

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNSYLVANIA STATE CORRECTIONS :
OFFICERS ASSOCIATION :
 :
 v. : Case No. PERA-C-21-20-E
 :
 COMMONWEALTH OF PENNSYLVANIA, :
 DEPARTMENT OF CORRECTIONS :

FINAL ORDER

The Commonwealth of Pennsylvania, Department of Corrections (Commonwealth) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) on February 17, 2022, challenging a Proposed Decision and Order (PDO) issued on February 1, 2022. Specifically, the Commonwealth excepts to the Hearing Examiner's conclusion that it violated Section 1201(a)(1) of the Public Employe Relations Act (PERA) when it denied a union representative's request to caucus with Corrections Monitor Jason Henry during an investigatory interview. Pursuant to an extension of time granted by the Secretary of the Board, the Commonwealth filed a brief in support of its exceptions on March 21, 2022. The Pennsylvania State Corrections Officers Association (PSCOA) filed a brief in opposition to the exceptions on May 12, 2022, after an extension of time granted by the Secretary. On August 16, 2022, the Board granted the Commonwealth's request for oral argument, and argument was held before the Board on September 20, 2022, in Harrisburg.

The facts of this case are summarized as follows. Allen Lynch has been employed by the Commonwealth as a Security Lieutenant at Progress Community Corrections Center (PCCC) since March of 2011. (FF 5). PCCC is a facility that houses parole violators in lockdown units and inmates transitioning to parole. (FF 4). Lieutenant Lynch conducts investigations of alleged staff misconduct as part of his regular job duties. (FF 5). On February 1, 2021, Lieutenant Lynch summoned Jason Henry, a Corrections Monitor at PCCC, to an investigatory interview for allegedly making racially insensitive remarks to his coworkers. (FF 4, 7). David LeMasters, the Director of PCCC, was also present during the interview. (FF 6, 7).

Prior to starting the investigatory meeting, Corrections Monitor Henry requested that Robert Hendricks, local PSCOA vice president, be present at the meeting as his Weingarten¹ representative, which was granted by the Commonwealth. (FF 3, 7). Lieutenant Lynch advised Corrections Monitor Henry and Vice President Hendricks of the purpose of the interview and provided them with an opportunity to confer with each other before starting the interview. A private caucus between Vice President Hendricks and Corrections Monitor Henry occurred before any questions were asked. (FF 8).

¹ The Board has adopted the rule set forth in NLRB v. Weingarten, Inc., 420 U.S. 251 (1975), that employes have the right to union representation at investigatory interviews that they reasonably believe may result in discipline. Conneaut School District, 12 PPER ¶ 12155 (Final Order, 1981); Commonwealth of Pennsylvania, Office of Administration v. PLRB, 916 A.2d 541 (Pa. 2007).

After the first question of the interview was posed by Lieutenant Lynch, Corrections Monitor Henry asked to caucus with Vice President Hendricks. Corrections Monitor Henry's request was granted, and the two men left the room for a few minutes. When they returned to the interview room, Vice President Hendricks asked that the interview be started over and that Corrections Monitor Henry be permitted to answer the previous question again, which was denied. (FF 9). Thereafter, the interview continued, and Corrections Monitor Henry did not make any additional requests to caucus with Vice President Hendricks for the remainder of the interview. (FF 10).

During the interview, Lieutenant Lynch asked Corrections Monitor Henry why his coworkers would report that he had made the alleged racially insensitive remarks if he did not recall making them. (FF 12). At this juncture, Vice President Hendricks made a request to caucus with Corrections Monitor Henry. (FF 11). Lieutenant Lynch denied the request and continued with the interview until all his questions had been answered. (FF 11, 13). The investigatory interview concluded with Lieutenant Lynch asking Corrections Monitor Henry to write a witness statement and Vice President Hendricks leaving the room for a discussion with Director LeMasters regarding the role of a union representative in an investigatory interview. No further questions were asked of Corrections Monitor Henry after Vice President Hendricks left the room. (FF 13). Thereafter, a confidential report was issued on February 4, 2021, summarizing the investigation of Corrections Monitor Henry's alleged conduct, and determining that the allegations were substantiated, such that Corrections Monitor Henry received a written reprimand on February 11, 2021. (FF 16, 17).

PSCOA filed a Charge of Unfair Practices with the Board on February 9, 2021, alleging that the Commonwealth violated Section 1201(a)(1) of PERA by refusing to permit Corrections Monitor Henry to caucus with his Weingarten representative during an investigatory interview. On April 2, 2021, the Secretary issued a Complaint and Notice of Hearing, directing that a hearing be held before the Hearing Examiner on August 30, 2021. The hearing was held as scheduled, at which time both parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Both parties filed post hearing briefs.

In the PDO, the Hearing Examiner concluded that the Commonwealth had violated Section 1201(a)(1) of PERA by refusing Corrections Monitor Henry the opportunity to consult with his Weingarten representative when the interview focus turned from his alleged conduct to his veracity. In this regard, the Hearing Examiner stated as follows:

[T]he record also demonstrates that the question posed to Henry when Hendricks made his request to caucus was why Henry's coworkers would report that he made the alleged racially insensitive remarks if he, Henry, did not recall making them. This question fundamentally changed the nature of the interview. At that point, Lynch was no longer simply investigating the underlying facts of the alleged incident. Instead, Lynch had now started to question the veracity and truthfulness of Henry's responses, potentially subjecting Henry to additional discipline beyond what he could receive for the alleged underlying infractions. And, although such an inquiry by the Commonwealth was certainly permissible and lawful, the Board has held that it is beyond cavil

that a reasonable employe would understand that they could be disciplined by the employer if they were found to be lying to a supervisor. Fraternal Order of Police E.B. Jermyn Lodge 2 v. City of Scranton, 40 PPER 136 (Final Order, 2009). At the point where the employe reasonably believes that the employer is accusing him of lying during an interview and there is the potential for discipline, the employe clearly has the right to union assistance in accordance with Weingarten. *Id.*

(PDO at 7). Because the Commonwealth established that the written reprimand issued to Corrections Monitor Henry was not based upon information obtained during the investigatory interview, the Hearing Examiner did not direct any remedial relief but ordered that the Commonwealth cease and desist from interfering with or restraining employe rights under PERA.

Initially, the Commonwealth does not challenge any of the Hearing Examiner's Findings of Fact in its exceptions. Therefore, the Hearing Examiner's findings are conclusive. 34 Pa. Code §95.98(a)(3); FOP Lodge #5 v. City of Philadelphia, 34 PPER 22 n.3 (Final Order, 2003).

On exceptions, the Commonwealth asserts that the Hearing Examiner erred by concluding that a Weingarten representative can request a caucus on behalf of an employe who is being questioned in an investigatory interview. In particular, the Commonwealth argues that the entitlements afforded by Weingarten must be requested only by the subject of the investigation.

It is well-settled that public employes have a right, pursuant to the rule first set forth in NLRB v. Weingarten, Inc., 420 U.S. 251 (1975), to union representation during an investigatory interview which they reasonably believe could lead to discipline. Commonwealth of Pennsylvania, Office of Administration v. PLRB, 916 A.2d 541 (Pa. 2007). This right is based upon the statutory guarantee of "mutual aid and protection" found in Section 401 of PERA. A union representative's role under Weingarten is to provide assistance and counsel to the employe being interviewed, and as such, the representative may, under certain circumstances, consult with the employe after a question has been asked but before it has been answered. Commonwealth of Pennsylvania, supra.; Commonwealth of Pennsylvania v. PLRB, 826 A.2d 932 (Pa. Cmwlth. 2003).

Here, the Commonwealth argues that Corrections Monitor Henry was not entitled to consultation with his union representative in this case merely because the request for a caucus was articulated by Vice President Hendricks, rather than Corrections Monitor Henry. The fact that Vice President Hendricks made the request to caucus does not destroy Corrections Monitor Henry's right to confer with his Weingarten representative. Once the request for a Weingarten representative is made and has been granted, the Weingarten representative steps into the interview with certain statutory rights to provide mutual aid and protection, assistance and representation, as permitted by law on behalf of the employe.

Under Weingarten and progeny, there are bounds to the assistance and representation that can be afforded to the employe. Indeed, the Weingarten representative may not demand an employer bargain during an interview, Cheltenham Township v. PLRB, 846 A.2d 173 (Pa. Cmwlth. 2004), nor may the union representative convert an investigatory interview into an adversarial

confrontation or otherwise disrupt an employer's investigation, Pennsylvania State Corrections Officers Association v. Commonwealth of Pennsylvania, 33 PPER ¶ 33177 (Final Order, 2002). Finally, a Weingarten representative may not answer a question for the interviewee. Id.; see Pennsylvania State Corrections Officers Association v. Commonwealth of Pennsylvania, 50 PPER 82 (Proposed Decision and Order, 2019).

In this regard, the Commonwealth argues that the Hearing Examiner erred by failing to find that Vice President Hendricks exceeded the appropriate scope of his role under Weingarten by transforming the investigatory interview into an adversarial proceeding. It is the function of the hearing examiner, who is in a position to view the witnesses' testimony first-hand, to determine the credibility of witnesses and to weigh the probative value of the evidence presented at the hearing. Mt. Lebanon Education Association v. Mt. Lebanon School District, 35 PPER 98 (Final Order, 2004). The hearing examiner may accept or reject the testimony of any witness in whole or in part. Pennsylvania State Corrections Officers Association v. Commonwealth of Pennsylvania Department of Corrections Pittsburgh SCI, 34 PPER 134 (Final Order, 2003). The Board will not disturb the Hearing Examiner's credibility determinations absent the most compelling of circumstances. Id.

In this case, the Hearing Examiner did not credit the testimony of Lieutenant Lynch and Director LeMasters concerning the alleged adversarial conduct of Vice President Hendricks during the investigatory interview. The Hearing Examiner concluded that Vice President Hendricks' request to caucus with Corrections Monitor Henry during the investigatory interview was reasonable and that the request "[did] not transform the interview into an adversarial contest, nor would it deprive the Commonwealth of its ability to control the investigation." (PDO at 8). The Commonwealth has failed to present compelling reasons to warrant reversal of the Hearing Examiner's credibility determinations and, therefore, the Commonwealth's exception on this issue is dismissed.

Moreover, as held by the Court in Commonwealth, supra, the right to "mutual aid and protection" under Section 401 of PERA and Weingarten includes the ability to confer with a union representative when a significant question is asked during an investigatory interview which could result in additional discipline of the employe, and held that a caucus should be permitted after such a question is posed but before it is answered. Here, as stated by the Hearing Examiner, Lieutenant Lynch's question regarding why Corrections Monitor Henry's coworkers would report that he made racially insensitive comments if, in fact, he did not make such remarks changed the focus of the interview. Thus, the Hearing Examiner found that the question posed to Corrections Monitor Henry for which a consultation was sought was a substantial question regarding his veracity which could lead to additional discipline.²

When the questioning of Corrections Monitor Henry deviated from whether he made the alleged racist remarks, to an inquiry as to the truthfulness of his answers, the new line of questioning triggered Corrections Monitor Henry's right to confer with his union representative prior to answering the

² The Commonwealth did not except to the Hearing Examiner's conclusion that Lieutenant Lynch's question concerning the veracity of Corrections Monitor Henry fundamentally changed the nature of the interview and, therefore, the Commonwealth has waived this issue. 34 Pa. Code § 95.98(a)(3).

question. Fraternal Order of Police E.B. Jermyn Lodge 2 v. City of Scranton, 40 PPER 136 (Final Order, 2009) (employee's right to union assistance is triggered where subject of interview turns into an investigation of the employee's veracity during the meeting). Therefore, it was permissible for Vice President Hendricks, as the Weingarten representative, to request a caucus with Corrections Monitor Henry prior to answering the question to adequately provide assistance and knowledgeable representation with regard to the new line of inquiry. See Pacific Telephone and Telegraph Co. v. NLRB, 711 F.2d 134, 137 (9th Cir. 1983) ("once union representation has been afforded, the representative may speak for the employee he represents and either the union representative or the employee may make the request for pre-interview conference").

After a thorough review of the exceptions and all matters of record, and oral argument, the Hearing Examiner did not err in concluding that the Commonwealth violated Section 1201(a)(1) of PERA by denying Vice President Hendricks' request to caucus with Corrections Monitor Henry during the investigatory interview. Accordingly, the Board shall dismiss the exceptions and make the Proposed Decision and Order final.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the exceptions filed by the Commonwealth of Pennsylvania, Department of Corrections are hereby dismissed, and the Proposed Decision and Order issued on February 1, 2022, shall be, and the same is, hereby made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, James M. Darby, Chairman, Albert Mezzaroba, Member, and Gary Masino, Member, this fifteenth day of November, 2022. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within Order.

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNSYLVANIA STATE CORRECTIONS :
OFFICERS ASSOCIATION :
v. : Case No. PERA-C-21-20-E
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF CORRECTIONS :

AFFIDAVIT OF COMPLIANCE

The Commonwealth hereby certifies that it has ceased and desisted from its violation of Section 1201(a) (1) of the Public Employe Relations Act; that it has posted a copy of the Proposed Decision and Order and Final Order as directed; and that it has served an executed copy of this affidavit on PSCOA 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