

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENN TOWNSHIP POLICE BENEVEOLENT :
ASSOCIATION & PENN TOWNSHIP POLICE :
WAGE & POLICY COMMITTEE :
 :
 :
v. : Case No. PF-C-18-41-W
 :
 :
PENN TOWNSHIP :

PROPOSED DECISION AND ORDER

On March 22, 2018, the Penn Township Police Benevolent Association and Wage and Policy Committee (Union) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) against Penn Township, Westmoreland County (Township or Employer) alleging that the Township violated Section 6(1)(a), (c) and (e) of the Pennsylvania Labor Relations Act (PLRA) as read with Act 111.

On April 18, 2018, the Secretary of the Board issued a Complaint and Notice of Hearing, assigning the charge to conciliation for the purpose of resolving the matters in dispute through mutual agreement of the parties, and designating August 31, 2018, in Pittsburgh, as the time and place of hearing, if necessary.

The hearing was held on August 31, 2018, in Pittsburgh, and on December 17, 2018, in Harrison City, before the undersigned Hearing Examiner, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The Union submitted a post-hearing brief on February 11, 2019. The Township submitted a post-hearing brief on March 13, 2019.

The Hearing Examiner, based on all matters of record, makes the following:

FINDINGS OF FACT

1. The Township is a public employer and political subdivision under Act 111 as read *in pari materia* with the PLRA. (N.T. 5).

2. The Union is a labor organization under Act 111 as read *in pari materia* with the PLRA. (N.T. 5).

3. Doug Lewis is a patrolman in the bargaining unit. He has been an employe of the Township for over 25 years. (N.T. 24-25).

4. On January 26, 2018, Lewis submitted a written grievance to Chief John Otto. The grievance alleged that the Township disciplined Lewis "by issuing an edict that he must have a Sergeant ride with him on all shifts for an unknown duration in 2018, without substantial evidence of just cause." This grievance followed a meeting Lewis had with Sergeant Hummert on January 2, 2018. At this meeting, Hummert told Lewis that Lewis was being placed on a ride along program with

sergeants for possibly up to a year. Hummert told Lewis that the Lewis was being placed on ride along because Otto was not happy with Lewis's job performance. The ride along program began on January 2, 2018. (N.T. 27-30; Union Exhibit 2).

5. On January 8, 2018, Lewis went to Otto's office and talked to Otto about the ride along program. Lewis at that time told Otto he was considering a grievance over it. (N.T. 31, 49).

6. On or about January 24, 2018, Lewis again attempted to meet with Otto about the ride along program. He was however unable to do so before filing the grievance on January 26, 2018. (N.T. 32).

7. On February 2, 2018, Lewis met with Otto over the grievance. The grievance was not resolved at this meeting. (N.T. 32-33, 66).

8. On February 8, 2018, Lewis sent an email to Otto requesting that Otto sign the grievance or resolve it which would move the grievance to step three with the Township Police Commissioner. Otto responded to Lewis on February 8, 2018, via email and told Lewis that Lewis would still be in the ride along program and that the status quo would remain. In response, during the night of February 8, 2018, Lewis called and texted the Police Commissioner and told him that the grievance needed to be moved to step three because the grievance was, in Lewis's opinion, not being resolved. (N.T. 33-34).

9. On February 9, 2018, Lewis finished his regular shift at 6:00 a.m. At 9:30 a.m. Otto called Lewis. Otto was enraged over the grievance and upset that, in Otto's opinion, Lewis was not following proper procedures and that Lewis contacted the Police Commissioner. Otto told Lewis that Lewis had to be in the office in uniform in five minutes or he would be fired. (N.T. 34-35).

10. After the phone call, Lewis decided to go to the police station as ordered and made it there at around 10:15 a.m. At the police station when Lewis arrived were Patrolman Dave Noll, Patrolman Rob Broome, Captain Shirley and Otto. Otto and Lewis began a conversation about Lewis's behavior in the kitchen area of the police department with Shirley, Noll and Broome present. Otto was enraged, put up his hand, pointed at Lewis, said that Lewis was "this close to getting fired" and to get into Otto's office. Otto asked Lewis if he liked working for the Township. Otto was very close to Lewis, yelling, and threatening his job. At this time, Lewis asked for Broome or Noll to accompany him into Otto's office because Lewis felt the conversation had moved to being about his job and he needed someone from the Union to be with him. His request was denied by Otto because Otto believed the meeting was not about discipline. In total, Lewis asked for Noll or Broome to come with him three times, and each time his request was denied by Otto. Otto said, in denying Lewis's requests, that he runs the department and to get into his office. (N.T. 37-40, 46, 73, 78, 101-102, 110, 162-163, 190).

11. At this point, Otto, Lewis and Shirley went into Otto's office. Shirley usually assists Otto on disciplinary matters. The three proceeded to have a meeting for two and a half hours. During the meeting, Otto, who was still upset and emotional, questioned Lewis about Lewis's actions, his job performance, and Lewis's issues with the

Chief. Otto also discussed with Lewis how Lewis's performance was not meeting Otto's expectations. Otto also brought up the grievance Lewis filed and how he was not happy that Lewis did not follow proper procedure and that Lewis took the grievance "out of the four walls of the department." By the end of the meeting, Lewis's grievance was resolved. The ride along program was discontinued. Lewis was not further disciplined. Lewis subsequently withdrew his grievance. (N.T. 40-44, 74-75, 165-166).

12. Noll is the president of the Union. Broome is a member of the Union's Wage and Policy Committee. Captain Shirley is a member of the Union but is not active in Union leadership. (N.T. 40-41, 84, 98, 106, 113, 118).

13. Lewis would not have picked Shirley to accompany him as a Union representative because Shirley acts as an administrator for Otto and Shirley does not serve as a Union representative. (N.T. 47, 120, 163, 193).

DISCUSSION

Turning first to the issue of Weingarten rights, bargaining-unit police officers in the Commonwealth of Pennsylvania have a right to union representation during investigatory interviews, also known as a Weingarten right. Township of Shaler, 11 PPER ¶ 11347 (Nisi Decision and Order, 1980). Both the Supreme Court and the Commonwealth Court of Pennsylvania have applied the United States Supreme Court decision in National Labor Relations Board v. J. Weingarten, Inc., 420 U.S. 251 (1975) to unionized Pennsylvania public employees covered by both Act 111 and the Public Employee Relations Act. Commonwealth of Pennsylvania, Office of Administration v. PLRB, 916 A.2d 541 (2007); Pennsylvania State Troopers Association v. PLRB, 45 PPER ¶ 13, 71 A.3d 422 (Pa. Cmwlth. 2013). The Weingarten right of an individual employee, that is, the right to obtain a representative to accompany the employee during an investigatory interview when the employee reasonably fears that discipline may be imposed by the employer, includes the right to have the union representative of his or her choice, if the assisting union representative is reasonably available and absent extenuating circumstances. Commonwealth of Pennsylvania, Office of Administration v. PLRB, 916 A.2d 541, 551 (Pa. 2007). The right only arises, however, when the employee requests representation. City of Reading v. PLRB, 689 A.2d 990 (Pa. Cmwlth. 1997); Plouffe v. SSHE, Kutztown University, F. Javier Cevallos et. al, 41 PPER 63 (Proposed Decision and Order, 2010), 41 PPER 82 (Final Order, 2010). Further, an employee does not have a right to union representation in a non-investigatory meeting called by the employer to inform the employee of a disciplinary decision that has already been made. AFSCME District Council 85, AFL-CIO v. Pennsylvania Fish Commission, 18 PPER ¶ 18030 (Final Order, 1986). Interfering with Weingarten rights is an independent Section 6(1)(a) violation. Pennsylvania State Troopers Association v. PLRB, supra.

Turning to this matter, the record is clear that Lewis's Weingarten rights were violated by Otto. On the morning of February 9, 2018, on the phone, an enraged Otto told Lewis to report to the office and, if he did not, he would be fired. Otto was upset, in part, because he believed Lewis did not follow proper procedures in forwarding his grievance to the Police Commissioner. Lewis did come to

the office and met with Otto at first in a common area. The record shows that, during this confrontation between Otto and Lewis, Otto was enraged, put up his hand and pointed at Lewis, said that Lewis was "this close to getting fired" and said to get into Otto's office. Otto also asked Lewis if he "liked working for the Township". At this point, Lewis asked for a Union representative to accompany him since he reasonably understood that the meeting in Otto's office could, in part, be investigatory and disciplinary in nature. Lewis asked for Broome or Noll to accompany him. Broome and Noll were standing in the room at the time so there was no question of them being available to accompany Lewis. Otto repeatedly denied Lewis's request and Lewis accompanied Otto and Shirley into Otto's office for a meeting as ordered.

During the meeting, Otto, who was still upset and emotional, questioned Lewis about Lewis's actions, his job performance, and Lewis's issues with the Chief. Otto also discussed with Lewis how Lewis's performance was not meeting Otto's expectations. Otto also brought up the grievance Lewis filed and how he was not happy that Lewis did not follow proper procedure and that Lewis took the grievance "out of the four walls of the department." From this record, I find it is reasonable for an employee to infer from Otto's statements and demeanor that Otto was threatening Lewis's employment and that the following meeting was investigatory and could result in discipline of Lewis. See Pennsylvania State Troopers Association v. PLRB, *supra* (holding that the determination of whether an investigation is "investigatory" focuses on whether the employee reasonably believed an adverse impact could occur as the result of the meeting). Thus, Lewis reasonably understood from Otto's demeanor and statements that Otto was considering disciplining Lewis in the meeting in Otto's office. Therefore, by abridging Lewis's Weingarten rights, the Township has violated Section 6(1)(a) of the PLRA and will be ordered to cease and desist from such conduct.

Turning now to the Union's discrimination charge under Section 6(1)(c) of the PLRA, the Union has the burden of proving that an employee engaged in protected activity, that the employer was aware of this activity, and that the employer took adverse action against the employee that was motivated by the employee engaging in that known protected activity. Duryea Borough Police Department v. PLRB, 862 A.2d 122 (Pa. Cmwlth. 2004); FOP, Lodge 5 v. City of Philadelphia, 38 PPER 184 (Final Order, 2007). In this matter, I find that there was no offence by the Township because there was no adverse action taken against Lewis on February 9, 2018. Therefore, the Section 6(1)(c) charge is dismissed.

With respect to the Union's inclusion of a Section 6(1)(e) claim in its charge, I find that the record does not support any bargaining violation by the Township. Therefore, the Section 6(1)(e) charge is dismissed.

CONCLUSIONS

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

1. The Township is a public employer and political subdivision under Act 111 as read *in pari materia* with the PLRA.

2. The Union is a labor organization under Act 111 as read *in pari materia* with the PLRA.

3. The Board has jurisdiction over the parties hereto.

4. The Township has committed an unfair labor practice in violation of Section 6(1)(a) of the PLRA and Act 111.

5. The Township has **not** committed an unfair labor practice in violation of Section 6(1)(c) and (e) of the PLRA and Act 111.

ORDER

In view of the foregoing and in order to effectuate the policies of the PLRA and Act 111, the Hearing Examiner

HEREBY ORDERS AND DIRECTS

that Penn Township shall:

1. Cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed in the PLRA and Act 111.

2. Take the following affirmative action which the Hearing Examiner finds necessary to effectuate the policies of the PLRA and Act 111:

(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 employees and have the same remain so posted for a period of ten (10) consecutive days;

(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; and

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

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 second day of May, 2019.

PENNSYLVANIA LABOR RELATIONS BOARD

Stephen A. Helmerich, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENN TOWNSHIP POLICE BENEVEOLENT :
ASSOCIATION & PENN TOWNSHIP POLICE :
WAGE & POLICY COMMITTEE :
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 v. : Case No. PF-C-18-41-W
 :
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 PENN TOWNSHIP :

AFFIDAVIT OF COMPLIANCE

Penn Township hereby certifies that it has ceased and desisted from its violations of Section 6(1)(a) of the Pennsylvania Labor 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