

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

ALBERT DAVIS :  
 :  
v. : CASE NO. PERA-C-16-363-E  
 :  
NORRISTOWN MUNICIPALITY :

**PROPOSED DECISION AND ORDER**

On December 19, 2016, Complainant Albert Davis filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the Municipality of Norristown (Municipality or Employer) violated Section 1201(a)(1), (3) and (5) of the Public Employe Relations Act (PERA or Act). Mr. Davis specifically alleged that, on or about October 5, 2016, the Municipality suspended him for 30 days in violation of the collective bargaining agreement procedures and in retaliation for his protected activities, which included filing grievances.<sup>1</sup> Mr. Davis also alleged that, on or about November 16, 2016, the Municipality refused to permit him to have a union representative present during a meeting, which Mr. Davis reasonably believed could lead to disciplinary action against him.

On December 28, 2016, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on Monday, January 9, 2017, in Harrisburg. On January 4, 2017, I granted the Municipality's continuance request of the January 9, 2017 hearing and rescheduled the hearing for January 27, 2017. On January 12, 2017, the Municipality filed an answer to the specification of charges and new matter. On January 13, 2017, the Municipality filed a motion to defer the proceedings to the grievance arbitration process. On January 16, 2017, Mr. Davis requested a continuance of the January 27, 2017. On January 23, 2017, I denied the Municipality's motion to defer. After the second granted continuance request, the hearing was rescheduled for April 21, 2017. During the hearing on that date, Mr. Davis represented himself pro se, and both parties were afforded a full and fair opportunity to present testimonial and documentary evidence and to cross-examine witnesses. (N.T. 28). Both parties presented closing arguments at the end of the hearing in lieu of filing post-hearing briefs.

The examiner, based upon the hearing exhibits, testimony, arguments and all matters of record, makes the following:

**FINDINGS OF FACT**

1. Mr. Davis is a public employe within the meaning of Section 301(2) of PERA. (N.T. 4)
2. The Municipality is a public employer and, at all relevant times hereto, the public employer of Mr. Davis, within the meaning of Section 301(1) of PERA. (N.T. 4)
3. Betsey Helsel is the Assistant Director of Planning and Municipal Development at the Municipality under the Director, Jayne Musonye. Ms. Helsel was Mr. Davis's Supervisor before his termination in January 2017, for alleged incompetency. Darlene Norwood is the Director of Human Resources for the Municipality. (N.T. 21, 76, 102; Complainant Exhibit 2)
4. Mr. Davis had been the Zoning Enforcement Officer for the Municipality for approximately 7.5 years when he was suspended for 30 days on October 5, 2016 as a result of Ms. Musonye's and Ms. Helsel's quarterly review of Mr. Davis's work performance. The suspension letter provides, in relevant part, as follows: "The purpose of this Memorandum is to notify you of the outcome of our quarterly review of your performance in light of the expectations and requirements outlined for you on June 9, 2016. As outlined below,

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<sup>1</sup> During the hearing, Mr. Davis withdrew the alleged bargaining and discrimination violations, claims and causes of action under Section 1201(a)(3) and (5) of PERA. (N.T. 23-27). Accordingly, the only remaining claim before me for disposition is Mr. Davis's **Weingarten** claim under Section 1201(a)(1) of PERA. (N.T. 27-28).

your performance remains unacceptable and well below the expectations of your position.” (N.T. 32-33, 76, 103-104; Complainant Exhibits 1 & 2)

5. On November 15, 2016, Ms. Musonye and Ms. Helsel prepared a memo to Mr. Davis which included a packet of documents that Mr. Davis was previously provided on June 9, 2016. Mr. Davis returned to work on November 16, 2016. Ms. Helsel organized a meeting between Mr. Davis and Management for the day of his return after his 30-day suspension. The purpose of the meeting was to review procedures with Mr. Davis, reorient him to his work duties and ensure his awareness of procedures and expectations. After Mr. Davis arrived at work on November 16, 2016 and got settled, Ms. Helsel told him that she wanted to meet with him later that day. Afterward, Mr. Davis and management communicated about the meeting via emails. Mr. Davis requested that a Union representative attend the meeting with him. No Union representatives or stewards employed by the Municipality were available, and Mr. Davis requested a 1-day continuance. Management denied his request. (N.T. 21, 32-35, 103-107; Complainant Exhibits 1 & 2).

6. Mr. Davis emailed Ms. Musonye, Ms. Helsel, Ms. Parker (on staff at AFSCME Council 13), and others specifically requesting that Asa Watts, his union steward, provide union representation at the meeting. Ms. Watts was unavailable on November 16, 2016. Mr. Davis wrote: “Since I do not know the topic of the meeting I need Asa or Ms. Parker at the meeting.” He further wrote: “As far [a]s I know A[sa] will be here Thursday. Or perhaps Darlene can call M[s.] Parker for today?” (Complainant Exhibit 3)

7. Ms. Norwood responded to Mr. Davis’s email as follows: “Al, your supervisor is requesting to meet with you. I suggest you attend the meeting.” Mr. Davis responded to Ms. Norwood as follows: I understand[.] I have no problem going but without knowing what the topic is or what may be said[,] I believe under the Weingarten Rule I am allowed to have Union there for my protection.” Ms. Norwood again responded to Mr. Davis as follows: This is not a discipline meeting, etc. This is a meeting to bring you up-to-date (work) since you have been out. I think Betsy sent you an email advising you of that. (N.T. 58-59, 107-108, 122; Complainant Exhibit 3)

8. Al’s response to Ms. Norwood was that Betsy did advise him that the meeting was not disciplinary and further wrote: “but I am still requesting under the Weingarten Rule that the union be present for my protection. If I am incorrect in my rights please let me know.” Ms. Norwood responded to Mr. Davis’s invitation to correct him by emphasizing the following: “Again, since this is not a disciplinary meeting/hearing, we do not have to accommodate. But, for peace sake, if Asa is available, fine. If not, contact another rep on site. You do not get to choose a particular rep. The meeting will be today.” (Complainant Exhibit 3)

9. Management assured Mr. Davis multiple times that the meeting was not disciplinary and that he could have a union representative. None of the communications to Mr. Davis from management mentioned or threatened discipline if Mr. Davis refused to attend the meeting. (N.T. 85, 90, 93)

10. Ms. Helsel personally emailed Michael Simonson, Code Department Manager, and Supervisor of Asa Watts, to attempt to accommodate Mr. Davis’s request for a union representative and to get Ms. Watts to the meeting for Mr. Davis, but she was unavailable. (N.T. 108-109; Employer Exhibit 2)

11. Mr. Davis further responded by email that his representative of choice, Asa Watts, was unavailable on November 16, 2016, and he repeated his request for a one-day delay to have either Ms. Watts or Ms. Parker, from AFSCME, represent him at the meeting. Mr. Davis also requested union representation when he arrived at the meeting. (N.T. 63-65; Complainant Exhibit 3)

12. The purpose of the November 16, 2016 meeting was educational and not disciplinary. Ms. Helsel organized the meeting so Mr. Davis could “get off on the right foot” and to eliminate potential issues. During the November 16, 2016 meeting, Mr. Davis met with his two supervisors and Human Resources person and received the packet of

documents that he had already received in June 2016 and that were attached to the November 15, 2016 memo. Very little had changed about Mr. Davis's job responsibilities since June 2016. (N.T. 34-36, 65, 84, 108)

13. Mr. Davis was not disciplined during or as a result of the November 16, 2016 meeting, and he was not questioned about any pending investigation or disciplinary matter regarding any employee. Mr. Davis was not investigated for any wrongdoing, noncompliance or dereliction of duty during the November 16, 2016 meeting. Mr. Davis was never denied a union representative, and he was never told that he could not have one. (N.T. 91-92, 109-110, 121)

#### DISCUSSION

In this case, Mr. Davis claims that the Municipality denied him his **Weingarten** right to a union representative during the meeting of November 16, 2016. After Mr. Davis rested his case-in-chief, the Municipality moved for dismissal of Mr. Davis's **Weingarten** claim. (N.T. 79-83). The Municipality argued on the record that Mr. Davis admitted that he was assured that the November 16, 2016 meeting was educational and not disciplinary. The Municipality further maintains that these assurances were corroborated by the emails provided by Mr. Davis at the hearing. (N.T. 79-83).

Additionally, contends the Municipality, there is no evidence that any discipline emanated from the November 16, 2016 meeting. The evidence further shows, posits the Municipality, that the meeting was not investigatory and that Mr. Davis was told about procedures during the meeting after having been away from work for 30 work days. Therefore, the Municipality argues that **Weingarten** was not implicated and that not every meeting with one's supervisors involves **Weingarten**. In this case, contends the Municipality, there was nothing to investigate as a matter of law because Mr. Davis had been out of work for over a month serving a suspension for past misconduct that was already disciplined. The goal and the purpose of the meeting was to reorient and educate. (N.T.79-83). I agree with the Municipality and grant its motion to dismiss.

In **Pennsylvania State Troopers Association v. PLRB**, 71 A.3d 422 (Pa. Cmwlth. 2013), the Commonwealth Court relied on its earlier decision in **Pennsylvania Emergency Management Agency v. PLRB (PEMA)**, 768 A.2d 1201 (Pa. Cmwlth. 2001), and stated that "in order for **Weingarten** rights to attach . . . the meeting must have been [an] investigatory interview, i.e., the meeting must have been calculated to form the basis for taking disciplinary or other job affecting actions." **State Troopers**, 71 A.3d at 426 (quoting **PEMA**, 768 A.2d at 1204) (alterations and omissions original to **State Troopers**). The **State Troopers** Court further opined that "the inquiry [is] not focused on the 'label' given to the questioning by the employer, but rather, the focus must be on whether the employee reasonably believed an adverse impact could occur as the result of the meeting." **Id.** at 426-427.

The substantial, competent evidence presented by Mr. Davis during his case-in-chief objectively establishes that the Municipality did not hold the November 16, 2016 meeting to conduct any type of investigation of any employee including Mr. Davis. Although Mr. Davis may have held a subjective belief that discipline could result from the meeting, Mr. Davis did not have a reasonable belief that he or any other employee was the subject of an investigation or that discipline could result from the meeting. Mr. Davis was repeatedly told that the meeting was educational after having been out of work for over a month. Also, the evidence shows that the meeting was in fact educational. There was nothing about Mr. Davis or his job performance to investigate, since he was not at work for 30 work days and he had already served his disciplinary sentence for past neglect of duties. Accordingly, under the facts and circumstances of the record, limited to Mr. Davis's case-in-chief, **Weingarten** did not attach, and the Municipality's motion to dismiss is granted.

Alternatively, for the purpose of possible Board and judicial review, the evidence presented by the Municipality during its defense case further buttresses the conclusion that **Weingarten** did not attach because the entire record objectively shows that the meeting

was not calculated to form the basis of disciplinary action and there was nothing being investigated. Additionally, the Municipality further established that Mr. Davis was never at any time denied a union representative. The employer was entitled to have its educational meeting on November 16, 2016 because time was of the essence in reorienting Mr. Davis, immediately upon his return, to the necessary procedures essential to his job duties, the very neglect of which caused him to serve a 30-day suspension. Ms. Helsel personally attempted to get Mr. Davis a union representative of his choice, but Ms. Watts was unavailable. Even where an investigatory interview is involved, an employer does not have to postpone a meeting due to the unavailability of the union representative of the employe's choice, **Commonwealth of Pennsylvania, Office of Administration v. PLRB**, 591 Pa. 176, 916 A.2d 541 (2007); **Indiana Area Education Association v. Indiana Area School District**, 34 PPER 133 (Final Order, 2003). The Employer here certainly had no obligation to postpone the November 16, 2016 meeting considering that there was no investigation of any kind and no reasonable, objective belief that discipline could result from the meeting.

#### **CONCLUSIONS**

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

1. The Municipality is a public employer under PERA.
2. Mr. Davis is a public employe under PERA.
3. The Board has jurisdiction over the parties hereto.
4. The Municipality has **not** committed unfair practices or violated Mr. Davis's **Weingarten** rights within the meaning of Section 1201(a)(1).

#### **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 twenty-fourth (24<sup>th</sup>) day of May, 2017.

PENNSYLVANIA LABOR RELATIONS BOARD

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Jack E. Marino, Hearing Examiner