

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PSCOA :
 :
 v. : Case No. PERA-C-22-277-E
 :
 COMMONWEALTH OF PA :

PROPOSED DECISION AND ORDER

On September 28, 2022, the Pennsylvania State Corrections Officers Association (Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against the Commonwealth of Pennsylvania (Commonwealth or Employer), alleging that the Commonwealth violated Section 1201(a)(1) of the Public Employe Relations Act (PERA or Act) by refusing to permit Union Representative Daniel Leary from assisting bargaining unit employe, Corey Townes, during an investigatory interview on August 1, 2022.

On November 9, 2022, the Board Secretary issued a Complaint and Notice of Hearing, assigning the charge to conciliation, and directing a hearing on February 15, 2023, if necessary. The hearing was continued, first to March 9, 2023 and then to May 12, 2023, at the Commonwealth's request and without objection by the Union. The hearing ensued on May 12, 2023, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The parties elected to submit closing statements on the record at the conclusion of the hearing in lieu of filing post-hearing briefs in support of their respective positions. (N.T. 29-30). The Board received the transcript of the hearing on June 7, 2023.

The Hearing Examiner, on the basis of the testimony presented at the hearing and from all other matters and documents of record, makes the following:

FINDINGS OF FACT

1. The Commonwealth 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. Daniel Leary is employed as a Corrections Officer II with the Commonwealth at State Correctional Institution-Phoenix (SCI Phoenix). He works the 2:00 p.m. to 10:00 p.m. shift and currently serves as Vice President of the Local Union. In August 2022, he was serving as a Union Steward. (N.T. 7-10)
4. On August 1, 2022, Lieutenant Fox summoned Leary to a factfinding meeting in her office at SCI Phoenix. She was conducting an interview with Corrections Officer Corey Townes, who requested Leary as his Union representative. (N.T. 11-12)

5. During the course of Lieutenant Fox's interview with Townes, she presented him with a document purporting to reflect AWOLs or absences without leave that he had previously accrued. (N.T. 13)

6. Leary testified that Townes had a prior incident regarding AWOLs, for which he was terminated. Leary explained that Townes was terminated in error, however, and that he had returned to SCI Phoenix since then. Leary described how the Union thought the situation regarding his prior AWOLs had been rectified. (N.T. 13-14)

7. During the August 1, 2022 interview, Leary and Townes caucused after Fox presented them with the document reflecting the prior AWOLs. Leary and Townes reviewed the document and talked about it with each other. But Leary explained how they were still confused because the Commonwealth had already told them the situation had been corrected. (N.T. 14)

8. Leary advised Townes during their caucus that Leary would ask Lieutenant Fox about the document to clarify its meaning and whether it was a current or older document. (N.T. 14-15)

9. When Leary and Townes reentered the interview room, Leary asked Fox to clarify what was included in the document, after which Fox became irate and told Leary to "shut up." Specifically, Leary asked Fox whether the document said that Townes currently has AWOLs or if they simply reflected the previous incident. Fox replied by stating to Leary: "shut up, you don't get to talk." (N.T. 15)

10. Leary responded to Fox by stating that he was allowed to speak and to ask clarifying questions, after which Fox began yelling repeatedly at Leary and using profanity. Specifically, Fox yelled at Leary that his job was to "sit there and shut the fuck up." (N.T. 15-16)

11. Leary again stated that he could ask clarifying questions, to which Fox only continued to yell louder and wave the contract book around. As she did so, Fox shouted to Leary: "show me in here where it says that." Townes remained silent. (N.T. 16)

12. Lieutenant Fox never provided the clarification that Leary sought regarding the AWOLs of Townes. (N.T. 17)

13. Leary did not yell or attempt to talk over Lieutenant Fox during this exchange. (N.T. 19)

14. Lieutenant Kern, whose office is adjacent to Fox, walked by at that time and stuck his head in the door. Lieutenant Kern stated that Leary was not a good Union steward and that Townes needed to get another Union steward who was not such an "ass." When Leary stated that Kern was not involved in the meeting, Kern continued to yell at Leary and demand that Townes should get somebody else to represent him. (N.T. 17, 24-25)

15. Immediately after the interview concluded, Leary spoke to Lieutenant Kern, who asked what was going on. Leary explained that he was just asking about the document and that Lieutenant Fox was refusing to clarify what the document meant. Leary described to Kern how Fox was yelling at him because she did not want to clarify the document. Kern replied that he was unaware of what was happening and apologized to Leary. (N.T. 26-27)

DISCUSSION

The Union has alleged that the Commonwealth violated Section 1201(a)(1) of the Act¹ by refusing to permit Union Representative Daniel Leary from assisting bargaining unit employee, Corey Townes, during an investigatory interview on August 1, 2022.² The Commonwealth contends that the charge should be dismissed because Leary turned the investigatory interview into an adversarial process, contrary to his permissible role. The Commonwealth also maintains that the charge should be dismissed as moot because both Lieutenant Fox and Corrections Officer Townes have since left Commonwealth service, rendering the situation incapable of repetition.

It is well settled that the Weingarten³ right of an individual employe, that is, the right to obtain a representative to accompany the employe during an investigatory interview when the employe 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 employe 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). The Board has recognized that "[t]he representative is present to assist the employee, and may attempt to clarify the facts or suggest other employees who may have knowledge of them." Pennsylvania State Corrections Officers Ass'n v. Commonwealth of Pennsylvania, 33 PPER ¶ 33177 (Final Order, 2002) (quoting Weingarten, 420 U.S. at 260).

In Commonwealth, supra, the Board stated:

In New Jersey Bell Telephone Co., and Local 827 Int'l Brotherhood of Electrical Workers, 308 NLRB 277, 141 LRRM 1017 (1992), the NLRB explained that Weingarten permits "assistance and counsel" to the employe being interrogated. It is generally recognized that an employer is free to insist that it is only interested in hearing the employe's account and that Weingarten does not allow the union representative to disrupt the interview or convert it into an adversarial confrontation. Yellow Freight System, Inc. and Otic Cross, et. al, 317 NLRB 115, 1149 LRRM 1327 (1995).

33 PPER at 414. The permissible extent of participation of Weingarten representatives lies somewhere between mandatory silence and adversarial confrontation. Pennsylvania State Corrections Officers Ass'n v. Commonwealth of Pennsylvania, Department of Corrections (Retreat SCI), 34 PPER ¶ 140 (Proposed Decision and Order, 2003); Commonwealth of Pennsylvania, Department of Corrections (Greene SCI), 32 PPER ¶ 32103 (Proposed Decision and Order, 2001) (citing New Jersey Bell Telephone Co., supra).

¹ Section 1201(a) of PERA provides that "[p]ublic employers, their agents or representatives are prohibited from: (1) Interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of this act... 43 P.S. § 1101.1201.

² The Union has not alleged or argued that the actions of Lieutenant Kern ran afoul of the Act and instead has focused exclusively on the conduct of Lieutenant Fox.

³ NLRB v. Weingarten, 420 U.S. 251, 95 S.Ct. 959 (1975).

In this case, the Union has sustained its burden of proving that the Commonwealth violated the Act by refusing to permit Corrections Officer Leary to assist Corrections Officer Townes during his investigatory interview on August 1, 2022. The record shows that Fox's interview of Townes on August 1, 2022 was investigatory in nature, as Leary testified credibly that Fox summoned him to assist Townes, at Townes' request during a factfinding meeting on that date. Similarly, the record shows that Townes reasonably feared discipline during the August 1, 2022 interview, as a supervisory or managerial employe was questioning him regarding his attendance record and several alleged AWOLs. If there were any doubt on these elements of the Section 1201(a)(1) test, the Commonwealth conceded these two factors during its closing statement at the May 12, 2023 hearing. (N.T. 34). Thus, the dispute hinges on whether Leary remained within the permissible bounds of his role as a Weingarten representative during the interview, as the Union maintains, or whether he exceeded the permissible limits of that role, disrupting the interview and converting the interview into an adversarial confrontation, as alleged by the Commonwealth.

The record does not support the Commonwealth's allegations that Leary exceeded the permissible scope of his role as Union representative during the August 1, 2022 interview and converted it into an adversarial confrontation. To the contrary, the only substantial and credible evidence demonstrates that Leary remained well within his permissible role of assisting the employe and attempting to clarify the facts. Indeed, the record shows that, after his caucus with Townes, Leary reentered the interview room and asked Fox to clarify what was included in her document. In particular, Leary asked Fox whether the document said that Townes currently has AWOLs or if they simply reflected the previous incident. This was undoubtedly a legitimate inquiry given that the Commonwealth had previously disciplined Townes in error and since returned him to work. In fact, the Commonwealth had advised the Union that the previous incident had already been corrected. Despite this sincere confusion, Fox then became irate and shouted at Leary that he was not permitted to talk. When Leary accurately replied that he was allowed to speak and to ask clarifying questions, Fox belligerently yelled at him that his job was to "sit there and shut the fuck up." Leary again replied that he was entitled to ask clarifying questions, after which Fox only continued to yell louder and wave the contract book around, screaming "show me in here where it says that."⁴

As such, the record shows that Leary only tried to clarify the meaning of a document with Fox and stated accurately to her what his permissible role was as a Weingarten representative. At no time did Leary ever yell at, or attempt to talk over, Fox. Nor did he ever try to answer any questions for Townes or disrupt the interview in any way whatsoever. Instead, it was Fox who disrupted the interview and began to scream profanities at Leary and preclude Leary from speaking. What is more, Fox never provided the clarification that Leary sought regarding the AWOLs of Townes, which may have assisted in determining the facts of any underlying alleged misconduct. This was a clear violation of the Act by the Commonwealth. At least one Board hearing examiner has held that a Weingarten representative is not relegated

⁴ Contrary to Fox's assertions, the Pennsylvania Supreme Court has now long held that the Weingarten rights of individual employes flow from Section 401 of PERA, which grants the right to engage in mutual aid and protection, and are therefore statutory in nature, rather than contractual. Commonwealth of Pennsylvania, Office of Administration, 916 A.2d at 549.

to the status of a silent observer, but is entitled to give active assistance to the represented employee, especially where the conduct is not violent, verbally abusive, arrogant or insulting, or attempting to limit the scope of the employer's questions. PSCOA v. Commonwealth of Pennsylvania, 50 PPER 82 (Proposed Decision and Order, 2019) (citing Purple Communications, Inc. et. al. and Pacific Media Workers Guild, Local 39521, the Newspaper Guild, Communications Workers of America, AFL-CIO, 2018 WL 3727400 (NLRB Division of Judges, 2018)). By silencing Leary in his legitimate attempts to clarify Fox's document and berating him for trying to assist the employe subject to the investigatory interview, the Commonwealth has committed unfair practices in violation of Section 1201(a) (1) of the Act.

This conclusion, however, does not end the analysis, as the Commonwealth has also raised a mootness argument. Specifically, the Commonwealth contends that, because Fox and Townes have since left Commonwealth employment, (N.T. 18), the charge is now moot given that the situation is allegedly incapable of repetition. (N.T. 29). The Commonwealth also asserts that the charge has become moot because the potential remedy is limited to a cease and desist order. However, the Commonwealth misapprehends the Board's law on mootness.

The Board has long held that a unilateral implementation charge of unfair practices is rendered moot by resolution of the bargaining impasse through execution of a successor agreement. Temple University, 25 PPER ¶ 25121 (Final Order, 1994). The Board may also dismiss a charge not grounded in a unilateral implementation allegation as moot where the charge relates to the bargaining impasse which was resolved by the execution of a collective bargaining agreement. *Id.*

Here, the Union has not filed a charge alleging a bargaining violation or an unlawful unilateral implementation. As a result, there has been no bargaining impasse that could have been rendered moot. Nor has there been an execution of a successor agreement, which could have rendered the charge moot. The Commonwealth has cited no authority for the proposition that an alleged Weingarten violation under Section 1201(a) (1) of PERA can be rendered moot simply because the offending supervisory/managerial and bargaining unit employes have since left the employer. Nor has the Commonwealth cited any authority for the proposition that a potential Weingarten violation is rendered moot simply because the remedy would be limited to a cease and desist order. Accordingly, it must be concluded that the charge is not moot and that the Commonwealth has violated Section 1201(a) (1) of the Act.

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

ORDER

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

HEREBY ORDERS AND DIRECTS

that the Commonwealth shall

1. Cease and desist from interfering, restraining or coercing employes in the exercise of their rights;

2. Take the following affirmative action which the examiner finds necessary to effectuate the policies of PERA:

(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; and

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 21st day of July, 2023.

PENNSYLVANIA LABOR RELATIONS BOARD

/s/ John Pozniak
John Pozniak, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PSCOA

v.

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AFFIDAVIT OF COMPLIANCE

The Commonwealth hereby certifies that it has ceased and desisted from its violations of Section 1201(a)(1) of the Public Employe 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