COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

SOUTH MIDDLETON EDUCATION ASSOCIATION PSEA/NEA	:	
v.	:	CASE NO. PERA-C-12-369-E
SOUTH MIDDLETON SCHOOL DISTRICT	:	

PROPOSED DECISION AND ORDER

On December 5, 2012, the South Middleton Education Association (Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against the South Middleton School District (District) alleging that the District violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA). The Union specifically alleged that the District unilaterally changed working conditions when, for the first time, it insisted that a court reporter transcribe the verbal exchanges during an investigatory interview of a bargaining unit member and where the collective bargaining agreement does not provide for the use of a court reporter during an investigatory interview. The Union claims that the District had an obligation to bargain the change or the impact thereof.

On January 8, 2013, the Secretary of the Board issued a complaint and notice of hearing designating a hearing date of June 20, 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. The parties also entered into a stipulation of facts. On October 4, 2013, the Union timely filed a post-hearing brief. On December 2, 2013, the District timely filed a post-hearing brief.

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

FINDINGS OF FACT

THE PARTIES STIPULATED AND AGREED TO THE FIRST 18 FINDINGS OF FACT:

1. The District is a public employer within the meaning of Section 301(1) of PERA. (N.T. 5).

2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 5).

3. During the summer of 2010, an issue arose regarding the possible criminal activities of a high school teacher at South Middleton School District, Mr. Doe, following his presence at a residence where a drug raid was being conducted.[1] (Joint Exhibit 10, ¶ 1).

4. A meeting was held with District officials and Mr. Doe on August 6, 2010, during which Mr. Doe refused to answer any questions on the advice of his attorney. (Joint Exhibit 10, ¶ 2).

5. Another meeting was held on August 10, 2010. In attendance at that meeting were Mr. Doe, his attorney, Terrence McGowan, District Solicitor, Philip Spare, Union President, Brad Group, District Superintendent, Dr. Patricia B. Sanker, and District Assistant Superintendent, Dr. Sandra Tippet. (Joint Exhibit 10, ¶ 3).

[1] I have changed the name of the bargaining unit member under investigation in an attempt to protect whatever privacy he has left regarding the charges and allegations against him.

6. Following the August 10, 2010 meeting, Dr. Sanker sent a letter, dated August 16, 2010, to Mr. Doe suspending him with pay pending completion of the investigation. (Joint Exhibits 1 & 10, ¶ 4).

7. On or about September 22, 2010, Mr. Doe was federally charged as follows: manufacturing, distribution and possession with intent to distribute a controlled substance, aid, abet, Title 21, use Section 843 (b). (Joint Exhibit 10, ¶ 5).

8. On September 24, 2010, Thomas W. Scott, Esquire, attorney for the Union, wrote to Mr. Spare, indicating, in part, that "Mr. Doe is prepared to either request or accept without challenge a leave without pay that would commence immediately and be effective until such time as each of the criminal charges against him are resolved or either the District or Mr. Doe notify the other that they wish to terminate the leave without pay." (Joint Exhibits 2 & 10, ¶ 6).

9. By letter dated September 27, 2010, Mr. Spare wrote a responsive letter to Mr. Scott indicating, in part: "effective today, he is on administrative leave without pay or benefits. His status will remain unchanged until such time as the criminal charges are resolved or either the District or Mr. Doe notifies the other that they wish to terminate the leave without pay status." (Joint Exhibits 3 & 10, ¶ 7).

10. The next development in this matter occurred in April 2012, when Lora Apaliski, UniServ Representative, wrote to Mr. Spare, indicating that Mr. Doe had successfully completed the Pre-Trial Diversion Program and the criminal charges against him were dismissed. She requested that the District return Mr. Doe to his teaching position. (Joint Exhibits 4 & 10, ¶ 8).

11. Mr. Spare responded to Ms. Apaliski's April 26, 2012 letter, by letter dated May 1, 2012, indicating that the District planned to continue the August 6, 2010 investigatory interview and to have a court reporter present to record Mr. Doe's responses during that interview. (Joint Exhibits 5 & 10, ¶ 9).

12. By letter dated July 10, 2012, Ms. Apaliski explained her objections to the District's intention of having a court reporter present at the next investigatory meeting. (Joint Exhibits 6 & 10, ¶ 10).

13. A meeting was scheduled for August 14, 2012. Present were Dr. Sanker, Mr. Spare, Ms. Apaliski, Mr. Doe and a court reporter. Ms. Apaliski objected to the presence of the court reporter at the beginning of the meeting. Despite the objection, the District proceeded with its investigatory interview of Mr. Doe in the presence of the court reporter and the UniServ Representative. (Joint Exhibit 10, ¶ 11).

14. Following the August 14, 2012 meeting, Ms. Apaliski wrote to Mr. Spare, dated September 25, 2012, requesting that the District pay an invoice from the court reporter to PSEA for $67.90. The letter further indicated that the Union would not participate in future meetings if the District intends to require the presence of a court reporter. (Joint Exhibits 7 & 10, ¶ 12).

15. By Letter dated October 11, 2012, Mr. Spare responded to Ms. Apaliski declining the Union's request for the District to pay for the Union's copy of the transcript. (Joint Exhibits 8 & 10, ¶ 13).

16. In 2013, the District Administration issued a Notice of Charges to Mr. Doe seeking his dismissal as a professional employe of the District. (Joint Exhibit 10, ¶ 16).

17. Brad Group has been the Union President for over 20 years. He has attended approximately 2 investigatory interviews per school year called by the Administration to investigate allegations of misconduct by bargaining unit members. (Joint Exhibits 10, ¶ 17; N.T. 10).

18. At no time prior to August 14, 2012, did the District have a court reporter attend any investigatory hearings or make any other verbatim recording of the proceedings. The District and the Union have never negotiated the topic of the presence of a court reporter at an investigative meeting. (Joint Exhibit 10, ¶ 19 7 20; N.T. 10-11).

19. The purpose of an investigatory interview is to gather facts and data so the employer can make a more reasoned, well informed decision about the employe and so that the employe can explain his/her conduct. Mr. Doe's case was more complex than a typical employe investigation. It is important that the investigated employe is honest and forthcoming with information. A court reporter causes the interviewee to be more accurate and cautious in giving answers. (N.T. 21-23, 31-32, 34, 44, 55).

20. The District never denied the Union a copy of the transcript of Mr. Doe's investigatory interview. The District refused to pay the bill that the court reporting agency charged the Union for its own copy of the transcript. (N.T. 45-46).

21. Both parties take their own notes to document what occurs at investigatory interviews because both parties need to know what was asked and what was answered at those interviews. (N.T. 52-53).

22. There is more potential for there to be factual disputes about what transpired at an investigatory interview when both parties take notes as compared to when a professional neutral court reporter records everything verbatim. (N.T. 55).

DISCUSSION

The facts in this case are not in dispute, leaving a purely legal question for the Board's determination. The issue is whether the District's insistence upon the presence of a professional neutral court reporter during an investigatory interview without bargaining with the Union, where the interview occurred, at the request of the Union, two years after the investigated employe was administratively suspended, violates Section 1201(a)(1) and (5) of PERA. I answer this question in the negative.

The Union argues that a party may not insist upon a verbatim transcript at an investigatory interview without bargaining with the Union. The Union further contends that "[t]he chilling effect that will result from verbatim records of investigatory interviews will deprive the individual employe of any meaningful opportunity to respond to accusations against them." (Union's Post-hearing Brief at 6). The Union maintains that "[a]llowing pre-disciplinary hearings to be transcribed verbatim would negate the benefits of having a union representative present." (Union's Post-hearing Brief at 6). The Union also argues that a transcript of an investigatory interview will be used to tie down an employe to what he/she said before he/she knows everything. (Closing Argument, N.T. 66-67).

The presence of a court reporter, argues the Union, elevates the investigatory interview to the level of a formal hearing like an arbitration or unfair practice hearing. The Union claims that transcripts at formal hearings are necessary because the positions of the parties and the issues have been investigated and fleshed out whereas the investigatory interview is a preliminary stage where the investigated employe is unsure of facts. The Union accordingly claims that insisting on a court reporter at an investigatory interview is a violation of Section 1201(a)(5), because the District refused to bargain the use of the court reporter, and Section 1201(a)(1), because it is coercive.

The District parries by emphasizing that, contrary to the Union's claim, the investigatory interview is indeed a very formal and serious proceeding because someone may lose their job. It is not a chit-chat or feel-good bargaining session or grievance settlement, and it is not subject to collective bargaining. The parties are not meeting to resolve a contract dispute, a past practice or ambiguous language in the contract.

(N.T. 59-61). The District maintains that the case law is clear that the manner in which an employer conducts an investigatory interview is a matter of managerial discretion and prerogative. The case law even supports surprising the interviewee and keeping him/her off balance with interrogation tactics. (N.T. 61). I agree with the District.

The District begins with the United States Supreme Court's seminal decision in **NLRB v. Weingarten**, 420 U.S. 251 (1975), holding that an employe has a right to a union representative during an investigatory interview where the employe has a reasonable concern that discipline may result. The District notes, however, that **Weingarten** and its progeny support the District's position that the employer's right to investigate employe misconduct in the manner it deems appropriate is not limited. (District's Post-hearing Brief at 3-7). The District further maintains that the complexity of the Doe investigation warranted the presence of a court reporter during his investigatory interview because it was the most accurate way to record and preserve the information provided by Mr. Doe. (District's Post-hearing Brief at 7). The District, in this regard, argues that the court reporter was necessary to obtain an accurate account of Mr. Doe's conduct to ensure that the District made a well-reasoned employment decision based on the most accurate information. (District's Post-hearing Brief at 7-9).

As referenced by the District in its post-hearing brief, the United States Supreme Court, in **Weingarten**, quoted with approval from the National Board's decisions in **Quality Mfg. Co.**, 195 NLRB 197 (1972) and **Mobil Oil Corp.**, 196 NLRB 1052 (1972), recognizing that therein the National Board "shaped the contours and limits of the statutory right [to union representation during an investigatory interview]." **Weingarten**, 420 U.S. at 256. The **Weingarten** Court specifically emphasized that "the employer has no duty to bargain with any union representative who may be permitted to attend the investigatory interview." **Id.** at 259. Quoting from the National Board in **Mobil**, the Court said "`we are not giving the Union any particular rights with respect to predisciplinary discussions which it otherwise was not able to secure during collective-bargaining negotiations.'" **Weingarten**, 420 U.S. at 259 (quoting **Mobil**, 196 NLRB at 1052 n.3). The Court expressly stated that "***[t]he employer has no duty to bargain with the union representative at an investigatory interview***." **Weingarten**, 420 U.S at 260 (emphasis added). "The union representative may not turn the meeting into an adversarial proceeding, may not prevent the employer from questioning the employee, even repetitiously, and 'may not interfere with legitimate employer prerogatives.'" **Barnard College and Transport Workers Union of America, Local 264**, 340 NLRB 934, 935 (2003).

The Union, however, relies on a line of cases beginning with **NLRB v. Pennsylvania Telephone Guild (PTG)**, 799 F.2d 84 (3rd. Cir. 1984). However, those cases are inapposite because of ***the fundamental difference between investigatory interviews and grievance meetings***. The union representative in that case tape recorded the investigatory interviews of employes suspected of organizing an unauthorized work stoppage. The employes were suspended. Neither the investigatory interviews nor the suspension announcements were grievance meetings. The Union filed grievances over the suspensions. Both parties waived the first two steps of the grievance procedure and they held a third level grievance meeting. The union insisted upon tape recording the ***grievance meeting*** and the employer objected. It was the union in that case who argued that the circumstances were unique and it needed the most accurate record it could obtain, and the employer that argued that it would inhibit open and honest discussion, formalizing the process and preventing flexibility in reaching a practical solution. **PTG**, 799 F.2d at 86. The National Board and the Third Circuit agreed with the employer and held that ***grievance meetings*** are not only substantially similar to collective bargaining negotiations, but also an integral part of collective bargaining negotiations and that the use of tape recorders could inhibit free and open discussion in grievance meetings as well as collective bargaining. The adverse effects on the bargaining process outweighed the need for a verbatim transcript. The National Board held, and the Third Circuit affirmed, that a party violates its duty to bargain by insisting to impasse on recording ***grievance meetings***.

In seeking enforcement in the Third Circuit Court of Appeals, the National Board, in **PTG**, relied on **Latrobe Steel Co. v. NLRB**, 630 F.2d 171 (3d Cir. 1980), also cited by the Union here, and **NLRB v. Bartlett-Collins Co.**, 639 F.2d 652 (10th Cir. 1981). In those

cases, the Third and Tenth Circuit Courts of Appeal upheld the National Board's determination that verbatim recording of collective bargaining sessions constituted a non-mandatory subject of bargaining and a party violates its duty to bargain in good faith by insisting to impasse on a non-mandatory subject as a precondition to bargaining mandatory subjects. Both courts also reasoned that it would have a chilling effect on negotiations. The **PTG** Court adopted the National Board's view that both grievance meetings and collective bargaining negotiations are informal mechanisms used to resolve employe concerns about working terms and conditions through settlement and agreement. . . . Therefore both require a free and open exchange of views so that resolution may be reached." ***PTG***, 799 F.2d at 88. "Such manifestations of suspicion and distrust are antithetical to the negotiating process." **Id.**

However, the goals of investigatory interviews and adjudications are significantly different than the goals of grievance and collective bargaining meetings. The goal of an investigatory interview is to ascertain truthful facts to make an informed employment decision. The goal of an adjudicatory hearing is also to ascertain truthful facts such that the adjudicator can make an informed, reasoned decision. An accurate recording of those facts facilitates the informed and reasoned nature of the employer's employment decision or the adjudicator's decision. (F.F. 19). Collective bargaining and grievance meetings cannot be equated with truth-finding and fact-finding processes. The goal of bargaining and settlement discussions is not the attainment of truthful facts but ***the attainment of agreement*** based on relative economic power, the parties' interests, public opinion, reason, persuasion and accommodation. **Bartlett-Collins**, 639 F.2d at 657. "The pursuit of truth and justice is not always the guiding beacon in collective bargaining. The goal of ascertaining with 100 percent accuracy what was said in negotiations may be subordinate to other concerns, such as ensuring peaceful resolution of industrial disputes." **Id.**

An examination of **Weingarten**, **PTG**, **Latrobe and Bartlett-Collins** reveals that the United States Supreme Court, federal courts of appeal and the National Board draw a clear distinction between grievance meeting procedures and investigatory interview procedures. The United States Supreme Court in **Weingarten** and this Board in **Cheltenham Township Police Ass'n v. Cheltenham Township**, 36 PPER 4 (Final Order, 2005), have mandated that employers retain complete managerial discretion over the manner by which they conduct investigatory interviews, as long as they permit the presence of requested union representatives.

In **Cheltenham**, **supra**, this Board reiterated that **Weingarten** protections at investigatory interviews are rooted in an employe's right to engage in concerted activity for mutual aid and protection ***and not any guarantee of the right to bargain collectively***. **Cheltenham**, 36 PPER at 13. The Board stated as follows:

> First, the employer's interest in a **Weingarten** interview is specific and focused, and has nothing to do with collective bargaining. By nature, a **Weingarten** interview is an employer initiated investigatory interview of an employe, where the employer has reason to suspect employe misconduct that may result in serious discipline, including dismissal. The interview itself is an exercise of managerial prerogative (the employer's right to supervise, discipline, and if necessary to discharge employes for cause) ***and is not, as the Supreme Court points out in Weingarten, affected by the right of employes to collectively bargain through their representative***.

Cheltenham, 36 PPER at 14 (emphasis added). Clearly, the Board has concluded that there is nothing bargainable about the manner in which an employer conducts an investigatory interview. The **Cheltenham** Board forcefully opined at length that it expressly rejected any notion that an employer has a duty to bargain over the time, place or manner of investigatory interviews by stating the following:

> We further believe that casting **Weingarten** as a right solely possessed by the union, as collective bargaining representative, will weaken the managerial prerogative nature of such interviews. The Supreme Court was

careful to expressly support the managerial prerogative nature of such an interview and reject any notion that collective bargaining or collective bargaining rights play a part in **Weingarten. Weingarten**, where properly observed by both sides, is neither a means by which the employe and his/her representative can undermine or negate management's investigation, nor is it support for an employer's single minded purpose or interest in building a case against an employe regardless of the facts. ***Regarding Weingarten rights as an extension of the bargaining process upsets the balance the United States Supreme Court struck in trying to protect both management's prerogative to conduct such interviews on its terms, and the right of the employe to have the mutual aid and assistance of his/her representative during the interview.***

Viewing **Weingarten** as a collective bargaining matter empowering the union in its capacity as collective bargaining representative, will, we believe, have the unintended consequence of weakening the employer's managerial prerogatives in the **Weingarten** process. Characterizing a matter as part and parcel of collective bargaining rights generally establishes a right and duty to collectively bargain. **Pennsylvania Labor Relations Board v. State College Area School District**, 461 Pa. 494, 337 A.2d 262 (1975). If **Weingarten** is considered a bargaining matter, then, while management has a right to hire, fire and direct its workforce, it would have an obligation to collectively bargain over the wage, hour and working condition impact of the exercise of managerial prerogatives. **Lackawanna County Detectives' Association v. Pennsylvania Labor Relations Board**, 762 A.2d 792 (Pa. Cmwlth. 2000). Under an impact bargaining analysis this right normally would include reasonable notice of the matter under investigation, the right to certain information, and likely a duty to negotiate time and place of interviews which would afford that a union designated representative (such as an attorney who is not present at the worksite) to attend **on behalf of the union.** We believe **Weingarten** as an extension of collective bargaining would unnecessarily entangle management in a bargaining process not envisioned by **Weingarten**, or the Board in its precedent following **Weingarten.**

A **Weingarten** investigatory interview should be an exercise of managerial prerogative to direct and manage the employer's workforce, with the representative present merely to assist the employe in the interview, and not pursuant to any present or prospective collective bargaining interest. ***Management should retain the right, unfettered by collective bargaining or the collective bargaining representative, to schedule and conduct the interview using legitimate investigative techniques, (e.g. surprising the interviewee with information, keeping the interviewee off balance in questioning, etc.) and retain the exclusive province to evaluate the results of its investigatory interview. Regarding Weingarten solely as an employe right to engage in mutual aid and protection, and not as a collective bargaining right, vests the employer with discretion regarding the circumstances of the interview (when it will be conducted, advance notice, the representative must be available at the worksite).*** These managerial rights will be blunted or thwarted by casting ***Weingarten*** as a collective bargaining matter involving only "union rights," since, it will bring to bear the statutorily conferred right the union possesses in the collective bargaining process to be present and consulted by the employer in good faith.

Cheltenham, 36 PPER at 15 (footnotes omitted)(emphasis added).

In this case, the District attempted to conduct an investigatory interview with Mr. Doe in August 2010 regarding his presence at a residence while a drug raid was conducted. Mr. Doe refused to answer any questions at that time on advice of counsel. The District agreed not to terminate Mr. Doe until it completed a thorough investigation and also agreed that Mr. Doe would be suspended without pay until the resolution of his criminal charges. In April 2012, Ms. Apaliski contacted the District informing them that Mr. Doe's charges

had been resolved without conviction and that he should be reinstated to his teaching position for the 2012-2013 school year. Having been unable to complete its investigation in August 2010, the District informed the Union that it wanted to finish the August 2010 investigatory interview of Mr. Doe and that a court reporter would be present. Ms. Apaliski objected to the presence of a court reporter in her July 10, 2012 letter to Mr. Spare. Ms. Apaliski cited, as the basis for her objection, the lack of any provision in the parties' collective bargaining agreement permitting a court reporter to be present or a past practice of having a court reporter present. She stated that, in her opinion, the District has an obligation to bargain over the presence of a court reporter.

However, both federal authority and this Board's precedent have clearly distinguished between investigatory interviews on one hand and grievance settlement and negotiation meetings on the other. The Union recognized here that Mr. Doe's case was complex and that there is no better way to document the interview than with a court reporter because there can be no dispute about the questions and answers. The Board opined in **Cheltenham** that the goal of an investigatory interview is to collect information and learn the employe's version of facts to make a more informed, reasoned decision about discipline. In this regard, the Board stated as follows:

> The interview assists the employer in hearing from the employe directly and can avoid poor managerial decisions regarding employe discipline, where an ounce of informed prevention through the interview is worth a pound of expensive cure through subsequent "just cause" grievances over poorly informed management decisions.

Cheltenham, 36 PPER at 14. The presence of a court reporter, therefore, is as preferred during the interview as it is during an arbitration or unfair practice hearing, where the adjudicator has the same goals of reaching an informed decision based on a complete record of truthful facts. In this regard, the Board has held that investigatory interviews, which are managerial prerogatives, are not bargainable and that any wage, hour or working-condition impact is also not bargainable. **Cheltenham**, **supra**.

The Union's witness credibly testified that an investigated employe must be honest and forthcoming with information. The **Cheltenham** Board emphasized that a **Weingarten** representative helps a nervous employe properly articulate his/her facts to possibly prevent an erroneous employer decision. The presence of a court reporter has a similar positive effect, where the Union's witness also testified that a reporter causes an employe to be more accurate and cautious in giving answers, a laudable result under **Weingarten** and **Cheltenham**. In this regard, the reporter's presence does not have a chilling effect on the exercise of protected rights; rather it improves the conduct of the interview and the results of the investigation. The only protected right of the employe during the investigatory interview is the presence of a union representative. The court reporter's presence has no effect on the provision or presence of the union representative. Therefore, there is no chilling affect or coercion with respect to the exercise of rights protected by PERA.

Moreover, the Union's contention that investigatory interviews are preliminary stages in an employer's investigation is belied by the uncontested facts of record in this case, which establish that Mr. Doe's investigatory interview occurred two years after the occurrence of events for which he was being investigated and there was a complete police investigation. This position is also contrary to the Board's opinion in **Cheltenham** which provides that "[i]t is the Board's experience that usually some pre-interview investigation has been undertaken by the employer and the interview serves the employer's interest in confronting the employe with the employer's information and hearing the employe's version before it decides to impose discipline." **Cheltenham**, 36 PPER at 14.

Accordingly, the charge of unfair practices is dismissed and the complaint rescinded.

CONCLUSIONS

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

1. The District is a public employer under PERA.

2. The Union is an employe organization under PERA.

3. The Board has jurisdiction over the parties hereto.

4. The District has **not** committed unfair practices within the meaning of Section 1201(a) (1) or (5).

ORDER

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

HEREBY ORDERS AND DIRECTS

That the charge of unfair practices is dismissed and the complaint is rescinded.

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 order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this fifth day of June, 2014.

PENNSYLVANIA LABOR RELATIONS BOARD

_____

Jack E. Marino, Hearing Examiner