

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNSYLVANIA STATE CORRECTIONS :
OFFICERS ASSOCIATION :
 :
 v. : Case No. PERA-C-13-29-E
 :
 COMMONWEALTH OF PENNSYLVANIA :
 DEPARTMENT OF CORRECTIONS :
 RETREAT SCI :

PROPOSED DECISION AND ORDER

On February 11, 2013, the Pennsylvania State Corrections Officers Association (Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board). In the charge, the Union alleged that the Commonwealth of Pennsylvania (Commonwealth) violated Section 1201(a)(1) of the Public Employe Relations Act (PERA). The Union specifically alleged that the Commonwealth engaged in unfair practices when, on January 18, 2013, it denied Corrections Officer AK a Union representative during an investigatory interview.¹

On February 27, 2013, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing take place on September 19, 2013, in Harrisburg. During the hearing on that date, both parties in interest 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 Commonwealth is a public employer within the meaning of Section 301(1) of PERA. (N.T. 3; PERA-R-01-153-E, Order and Notice of Election, 2001).
2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 3; PERA-R-01-153-E, Order and Notice of Election, 2001).
3. AK is employed as a Corrections Officer I by the Department of Corrections (DOC) at the Retreat State Correctional Institution (Retreat SCI). Her shift commander is a captain. (N.T. 6-7).
4. On January 17, 2013, AK's shift commander directed her to report to his office. Upon arrival, the Captain presented AK with a "Proceedings Notice" from Agent Adam D. Hough from the DOC's Office of Special Investigation and Intelligence (OSII) advising AK that she will be interviewed by the OSII to investigate allegations of inmate abuse made by a former male inmate. This notice is a 24-hour notice of interview required by the parties' collective bargaining agreement. (N.T. 7-8, 34-35; Union Exhibit 3).
5. When Officer AK left the Captain's office on January 17, 2013, she contacted her Union President to discuss the investigation. Officer AK believed that she could be disciplined by the DOC and that she could potentially lose her job if investigators credited any of the inmate's allegations. The Union President informed Officer AK to call him for representation whenever she is interviewed by the DOC investigators. (N.T. 8-11).
6. The male inmate falsely alleged that Officer AK sexually and physically abused him. He further alleged that Officer AK was having an extramarital affair with

¹ I have changed the name of the Officer due to the nature of the dishonest, false and unfounded accusations lodged against her by a former inmate.

a corrections officer (Officer J) at Retreat SCI and the accusing inmate. He also falsely alleged that Officer AK was trying to have three other corrections officers killed. The inmate further falsely alleged that Officer AK wanted to bring a handgun into the prison and give it to an old, dying inmate serving a life sentence and that she and Officer J were going to get Officer J's "biker friends" to shoot the other corrections officers. (Union Exhibit 3).

7. On January 18, 2013, as soon as the gate closed behind Officer AK upon her arrival for her shift, AK's shift commander met her in the lobby and told her to immediately report to the security captain's office and that OSII was waiting for her. She could not refuse that order. (N.T. 11-12).
8. When Officer AK arrived at the security captain's office, the security captain said: "are you ready for this?" AK responded: "sure." The security captain escorted Officer AK to the office next door. (N.T. 12-13).
9. Inside the office, there were two men in suits. The security captain said: "good luck" and left the room. The two men introduced themselves as agents of OSII in the DOC and stated that they had some questions for her. Agent Adam Hough was the lead agent and Agent David Smith was the second agent. The door to the office was closed during the entire interview. Officer AK stopped Agent Hough and asked if she could have a Union representative. Agent Hough said: "No, not at this time." And then said: "I'll explain." (N.T. 12-15, 34-38, 51, 56-57).
10. Agents Hough and Smith are both Act 120 certified police officers with full police powers. Agent Hough told Officer AK that she was the subject of an investigation that had the potential to be criminal in nature. Officer AK believed that she could lose her job. Any of Officer Hough's investigations could result in discipline. (N.T. 15-17, 33-34, 42-43, 47-49, 56-57).
11. Agent Hough presented Officer AK with a document entitled: "Pennsylvania Department of Corrections RIGHTS WARNING AND WAIVER." Agent Hough asked Officer AK to sign the document. (N.T. 16-17, 22, 37; Commonwealth Exhibit 1).
12. The document is a **Miranda** Warning and Waiver and provides as follows:

You have the right to remain silent.

Anything you say can and will be used against you in a court of law.

You have the right to speak to an attorney and have him/her present before and during questioning.

If you cannot afford an attorney, one will be appointed to represent you free of charge before any questioning, if you so desire.

If you decide to answer questions, you may stop at any time you wish and you cannot be forced to continue.

WAIVER

I fully understand my rights and I am willing to waive them. I am willing to answer questions. I do not wish to speak to an attorney. I Understand that I may stop answering questions at any time during questioning. I make this waiver freely. No promises have been made to me, nor have I been threatened in any manner.

(Commonwealth Exhibit 1).

13. Agent Hough gave Officer AK the **Miranda** Warning as a protective measure due to the potential for criminal charges. Officer AK read and signed the waiver. Neither Agent Hough nor Agent Smith read or explained the **Miranda** Warning to Officer AK. She believed that she could not leave the interview. At no point during the interview did Officer AK request an attorney. The interview would have continued even if Officer AK had not signed the Waiver Agreement. (N.T. 17-18, 21, 24, 37-38, 51; Commonwealth Exhibit 1).
14. During the interview, Officer AK hand wrote a statement and signed every page of it. She believed that she could not refuse to provide the written statement. (N.T. 22-24, 28; Commonwealth Exhibit 2).
15. Officer AK was not criminally charged nor was she disciplined by the DOC. (N.T. 18).

DISCUSSION

The Union claims that the Commonwealth violated Officer AK's right to a Union representative during the OSII interview on January 18, 2013. An employe has the right to union representation, upon request, at an investigatory interview. **PLRB v. Conneaut School District**, 12 PPER ¶ 12155 (Final Order, 1981); **PLRB v. Township of Shaler**, 11 PPER ¶ 11347 (Nisi Decision and Order, 1980). This right is commonly referred to as a **Weingarten** right, so named for the United States Supreme Court decision in **NLRB v. Weingarten**, 420 U.S. 251 (1975). In a **Weingarten** case, the complainant has the burden of establishing the following:

[T]hat he reasonably believed that the interview might result in disciplinary action. Second, the [c]omplainant must request that a union representative be present and that such request must be denied. Finally, that subsequent to the employer's denial of representation, the employer must compel the employe to continue with the interview.

Township of Shaler, 11 PPER at 559. The **Weingarten** protection is a right held by the individual employe and a violation of that right constitutes a violation of Section 1201(a)(1) of PERA. **Commonwealth of Pennsylvania, Office of Administration v. PLRB**, 591 Pa. 176, 916 A.2d 541 (2007). Moreover, an individual's right to union representation at an investigatory interview includes the right for an employe to have the union representative of his choice at the interview if that chosen representative is reasonably available and there are no extenuating circumstances. **Commonwealth, Office of Administration**, 591 Pa. at 192-193, 916 A.2d at 551.

Officer AK was undoubtedly the subject of an investigatory interview on January 18, 2013, when she was escorted to a closed door meeting with two OSII agents from her employer, the DOC. She was aware that she had been accused of inmate abuse; Agent Hough told her that they had some questions for her and that criminal charges could result depending on the outcome of the investigation. She reasonably believed that she could lose her job. Clearly, Officer AK had a reasonable belief that discipline might result from the interview. Both parties' witnesses unequivocally confirmed that Officer AK clearly requested a Union representative to be present during the investigatory interview. Both Agent Hough and Officer AK testified that Agent Hough denied Officer AK's request for a Union representative and then presented Officer AK with a **Miranda** Warning and Waiver Agreement.² After Officer AK signed the Waiver, Agent Hough proceeded to question Officer AK about the allegations of inmate abuse. He had her write a statement and sign each page of her written statement.

Although the Commonwealth contends that "there is certainly doubt as to whether [Officer AK] was compelled to continue with the interview once her request was denied,"

² Moreover, the Commonwealth concedes in its brief that "there is little, if any, doubt that [Officer AK] reasonably believed that her interview with Agents Hough and Smith might result in disciplinary action, or that [Officer AK] requested and was denied union representation." (Commonwealth's Brief at 3).

Officer AK credibly testified that she believed that she could not leave the interview or refuse to provide the written statement. I conclude that those beliefs were reasonable based on the circumstances and the environment in which she found herself. Once Officer AK was presented with a **Miranda** Warning, she had a reasonable believe that she was in a custodial interrogation setting and she was not free to leave. Accordingly, the Union has met its burden of proving all the elements of a **Weingarten** violation.

The Commonwealth argues in defense, however, that the Waiver Agreement, which Officer AK signed, provided that she was free to stop at any time and she could not be forced to continue. Both the rights portion and the waiver portion of the **Miranda** Warning and Waiver Agreement provide that the subject may stop at any time and cannot be forced to continue. However, Agent Hough testified that the **Miranda** Warning and Waiver Agreement was a protective measure due to the potential for criminal charges. Accordingly, the Waiver Agreement did not have any effect on the employer's investigatory interview of an employe for alleged workplace misconduct. The Waiver Agreement, indicating that Officer AK could terminate the questioning at any time, was designed to protect a criminal suspect from self-incrimination. Officer AK could have invoked her right to stop the questioning under the Waiver Agreement based on her perception that the track of the interview raised criminal implications. However, the Waiver Agreement did not afford any additional rights to Officer AK to stop the interview as a result of being denied a Union representative. She had already exercised her **Weingarten** right to stop the interview when she asked for her Union representative. Once that request was denied and questioning continued, she was indeed compelled to continue with the interview.

Moreover, the Commonwealth's argument would place the additional burden on the employe to attempt to stop the investigatory interview after their request for a union representative was denied and the employer's agent continued with the interview. The request for the representative in the first instance is the employe's attempt to stop the interview until a representative is provided. Requiring the employe to again request that the interview stop after the employer's denial of the representative and continuation of questioning is not what is meant by the **Shaler** requirement that "the employer must compel the employe to continue with the interview." **Township of Shaler**, 11 PPER at 559. The employer compels the employe to continue with the interview when it continues with the interview after denying the representative.³

The context of the questioning is also important. Officer AK was approached by her shift commander as soon as she reported for duty on January 18, 2013. The shift commander told her to immediately report to the security captain's office and that OSII was waiting for her. As a corrections officer in a paramilitary employment setting, she could not refuse that order. When Officer AK arrived at the security captain's office, he asked her if she was ready for the interview and escorted Officer AK to the office next door. Officer AK was inside the office with the door closed with two OSII agents who are certified police officers. A reasonable employe in Officer AK's position, where ranking officers from DOC had ordered Officer AK to attend the interview with DOC special investigators, would not feel that she/he could stop the interview after being denied her/his **Weingarten** representative. To impose the additional burden on Officer AK to repeatedly request a representative or the cessation of the interview, after she was denied her initial request, could risk visiting upon her additional discipline, unrelated

³ Due to the conclusion that the burden was not on Officer AK to again request a Union representative or the cessation of the interview without one, I need not address the Commonwealth's argument that I should not rely on Officer AK's testimony that she requested a Union representative a second time after she signed the Waiver. Whether or not she did make a second request does not change the conclusion that the Commonwealth violated Officer AK's **Weingarten** rights. However, for purposes of review, I find as follows: Officer AK testified that she requested a Union representative both before and after receiving the **Miranda** Warning and Waiver Agreement. After receiving it, she confirmed with Agent Hough: "so you're denying me my right to Union representation?" To which Agent Hough said: "Yes." (N.T. 25-28). Agent Hough could not recall whether Officer AK mentioned a Union representative after receiving the **Miranda** Warning and Waiver Agreement. (N.T. 52). Agent Smith testified that Officer AK did not mention a Union representative after the **Miranda** Warning and Waiver Agreement. (N.T. 58). I am unable to resolve the conflict between Agent Smith and Officer AK. Therefore, the Union did not prove that Officer AK mentioned a Union representative a second time after she received the **Miranda** Warning and Waiver Agreement.

to her inmate abuse allegations, especially in a paramilitary organization like corrections.

CONCLUSIONS

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

1. The Commonwealth is a public employer within the meaning of Section 301(1) of PERA.
2. The Union is an employe organization within the meaning of Section 301(3) of PERA.
3. The Board has jurisdiction over the parties hereto.
4. The Commonwealth has committed unfair practices in violation of Section 1201(a)(1) of PERA.

ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employe Relations Act, the hearing examiner

HEREBY ORDERS AND DIRECTS

that the Commonwealth of Pennsylvania, Department of Corrections shall:

1. Cease and desist from interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of the Act.
2. Take the following affirmative action, which the hearing examiner finds necessary to effectuate the policies of PERA:
 - (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 the DOC 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 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 tenth day of January 2014.

PENNSYLVANIA LABOR RELATIONS BOARD

JACK E. MARINO, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNSYLVANIA STATE CORRECTIONS
OFFICERS ASSOCIATION

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF CORRECTIONS

:
:
:
:
:
:
:
:
:

Case No. PERA-C-13-29-E

AFFIDAVIT OF COMPLIANCE

The Commonwealth of Pennsylvania, Department of Corrections hereby certifies that it has ceased and desisted from its violations of Section 1201(a)(1) of the Public Employe Relations Act; that it has posted a copy of the decision and order as directed 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