

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

SUSAN JOCKEL :
 :
 v. : Case No. PERA-C-11-429-E
 :
 LUZERNE COUNTY :
 LUZERNE COUNTY PRISON :

PROPOSED DECISION AND ORDER

On December 20, 2011, Susan Joyce-Jockel (Jockel or Complainant) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against the Luzerne County Prison¹ (County or Respondent) alleging that Warden Joseph Piazza committed unfair practices in violation of Section 1201(a)(1) and (3) of the Public Employe Relations Act (PERA).

On January 4, 2012, the Secretary of the Board issued a Complaint and Notice of Hearing in which the matter was assigned to a conciliator for the purpose of seeking resolution of the matters in dispute through mutual agreement of the parties, and May 21, 2012 in Harrisburg was assigned as the time and place of hearing, if necessary.

The hearing was necessary, but was continued to October 15, 2012 and held before Thomas P. Leonard, Esquire, a hearing examiner of the Board, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence.

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. Luzerne County, Luzerne County Prison is a public employer within the meaning of Section 301(1) of PERA.
2. Susan Joyce-Jockel has been employed at the Luzerne County Prison as a correctional officer since 1996. (N.T. 7)
3. The correctional officers are represented by Laborers International Union of North America, Local 1310 (Union). (N.T. 8)
4. On Thursday and Friday, September 8 and 9, and Monday, September 12, 2011, Jockel missed work following an evacuation of her home in Kingston related to Hurricane Lee. For September 8, she used a personal day and for September 9, she used a vacation day. For September 12, she wanted to use a sick day, but her supervisors, Lt. Smith and Captain Orkwis, told her she was not allowed to take leave due to a state of emergency. Despite her supervisors' denial, she took leave for September 12. (N.T. 9, 10, 12, 15, 53)

¹ The Board amended the caption when it issued the Complaint and Notice of Hearing to add Luzerne County as a respondent.

5. On September 12, her supervisors told Jockel she would be written up for the absence. A supervisor did write her up. (N.T. 20, 51)
6. On September 16, Warden Joseph Piazza called Jockel to a meeting in his office. She was not told the purpose of the meeting, but she was concerned that it would be about her not being at work on Monday, September 12. (N.T. 10, 12)
7. Jockel brought Gene Wicht, her union steward, with her to the meeting. (N.T. 13)
8. Piazza told Wicht to leave because the meeting was not going to lead to discipline. Wicht left the meeting, telling Jockel there could be no discipline from this meeting. (N.T. 12-14)
9. After union steward Wicht left the meeting, Warden Piazza asked Jockel questions about where she lived, her child care situation and who would be responsible for her children on any other day other than Monday, September 12. (N.T. 14)
10. In the meeting with Piazza, Jockel stated numerous times that she would prefer that union steward Wicht would stay in the meeting. Piazza denied her request. (N.T. 29-30)
11. Piazza told Jockel that her absence and all employees' absences were going to be "investigated thoroughly." (N.T. 14)
12. On September 19, 2011, Jockel attended a disciplinary interview with Major James Larson. Larson is the highest ranking uniformed officer in the prison and also performed the function of deputy warden. (N.T. 50, 52, 56)
13. Jockel brought steward Corporal Boney with her to the interview with Larson. Larson had Captain Orkwis as the County witness. (N.T. 50, 52)
14. The meeting took place right after the start of the 3 pm to 11 pm shift, and lasted approximately ten minutes. (N.T. 56)
15. When the meeting began, Larson read the supervisor's write-up of Jockel's September 12 absence. He then asked her why she did not come to work on September 12. She explained that she had child care issues and water issues, that a tree had fallen on her house and that she had a migraine headache. He gave her an opportunity to present her side of the story. (N.T. 32, 52, 56-57)
16. Larson had talked with Piazza about Jockel after her September 12 meeting with Piazza, telling him that a hearing would be scheduled. Piazza did not tell Larson anything about the meeting he had with Jockel or give him any questions to ask Jockel for the September 19 meeting. Larson did not predetermine the discipline he was going to give Jockel. (N.T. 55, 58-59)
17. When the September 19 meeting ended, Larson gave his secretary his meeting notes. She typed them into a Disciplinary Action, which Larson signed and then sent it to Captain Orkwis, the shift

supervisor, who gave it to Jockel to sign. The Disciplinary Action read:

Please be advised that you are being issued a written warning under the Luzerne County Correctional Facility Code of Ethics. Level III Offense #-2 Absenteeism, other than abuse of sick leave, First Offense for calling for a sick day on September 12, 2011. There was a County wide "Declared Emergency" in effect and all leave was cancelled unless employee was directly affected and/or evacuated. You had been advised earlier in the day by Lt. Smith and later by Captain Orkwis of this County's emergency status.

(N.T. 21-22, 28, 30-31, Complainant's Exhibit 1)

18. Jockel signed the Disciplinary Action on the advice of her union steward. (N.T. 16)
19. Jockel had never been disciplined before. (N.T. 21)
20. On October 3, 2011, Jockel filed a grievance of the disciplinary action, seeking its removal from her record. (N.T. 2, 22, Respondent Exhibit 1)

DISCUSSION

Susan Jockel, a Luzerne County Prison corrections officer, alleges that Warden Joseph Piazza violated Sections 1201(a)(1) and (3) of PERA when he refused to allow her to bring a union representative to a meeting she believed was an investigatory interview that could lead to discipline. In the meeting, Warden Piazza asked her questions about her absence on September 12, a day her shift supervisors told her she could not take leave due to a state of emergency at the prison. Three days after the meeting with Piazza, Deputy Warden Major James Larson conducted a disciplinary interview with Jockel and issued Jockel a written reprimand for her absence.

In **Conneaut School District**, 10 PPER ¶ 10092 (Nisi Decision and Order, 1979), *aff'd*, 12 PPER ¶ 12155 (Final Order, 1981), the Board adopted the federal rule set forth in **Weingarten v. NLRB**, 420 U.S. 251, 95 S. Ct. 959 (1975), that an employee covered by a collective bargaining agreement has the right to a union representative at an investigatory interview which the employee reasonably believes may result in the imposition of discipline.

An individual public employe has standing to file an unfair practice charge alleging that her **Weingarten** rights have been violated. **Pennsylvania Emergency Management Agency**, 31 PPER ¶ 31034 (Final Order, 2000), *aff'd*, **Pennsylvania Emergency Management Agency v. Pennsylvania Labor Relations Board**, 768 A.2d 1201, 1205 (Pa. Cmwlth. 2001). A denial of **Weingarten** rights constitutes an independent violation of Section 1201(a)(1) of PERA. **Conneaut School District**, *supra*.

The County requests that the charge be dismissed, arguing that Jockel's meeting with Piazza did not permit the invocation of **Weingarten** rights. The County argues that Warden Piazza, as the head of the facility, does not conduct investigations of employes for discipline and that he is not the

official who issues discipline. The County argues that the actual investigation of Jockel took place during the September 19 meeting with Major Larson, at which time she had union representation. The County argues that the written reprimand issued from that meeting should not be rescinded because **Weingarten** was followed and respected.

As for the September 16 meeting, there is a conflict in the testimony on whether Piazza asked Jockel questions during that meeting. Jockel testified that during the meeting she was questioned about her absence, the evacuation, where she lived and her child care situation. Piazza told her that all the people who were absent would be investigated thoroughly. For the County's case, Piazza answered "No" when his counsel asked, "Did you ever have a meeting with Ms. Joyce-Jockel in which her absenteeism of September 12, 2011 was discussed." (N.T. 63) I find Jockel's testimony on this point to be more specific about the details of the September 12 meeting. I will credit her version of what occurred in the meeting.

Piazza testified that as the warden, he does not discipline, so the September 16 meeting with Jockel did not give rise to a **Weingarten** situation. However, Piazza's customary role in discipline is not dispositive of whether **Weingarten** attaches. The Board has cautioned that it is not the name the employer puts on the meeting, but whether the employee reasonably understands that discipline could come from the meeting. In **Pennsylvania State Correctional Officers Association v. Commonwealth of Pennsylvania**, 34 PPER ¶ 34021 (Final Order, 2003), the Board held that the employer's designation of an employee meeting as a "counseling session" did not remove the meeting from the ambit of **Weingarten** where the facts showed that the employer asked questions of the employee that could later serve as the basis for discipline. The test is what an employee should reasonably be expected to understand could flow from the meeting. **Commonwealth of Pennsylvania, supra**.

Although Jockel's union representative, Gene Wicht, told her that there would be no discipline from the meeting, what actually happened during the meeting understandably gave her a different impression. Jockel was called into the warden's office after taking off the disputed day and Piazza proceeded to ask her questions about her absence, including questions about her child care. Jockel also testified credibly that she had never been disciplined before and that she was not aware if there was an interview or a hearing before discipline is imposed. From these facts, it is possible to conclude that Jockel could have reasonably understood that Warden Piazza was the official who would issue discipline to her. At the September 16, Jockel was entitled to **Weingarten** representation.

Remedy

Jockel argues that the appropriate remedy for this **Weingarten** remedy is to make her whole, i.e., that the written reprimand be expunged from her file. In **Commonwealth of Pennsylvania, Pennsylvania Emergency Management Agency (PEMA) v. PLRB**, 31 PPER ¶ 31034 (Final Order, 2000), *aff'd* 768 A.2d 1201 (Pa. Cmwlth. 2001), the Board adopted the NLRB's standard for remedy, set forth in **Kraft Foods**, 251 NLRB 598 (1980),

[O]nce 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. If the employer fails to carry that

burden, then a conventional make-whole order will be issued.

Id. at 1205

As for the September 19 meeting, the parties present opposing versions of when Major Larson had prepared the the Disciplinary Action for Jockel's signature. Which version is accepted will decide the question of whether the County "imposed discipline based upon information that it obtained from the unlawful interview" with Piazza on September 16. Jockel argues that Piazza and Larson worked together to predetermine the September 19 Disciplinary Action. Major Larson did admit to having a conversation with Piazza about Jockel between September 16 and 19, but that conversation was about setting up the disciplinary interview, not about what Piazza learned from questioning Jockel on September 12.

For the reasons stated below, I find Larson's version of the September 19 meeting to be persuasive.

Larson testified that on September 19, he did not have the Disciplinary Action already typed. Larson testified clearly and credibly that when the September 19 meeting began he had the shift supervisor's "write-up" of Jockel's September 12 absence on the table, not the Disciplinary Action (Complainant's Exhibit 1). He testified that the meeting lasted approximately ten minutes. When the meeting ended, Larson left the room with his handwritten meeting notes and gave them to his secretary to type into a Disciplinary Action. When the secretary completed the form, he signed it and then gave it to Captain Orkwis, the shift supervisor, who gave it to Jockel to sign. Larson testified in a clear, calm, sincere and straightforward manner.

Jockel testified that on September 19, Larson already had the Disciplinary Action typed for Jockel's signature when Jockel entered the room. On this point, Jockel's argument tries to discredit the County's version of events. Jockel's counsel asked her, "Was there any time that Major Larson left the room during that meeting before you signed the letter of-----." (N.T. 33) Jockel, before her counsel completed his question, answered, "Not that I recall." As an attempt to discredit Larson's testimony, Jockel's testimony falls short. It was a bit too eager to answer and it was not a convincing rebuttal of Larson's story.

In light of this finding, it must be concluded that the County has carried its burden of proving that it based its disciplinary action against Jockel on what Larson determined in the September 19 interview meeting. This was a meeting when Jockel had union representation pursuant to **Weingarten**. Accordingly, there is no basis to remedy Piazza's violation of **Weingarten** with an order that would expunge the written reprimand issued on September 19.

This order does not preclude Jockel or her union from pursuing the grievance (Respondent Exhibit 1) to remove the disciplinary action from her record.

CONCLUSIONS

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

1. That Luzerne County, Luzerne County Prison is a public employer within the meaning of Section 301(1) of the Act.
2. That Susan Jockel is a public employe within the meaning of Section 301(2) of the Act.
3. That the Board has jurisdiction over the parties hereto.
4. That Luzerne County, Luzerne County Prison has committed unfair practices within the meaning of Section 1201(a) (1) of PERA.
5. That Luzerne County, Luzerne County Prison 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 the Act, the examiner

HEREBY ORDERS AND DIRECTS

that Luzerne County, Luzerne County Prison shall:

- (1) Cease and desist from interfering with, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of the Act.
- (2) Take the following affirmative action:
 - (a) 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
 - (b) 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 pursuant to 34 Pa. Code § 95.98(a) within twenty (20) days of the date hereof, this decision and order shall be and become absolute and final.

SIGNED, DATED and MAILED this twenty-fifth day of March, 2013, at Harrisburg, Pennsylvania.

PENNSYLVANIA LABOR RELATIONS BOARD

Thomas P. Leonard, Hearing Examiner