

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

PENNSYLVANIA SOCIAL SERVICES UNION :  
LOCAL 668, SERVICE EMPLOYES :  
INTERNATIONAL UNION :  
 :  
v. : CASE NO. PERA-C-13-362-E  
 :  
COMMONWEALTH OF PENNSYLVANIA, :  
OFFICE OF ADMINISTRATION, :  
BUREAU OF LABOR RELATIONS :

**PROPOSED DECISION AND ORDER**

On December 19, 2013, the Pennsylvania Social Services Union, Local 668, Service Employees International Union, (Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the Commonwealth of Pennsylvania (Commonwealth) violated Section 1201(a)(1) and (3) of the Public Employee Relations Act (PERA). On January 16, 2014, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on May 27, 2014, in Harrisburg. I granted the Union's continuance request, and the hearing was held on June 13, 2014. During the hearing, both parties were afforded a full and fair opportunity to present evidence and cross-examine witnesses. On July 31, 2014, the Union filed its post-hearing brief. On August 29, 2014, the Commonwealth filed its post-hearing brief.

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. 7).
2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 7).
3. The Commonwealth stipulated and agreed that the Commonwealth knows that Mr. Riedlinger has engaged in protected activities. (N.T. 7, 42)
4. Mr. Riedlinger is a vocational rehabilitation counselor in the Commonwealth's Office of Vocational Rehabilitation where he helps individuals with disabilities find and maintain employment. He is also the chief shop steward. (N.T. 16-17)
5. Mr. Riedlinger admits to poor work performance and was placed on a Performance Improvement Plan for poor work performance for several years. He was taken off one plan and placed on another approximately one year before the hearing. Performance Improvement Plans are usually written for three-month periods, but Mr. Riedlinger's plan, which began in August, 2013, was extended to January 2014. (N.T. 25-26, 50-51)
6. By the terms of the Performance Improvement Plan, Mr. Riedlinger was required to meet formally with his Supervisor, Patrice Domzalski, on every other Wednesday to review his work. He was also required to meet with her as needed for guidance, coaching assistance, feedback and support. (N.T. 46; Union Exhibit 2)
7. Heather Nelson is the District Administrator and Office Manager. (N.T. 70)
8. The "Terms of Agreement" Section of the Performance Improvement Plan provides, in relevant part, as follows:

I have read and understand the contents of the Performance Improvement Plan. . . . I also understand that failure to meet the performance expectations established in this plan may result in disciplinary action, up to and including termination.

(Union Exhibit 2; Commonwealth Exhibit 1)

9. On Wednesday, September 18, 2013, at 1:00 p.m., Mr. Riedlinger had a regularly scheduled bi-weekly performance evaluation meeting. This was the second such meeting for this plan. On the morning of September 18, 2013, Mr. Riedlinger requested a meeting with District Administrator Nelson, during which he told Ms. Nelson that his Supervisor, Ms. Domzalski, allegedly lied about the need to have customers sign a form for equipment purchases before OVR could pay for the equipment. After the Nelson-Riedlinger meeting, Mr. Riedlinger requested a Union representative to be present for his regularly scheduled bi-weekly Performance Improvement Plan meeting with his Supervisor. Ms. Domzalski denied the request. During the 1:00 meeting, Mr. Riedlinger again requested Union representation which was again denied. Mr. Riedlinger informed Ms. Domzalski that he would not answer any questions that were investigatory in nature, and again requested a representative, which request was again denied. (N.T. 28-31, 36-37, 51, 54-55)
10. Mr. Riedlinger wanted to meet the next day, September 19, 2013, because his desired Union representative, Ms. Tasha<sup>1</sup>, was unavailable. Ms. Domzalski wanted to proceed with the meeting on the 18<sup>th</sup> because there were pressing matters that needed to be timely addressed, and Mr. Riedlinger is out of the office in the field three days per week. (N.T. 52-53, 61)
11. Supervisor Domzalski asked questions that Mr. Riedlinger refused to answer, and both agreed to postpone until the next day when Mr. Riedlinger's chosen representative was available. Every scheduled bi-weekly performance improvement plan meeting thereafter was a group meeting with a Union representative and a supervisor in addition to Ms. Domzalski. Ms. Domzalski did not learn of Mr. Riedlinger's allegations against her during the Nelson-Riedlinger meeting until sometime after her 1:00 meeting with Mr. Riedlinger. (N.T. 29-30, 54-55, 73-74)
12. Under Department of Labor and Industry protocols, an interim Employee Performance Evaluation is conducted post Performance Improvement Plan to determine whether the goals of the plan were fulfilled. If the goals of the plan are not met, Management conducts a fact-finding to determine why the goals were not fulfilled and discipline could result. When Mr. Riedlinger's Performance Improvement Plan concluded in January, 2014, an interim Employee Performance Review was conducted. Those results were sent to management. As a result of several "needs improvement" ratings, management conducted a fact-finding to determine why Mr. Riedlinger failed to meet his goals, which resulted in management issuing a verbal reprimand. (N.T. 63-65, 71-72)

#### DISCUSSION

The Union alleges that the Commonwealth violated Section 1201(a)(1) and (3) of PERA by refusing to provide Mr. Riedlinger with Union representation during the 1:00 September 18, 2013 meeting, refusing to answer his requests for assistance with work related issues and refusing to train him. During the hearing and after the close of the Union's case-in-chief, the Commonwealth moved to dismiss the charge. In considering the Commonwealth's motion, I am limited to evaluating the record of the Union's case, and not the record as a whole. *FOP, Lodge No. 7 v. City of Erie*, 41 PPER 109 (Proposed Decision and Order, 2010), citing *Brock v. Lincoln University*, 22 PPER ¶ 22158 (Final Order, 1991). Under Section 1201(a)(1), an employee is entitled to union representation during an investigatory interview upon request when the employee has a reasonable expectation that

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<sup>1</sup> Tasha's last name was not provided.

disciplinary action may result from the information obtained during the interview. **PEMA v. PLRB**, 768 A.2d 1202 (Pa. Cmwlth. 2001). To establish a discrimination claim under Section 1201(a)(3) of PERA, the Union has the burden of establishing that the Commonwealth knew that Mr. Riedlinger was engaged in protected activity which was the motivation and the proximate cause of adverse employment action taken against him. **St. Joseph's Hospital v. PLRB**, 473 Pa. 101, 373 A.2d 1069 (1977). Motive creates the offense. **PLRB v. Stairways, Inc.**, 425 A.2d 1172 (Pa. Cmwlth. 1981).

The evidence presented, during the Union's case, does not establish that the Commonwealth refused to provide requested assistance to Mr. Riedlinger or provide training opportunities to him. Therefore, there is no violation of Section 1201(a)(1) or (3) for those allegations. Mr. Riedlinger was not provided Union representation during the September 18, 2013 performance improvement meeting. Although the Commonwealth stipulated that it knew of Mr. Riedlinger's protected activities, there is no evidence from which to draw an inference that the refusal to provide Union representation during that meeting was unlawfully motivated by Mr. Riedlinger's Union activities.<sup>2</sup> Accordingly, all claims under Section 1201(a)(3) are dismissed and the Motion is granted as it pertains to those claims.

The remaining issue for consideration, under the Motion, is whether the Commonwealth violated Mr. Riedlinger's **Weingarten**<sup>3</sup> right to a Union representative under Section 1201(a)(1) by refusing to grant his request for a Union representative during the 1:00 p.m. September 18, 2013 meeting. On that day, Mr. Riedlinger had a regularly scheduled bi-weekly performance evaluation meeting. On the morning of September 18, 2013, Mr. Riedlinger met with District Administrator Nelson, during which he told Ms. Nelson that his Supervisor, Ms. Domzalski, allegedly lied about whether customer-signed purchase forms were necessary.

As a result of the Nelson-Riedlinger meeting, Mr. Riedlinger requested a Union representative to be present for his regularly scheduled bi-weekly performance improvement plan meeting with his Supervisor, Ms. Domzalski. Ms. Domzalski denied the request. Mr. Riedlinger made two more requests for Union representation, which were again denied. Mr. Riedlinger informed Ms. Domzalski that he would not answer any questions that were investigatory in nature. During the meeting, Supervisor Domzalski asked questions that Mr. Riedlinger refused to answer, and both agreed to postpone until the next day when Mr. Riedlinger's representative was available.

The Commonwealth characterizes the meeting as a supervisory meeting under the Performance Improvement Plan. However, these meetings were investigatory. Every other Wednesday, Mr. Riedlinger was required to meet with his supervisor so that she could investigate his work performance over the two week period. Mr. Riedlinger was required to sign the plan indicating his understanding that a failure to meet "expectations" may result in disciplinary action. Although discipline may not have resulted immediately following any particular bi-weekly meeting, the information obtained during each of the plan meetings, regarding bi-weekly performance, would be used in support of any disciplinary action taken by the Commonwealth if Mr. Riedlinger failed to meet expectations. Therefore, the Union established a **prima facie** case, during its case-in-chief, that a **Weingarten** right attached and was unlawfully denied by the Commonwealth during the performance improvement plan meeting of September 18, 2013, when Ms. Domzalski proceeded with the meeting after denying Mr. Riedlinger's many requests for a representative. Accordingly, the Motion is denied with respect to the **Weingarten** claim under Section 1201(a)(1).

However, the Commonwealth met its burden of rebutting the Union's **prima facie** case. The Commonwealth established that Mr. Riedlinger specifically requested Ms. Tasha to serve as his Union representative for the scheduled meeting at 1:00 p.m. on September 18, 2013. An individual's right to union representation at an investigatory interview

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<sup>2</sup> Although it is beyond the scope of the Motion, as part of the Commonwealth's case, it is significant that Ms. Domzalski did not learn of Mr. Riedlinger's allegations against her until sometime after the 1:00 meeting on September 18, 2013.

<sup>3</sup> **NLRB v. J. Weingarten, Inc.**, 420 U.S. 251 (1975).

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 absent extenuating circumstances. *Commonwealth Office of Administrating v. PLRB*, 591 Pa. 176, 192-193, 916 A.2d 541, 551 (2007). Ms. Tasha, however, was not reasonably available. Mr. Riedlinger did not have the right to prevent a previously scheduled investigatory interview, and Ms. Domzalski was under no obligation to postpone that meeting, due to the unavailability of Mr. Riedlinger's preferred representative.<sup>4</sup> Significantly, Ms. Domzalski did terminate the September 18<sup>th</sup> meeting early, after Mr. Riedlinger refused to answer any questions, and she agreed to hold the meeting the next day, when Ms. Tasha was available. Moreover, Mr. Riedlinger was not disciplined for refusing to answer questions during the meeting. Accordingly, the Commonwealth did not violate Mr. Riedlinger's *Weingarten* rights or Section 1201(a)(1) of PERA.

#### 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 of Pennsylvania 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 Commonwealth has **not** committed unfair practices within the meaning of Section 1201(a)(1) or (3).

#### 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 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 (20) days of the date hereof, this order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this second day of September, 2015.

PENNSYLVANIA LABOR RELATIONS BOARD

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Jack E. Marino, Hearing Examiner

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<sup>4</sup> The Commonwealth could not have anticipated the request for Ms. Tasha and scheduled the meetings around her availability because Mr. Riedlinger had not requested her or any other Union representative at previously scheduled and held performance meetings. (N.T. 54)