

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

ALLEGHENY COUNTY PRISON EMPLOYEES :  
INDEPENDENT UNION :  
 :  
 : CASE NO.PERA-C-14-373-W  
v. :  
 :  
 :  
ALLEGHENY COUNTY :

**PROPOSED DECISION AND ORDER**

On November 25, 2014, the Allegheny County Prison Employees Independent Union (ACPEIU or Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that Allegheny County (County or Employer) violated Section 1201(a) (1) of the Public Employe Relations Act (PERA).

On December 17, 2014, the Secretary of the Board issued a complaint and notice of hearing, assigning the matter to Hearing Examiner Jack Marino, Esq., and assigning the charge to conciliation for the purpose of resolving the matters in dispute through mutual agreement of the parties, and designating June 10, 2015, in Harrisburg as the time and place of hearing, if necessary.

The hearing was necessary.A hearing was ultimately held on July 22, 2015, in Pittsburgh before the undersigned hearing examiner.At the close of the Union's case in chief, the County requested a continuance of the matter.The Union objected to this request, however the undersigned hearing examiner continued the matter and a second day of hearing was held on September 16, 2015, also in Pittsburgh and also before the undersigned hearing examiner.All parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence.

The Union filed a post-hearing brief on November 9, 2015.The County filed a post-hearing brief on December 14, 2015.

The hearing examiner, based upon all matters of record, makes the following:

**FINDINGS OF FACT**

1. The County is a public employer within the meaning of PERA.(N.T. 3).
2. The Union is an employe organization within the meaning of PERA. (N.T. 3).
3. The Union represents all full-time and regular part-time corrections officers (officers) within the Allegheny County Jail (ACJ).(N.T. 9).
4. On the morning of August 6, 2014, the prison administration noticed that more officers than usual were standing and gathering in front of the employe entrance to the prison during the morning shift change.Concerned that this was a work-stoppage or work slow-down, the administration of the prison conducted an investigation.(N.T. 56-57).
5. The administration conducted investigatory interviews with many officers over a number of days and split up the duties by assigning two teams of administration members to conduct the interviews.One team consisted of Major Demore, Captain McCall and Captain Maust and the other team consisted of Deputy Warden Wainwright and Captain Frank.(N.T. 69-70).
6. On August 6, 2014, Officer Kosco, a member of the Union, was called into a meeting with Major Demore, Captain McCall and Captain Maust (the Panel or the Administration) at the ACJ.Also present at this meeting was Officer Comer and Officer Reilly.Officers Reilly and Comer were Union representatives.(N.T. 11-12).

7. The meeting was about the County's concern that there had been a slow-down or work stoppage earlier that day when officers stood in front of ACJ and talked to each other. During this meeting the Panel wanted to know what he was doing during the time they thought there was a work stoppage. (N.T. 13).

8. At a certain point in the questioning of Kosco, Major McCall stated to Kosco: "you know you can be fired, you are on probation; you want to ruin your career because you won't tell us the truth?". (N.T. 13).

9. At one point in the questioning, one of the Panel said to Kosco that "would you like your Union reps to step out of this room so you can tell us the truth without retaliation against him from his Union guys." (N.T. 15).

10. Captain McCall then said to Kosco that "These [Union] guys will step out of here and you can tell us the truth, what really happened that day." (N.T. 16).

11. Kosco did ask Comer and Reilly to leave the meeting room while the meeting was still in progress and Comer and Reilly left the room. (N.T. 17).

12. After Kosco's meeting, Officer McClery was called by the Panel to be questioned about the work slow-down issue. Officers Reilly and Comer again attended the meeting to represent McClery after McClery asked them to attend. (N.T. 17-19).

13. After some questioning of McClery, the Panel, specifically Maust and Demore, asked Comer and Reilly to step out of the room. Unlike, Kosco, McClery did not ask Comer and Reilly to leave, and Comer and Reilly stayed for the entire meeting. (N.T. 20-21).

14. After McClery, the Panel questioned Officer Haynes about the work slow-down issue. Officers Reilly and Comer again attended the meeting to represent Haynes after Haynes asked them to attend. (N.T. 17-18, 21).

15. Haynes's meeting with the Panel covered the same topic as the meeting with Kosco and McClery. (N.T. 21-22).

16. A member of the Panel asked Haynes if Haynes would like Comer and Reilly to step out so that Haynes could speak freely and tell the Panel what really happened. Haynes did not ask Comer and Reilly to leave. (N.T. 22).

17. After questioning Haynes, the Panel questioned Officer Reick. Officers Comer and Reilly were present with Reick when he was questioned. (N.T. 18).

18. The Panel questioned Reick about the same work-stoppage incident. (N.T. 22).

19. During the questioning of Reick, a member of the Panel asked Reick if he would like Comer and Reilly to step out of the room so that he could speak the truth and tell the Panel what really occurred. Reick did not ask Comer and Reilly to leave the room. (N.T. 23).

20. During the questioning of Reick, Hanyes, and Kosco, the Panel told the officers that the results of the questioning could lead to possible discipline or punishment. The Panel also made it clear to the Officers that since they were on probation they could be fired if they do not tell the Panel the truth. (N.T. 13, 24, 28).

21. The Panel also questioned Officer Holland. Officer Salopek served as Holland's Union representation during this meeting upon Holland's request. (N.T. 33).

22. The Panel questioned Holland about the work stoppage. Holland responded that he did nothing wrong and that he did not know what the Panel was talking about. The Panel told Holland that he could be fired if he did not answer questions correctly. The Panel told Holland that Salopek could step outside. Holland did not ask Salopek to step outside. (N.T. 36).

23. Holland, Reick, Haynes, McClery and Kosco were probationary officers as of August 6, 2014. (N.T. 29, 42).

#### DISCUSSION

The Union claims that the Commonwealth violated Section 1201(a)(1) of PERA. Section 1201(a)(1) of PERA prohibits an employer from "interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of this Act." 43 P.S. §1101.1201(a)(1). An employer commits an independent violation of Section 1201(a)(1) of PERA "where in light of the totality of the circumstances the employer's actions have a tendency to coerce a reasonable employe in the exercise of protected rights." **Fink v. Clarion County**, 32 PPER ¶ 32165 at 404 (Final Order, 2001). Under this standard, the complainant does not have to show improper motive or that any employes have in fact been coerced. **Northwestern School District**, 16 PPER ¶ 16092 (Final Order, 1985); **Pennsylvania State Corrections Officers Ass'n v. Commonwealth of Pennsylvania, Department of Corrections, Pittsburgh SCI**, 35 PPER ¶ 97 (Final Order, 2004). If the employer's conduct was not coercive, then no violation of Section 1201(a)(1) may be found. **Commonwealth of Pennsylvania, Department of Corrections, Pittsburgh SCI**, *supra*. Nor may a violation of Section 1201(a)(1) be found if the employer presents a legitimate basis for its conduct that outweighs any coercive effect the conduct may have. **Temple University**, 23 PPER ¶ 23118 (Proposed Decision and Order, 1992), affirmed on another ground, 25 PPER ¶ 25121 (Final Order 1994); **Philadelphia Community College**, 20 PPER ¶ 20194 (Proposed Decision and Order, 1989). But if the employer presents no legitimate basis for its conduct that otherwise is coercive, then a violation of Section 1201(a)(1) must be found. **Ringgold School District**, 26 PPER ¶ 26155 (Final Order, 1995).

As mentioned above, an employer commits an independent violation of Section 1201(a)(1) of PERA where the employer's actions have a tendency to coerce a reasonable employe in the exercise of protected rights put forth in Section 401 of PERA. Included in Section 401 protected rights is the right to engage in lawful concerted activities for the purpose of mutual aid or protection. 43 P.S. §1101.401. The Pennsylvania Supreme Court has held that the right of a union member to be accompanied by a union representative during an investigative interview, the **Weingarten** right (discussed below), to be grounded in Section 401's right to engage in mutual aid and protection. **Commonwealth of Pennsylvania, Office of Administration v. PLRB**, 591 Pa. 176, 189 (2007).

In Pennsylvania, an employe has a **Weingarten** right to union representation, upon request, at an investigatory interview. **PLRB v. Conneaut School District**, 12 PPER P 12155 (Final Order, 1981); **PLRB v. Township of Shaler**, 11 PPER P 11347 (Nisi Decision and Order, 1980). This right is commonly referred to as a **Weingarten** right since it is named for the United States Supreme Court decision in **NLRB v. Weingarten**, 420 U.S. 251 (1975). 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 (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. **Id.** at 192-193.

Before addressing the facts in this matter, the County made an evidentiary objection at hearing and in its Brief to the testimony of Union witnesses regarding the statements made by County employees, more specifically members of the Panel, during the investigatory interviews on the grounds that such statements were inadmissible hearsay. (N.T. 13). It is well known that an opposing party's statement may be an exception to hearsay pursuant to Pa.R.E. 803(25)(D). For an admission of a party opponent to be admissible under Rule 803(25)(D), the proponent of the statement must establish three elements: (1) the declarant was an agent or employee of a party opponent; (2) the declarant made the statement while employed by the party opponent; and (3) the statement concerned a matter within the scope of agency or employment. **Harris v. Toys "R" Us-Penn, Inc.**, 880 A.2d 1270 (Pa. Super. Ct.

2005). In this matter, substantial and legally credible evidence exists to support that the members of the Panel were employees of the County, that during the investigatory interviews of the Officers the Panel members were employed by the County, and that the statements in question concerned employee discipline which is within the scope of employment of the Panel members. The County argues in its Brief that "Statements made in violation of PERA are not made within the scope of the employees' employment." County's memorandum of Law at 4. There is no authority cited to support this argument. But, even on its face this argument cannot be sustained because it could paradoxically immunize employers from certain unfair practice claims by claiming that employee reports of employer misconduct are hearsay. Furthermore, a statement made in violation of PERA is an admission of a violation. The County's evidentiary objection is overruled.

Turning to the facts in this matter, the Union's charges concern five separate meetings on August 6, 2014, when Major Demore, Captain McCall and Captain Maust (the Panel) interviewed five part-time officers: Officers Kosco, McCleary, Haynes, Reick and Holland. The questioning in these meetings focused on the officers involvement in or knowledge of an alleged work slow-down. The record is clear that all of the officers knew that these meetings were investigatory in nature and indeed all requested that a union representative be present with them during the meeting. The record is also clear that the five officers did in fact have union representation during these meetings. Thus, in this matter, the specific question is not whether the County violated the employees' **Weingarten** rights, but whether the County violated Section 1201(a)(1) by its statements to employees during the investigatory meetings during which the employees' **Weingarten** rights applied.

First are the statements made by Panel members during the meeting with Officer Kosco. The Union presented substantial and legally credible evidence that at one point in the questioning, one of the Panel members said to Kosco that "would you like your Union reps to step out of this room so you can tell us the truth without retaliation against him from his Union guys." Captain McCall then said to Kosco that "These [Union] guys will step out of here and you can tell us the truth, what really happened that day." I find that in the totality of the circumstances, these statements by the Employer would have the tendency to coerce or interfere with the **Weingarten** rights of a reasonable employee. As discussed above, **Weingarten** rights are protected activities. These statements are coercive because the County threatened that the Union may retaliate against Kosco if he were to tell the truth in the Union's presence. Furthermore, the County's statement insinuates that Kosco is not telling the truth, which, in combination with the County's previous threats that probationary employees can be terminated for not telling the truth, makes the County's statement coercive. A reasonable employee could interpret the County's statement to communicate the threatening idea that the employee should dismiss the Union representatives out of the investigatory meeting and tell the County what it wants to hear, irrespective of truth and outside the presence of the Union, or the employee would lose his or her job. This is coercive in its essence. Moreover, the employer has presented no legitimate basis for these statements. Thus, I find that these statements by the County to Officer Kosco have the tendency to coerce or interfere with the right of a reasonable employee to have union representation in an investigatory interview, and, therefore, the County committed a violation of Section 1201(a)(1) of PERA.

Second are the statements made by the County to Officers Haynes and Reick. They are similar statements so I consider them together. With regard to Haynes, the Union presented substantial and legally credible evidence that a member of the Panel asked Haynes if Haynes would like Comer and Reilly to step out so that Haynes could speak freely and tell the Panel what really happened. In the separate questioning of Reick, the Union presented substantial and legally credible evidence that a member of the Panel asked Reick if he would like Comer and Reilly to step out of the room so that he could speak the truth and tell the Panel what really occurred. I also find that in the totality of the circumstances, that these similar statements by the County would have the tendency to coerce or interfere with the **Weingarten** rights of a reasonable employee. These statements differ from the statement made to Officer Kosco, discussed above, in that they do not mention retaliation by the Union, though they are still coercive. The County's statements threaten by insinuating that the employees are not telling the truth because of the presence of Union representation, which, in combination with the County's previous

statements that probationary employees can be terminated for not telling the truth, makes the County's statement coercive. A reasonable employee could interpret the County's statement to communicate the threatening idea that the employee should dismiss the Union representatives out of the investigatory meeting and tell the County what it wants to hear, irrespective of truth and outside the presence of the Union, or the employee would lose his or her job. Thus, I find that these statements by the County to Officers Haynes and Reick have the tendency to coerce or interfere with the right of a reasonable employee to have union representation in an investigatory interview, and therefore the County committed a violation of Section 1201(a)(1) of PERA.

Third are statements made by the County in the separate investigations of Officers McClery and Holland. During the questioning of McClery, the Panel, specifically Maust and Demore, asked Comer and Reilly to step out of the room. During the questioning of Holland, the Panel told Holland that Salopek could step outside. I find that these statements do not have the tendency to coerce or interfere with the Weingarten rights of a reasonable employee because merely requesting a Union representative to leave the room or suggesting it to an employee is not coercive in itself. Employees are free to attend investigatory meetings without Union representation and are free to ask them to leave as well. What makes these statements different from the ones discussed above is that the requests for the Union representative to leave was not tied to a connected coercive comments dealing with Union retaliation or an insinuation that the employee was not telling the truth because the Union representative was in the room. Thus, I find that the County did not commit a violation of Section 1201(a)(1) of PERA due to the statements made by the County to Officers McClery and Holland.

Finally, in its Brief, the County argues that the Union's Complaint is moot because "the issue raised in this Complaint no longer exist and the employees in question suffered no discipline." County's Memorandum of Law at 1. The County cites **Ass'n of Pennsylvania State Coll. & Univ. Faculties v. PLRB**, 607 Pa. 461, 464 (2010). This argument fails because, importantly, this matter is a complaint alleging an independent violation of Section 1201(a)(1). The case cited by the County deals with a bargaining claim, or, more specifically, a Section 1201(a)(1) and (5) charge. Indeed, as set forth in the case cited by the County, the Board's mootness policy is to "dismiss as moot any unfair practice charge involving alleged bad faith bargaining where the parties have resolved the issues forming the basis for the charge through bargaining and a subsequent contract." *Id.* at 470. This matter is not a bargaining claim and the actions complained of by the Union have not been resolved by "subsequent contract". Therefore the Board's mootness policy does not apply to this matter.

#### CONCLUSIONS

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

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

#### ORDER

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

**HEREBY ORDERS AND DIRECTS**

that the County shall:

1. Cease and desist from interfering, restraining and coercing employes in the exercise of the rights guaranteed in Article IV of PERA.

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 the bargaining unit 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.

(c) Serve a copy of the attached Affidavit of Compliance upon the Union.

**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 become and be absolute and final.

**SIGNED, DATED AND MAILED** at Harrisburg, Pennsylvania, this twenty-second day of December, 2015.

PENNSYLVANIA LABOR RELATIONS BOARD

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STEPHEN A. HELMERICH, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

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INDEPENDENT UNION :  
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**AFFIDAVIT OF COMPLIANCE**

Allegheny County hereby certifies that it has ceased and desisted from its violation of Section 1201(a)(1) of the Public Employee Relations Act; that it has complied with the Proposed Decision and Order as directed therein; that it has posted a copy of the Proposed Decision and Order as directed therein; and that it has served an executed 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