. The City has committed unfair labor practices within the meaning of Section 6(1)(a) of the PLRA, as read in **pari materia** with Act 111.
5. The City has **not** committed unfair labor practices within the meaning of Section 6(1)(e) of the PLRA, as read in *pari materia* with Act 111.

ORDER

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

HEREBY ORDERS AND DIRECTS

That the City of Williamsport shall

1. Cease and desist from interfering with, restraining or coercing employes in the exercise of the rights guaranteed in Section 5 of the PLRA, as read with Act 111.
2. Cease and desist from denying a **Weingarten** representative to Officer Moyer for the September 7, 2012 investigatory interview.
3. Take the following affirmative action, which the hearing examiner finds necessary to effectuate the policies of Act 111 and the PLRA:
 - (a) Eliminate and expunge any charges and allegations against Officer Moyer relating to any information or misinformation obtained during the September 7, 2012 investigatory interview of Officer Moyer;
 - (b) Re-evaluate the level of discipline imposed against Officer Moyer without charges and allegations relating to any information or misinformation obtained during the September 7, 2012 investigatory interview of Officer Moyer;
 - (c) Post a copy of this decision and order within five (5) days from the effective date hereof in a conspicuous place readily accessible to its employes and have the same remain so posted for a period of ten (10) consecutive days; and
 - (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 of compliance.

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 days of the date hereof, this decision and order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this twenty-seventh day of August, 2013.

PENNSYLVANIA LABOR RELATIONS BOARD

JACK E. MARINO
Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE :
WILLIAMSPORT LODGE NO. 29 :
v. : Case No. PF-C-12-113-E
CITY OF WILLIAMSPORT :

AFFIDAVIT OF COMPLIANCE

The City of Williamsport hereby certifies that it has ceased and desisted from its violations of Section 6(1)(a) of the PLRA, as read with Act 111; that it has ceased and desisted from denying a **Weingarten** representative to Officer Moyer for the September 7, 2012 investigatory interview; that it has eliminated and expunged any charges and allegations against Officer Moyer relating to any information or misinformation obtained during the September 7, 2012 investigatory interview of Officer Moyer; that it has re-evaluated the level of discipline imposed against Officer Moyer without charges and allegations relating to any information or misinformation obtained during the September 7, 2012 investigatory interview of Officer Moyer; that it has posted a copy of this decision and order in the manner prescribed therein; and that it has served a copy of this affidavit on the Union at its principal place of business.

Signature/Date

Title

SWORN AND SUBSCRIBED TO before me
the day and year first aforesaid.

Signature of Notary Public