

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF TRANSIT POLICE, :  
 :  
 v. : Case No. PERA-C-18-65-E  
 :  
 SEPTA :

**PROPOSED DECISION AND ORDER**

On March 23, 2018, the Fraternal Order of Transit Police (FOTP or Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against the Southeastern Pennsylvania Transportation Authority (SEPTA or Authority), alleging that SEPTA violated Section 1201(a)(1) of the Public Employe Relations Act (PERA or Act) by denying requests for Union representation for three police officers, who underwent investigatory interviews on February 19, 2018.

On April 23, 2018, the Board Secretary issued a Complaint and Notice of Hearing, assigning the charge to conciliation, and directing a hearing on July 9, 2018, if necessary. After several continuances at the request of both parties, the hearing eventually ensued on July 22, 2019, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. SEPTA filed a post-hearing brief on December 4, 2019. The Union filed a post-hearing brief on December 9, 2019.

The 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. SEPTA is a public employer within the meaning of Section 301(1) of PERA. (N.T. 6)
2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 6)
3. The Union is the exclusive bargaining representative for a unit of police officers employed at SEPTA. (N.T. 17)
4. Omari Bervine has been employed as a police officer with SEPTA since August 2006. Bervine has also been President of the FOTP since 2016. (N.T. 16-17)
5. Thomas Nestel has been SEPTA's Chief of Transit Police for approximately seven years. (N.T. 74-75)
6. William Saunders has been a transit police officer at SEPTA for 23 years. Saunders currently holds a rank of Lieutenant, but previously held the rank of Sergeant during 2017 to 2018. As a Sergeant, his responsibilities included performing criminal investigations. (N.T. 121-122)
7. Mark Byrne has been a police officer at SEPTA for approximately two-and-a-half years. In December 2017, Byrne responded to a radio call

concerning a man in the track area with four other SEPTA police officers, including Christian Gregory, Kevin Costello, Jonathon Lanciano, and David Simcox. (N.T. 41-43, 75)

8. Byrne described some sort of altercation, during which the officers arrested the man and then transported him to the hospital. Byrne testified that afterwards, he was required to report to the 15<sup>th</sup> District of the City of Philadelphia Police Department to provide a statement regarding the incident to a detective.<sup>1</sup> He explained how the detective asked him questions, typed up his responses, and then gave him the opportunity to review the statement before signing off. (N.T. 43-45)

9. At some point thereafter, Nestel initiated an internal affairs investigation of the December 12, 2017 incident to be conducted by Sergeant Devin Isaac. Nestel testified that all five officers, who were present for the incident, were subject to potential discipline. During Byrne's interview, Isaac questioned him about an alleged discrepancy between his statement to the City detective and footage available from the body worn cameras and platform surveillance. Bervine attended the interview as Byrne's Union representative. (N.T. 46-48, 76, 79, 95-96)

10. Following the internal affairs interviews, Byrne was placed on restricted or modified duty for three days. SEPTA also took away his firearm and removed him from patrol duties. Costello and Gregory were not removed from their patrols, nor did they have their firearms taken. Lanciano and Simcox were discharged. (N.T. 19-20, 49, 54, 103-105)

11. Byrne learned that he was cleared of the internal affairs investigation when SEPTA returned his firearm and placed him back on duty. He testified that the only formal notification provided was a document he was required to sign to retake his firearm. (N.T. 49, 71)

12. Nestel testified that he received the results of the internal affairs investigation on January 23, 2019 and referred the matter to a Police Board of Inquiry, which consists of three lieutenants who review the investigation and provide a recommendation regarding any potential discipline. Nestel explained that he accepted the recommendations in this case that Lanciano and Simcox be terminated and that Byrne, Costello, and Gregory receive no discipline. The Police Board of Inquiry also recommended that Byrne should receive counseling or training regarding the use of his body worn camera. (N.T. 79-80, 95-97)

13. Nestel then assigned Sergeant William Saunders to initiate a criminal investigation. He testified that only Lanciano and Simcox were the targets of the investigation, while Byrne, Costello, and Gregory were merely witnesses. He described the scope of the investigation as being whether any SEPTA police officer used inappropriate force during the December 12, 2017 incident or lied about it. (N.T. 81-82, 108)

14. After roll call on February 19, 2018, Byrne, Gregory and Costello received orders from their direct supervisor, Sergeant Park, to report to SEPTA headquarters to provide statements to Saunders. The officers reported

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<sup>1</sup> Apparently, SEPTA has an agreement with the City whereby this is the normal process for arrests during the overnight shift, as SEPTA's detectives are not on duty on that time. (N.T. 44, 87)

for the interview, as ordered, with their Union representative, Officer Pete Sieron. (N.T. 49-51)

15. After arriving at SEPTA headquarters, Sieron told Saunders that the officers wanted to have Union representation during the interviews, to which Saunders replied that they were not entitled to such representation. Sieron then called Bervine and relayed the message, at which point Bervine called Saunders. (N.T. 124-125)

16. Saunders told Bervine that the decision not to allow Union representation was coming from above him. Bervine testified that Saunders also advised that Byrne, Costello, and Gregory would be subject to discipline if they failed to answer questions or answered untruthfully. The call ended with Bervine stating that he would call the Chief. (N.T. 25-27, 124-125)

17. Minutes later, Bervine called Nestel to discuss the issue. Nestel indicated that the officers were cleared of the internal affairs investigation and that this was now a criminal investigation. The Chief also advised that the officers would not be given any Garrity warnings.<sup>2</sup> The Chief further stated that the officers would be disciplined if they refused to answer questions or answered untruthfully. (N.T. 27-31)

18. Bervine then spoke with Sieron and relayed what the Chief had said. Bervine instructed Sieron to notify the officers regarding what the Chief had said. Bervine also spoke with Byrne and discussed the same. (N.T. 32-33)

19. Nestel then met in-person with Saunders, Byrne, Costello, Gregory, and Sieron. Nestel indicated during the meeting that the internal affairs probe was completed and that the three officers were found not to have committed any departmental violations. Nestel told them they were in no jeopardy of discipline and that these interviews were no different than the cases they handle on a daily basis where they provide statements to detectives regarding somebody else's conduct. The Chief also told them they were in no jeopardy of being a criminal target, as this inquiry was focused on the actions of Lanciano and Simcox. (N.T. 82-83)

20. Byrne testified that he had no reason not to trust the Chief's assurances. (N.T. 68)

21. The officers then underwent their interviews with Saunders on February 19, 2018. Byrne testified that Saunders did not ask any questions that concerned him regarding potential discipline. Instead, Saunders focused on the actions of Lanciano and Simcox. (N.T. 69-70)

22. Byrne received a written counseling regarding his use of the body worn camera at some point after the February 19, 2018 interview with Saunders. (N.T. 58, 72, 119)

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<sup>2</sup> "Garrity warnings" are warnings given to police officers, who are the subject of an internal investigation, that their answers will not be used in any criminal prosecution, while also warning the subject of the investigation that the refusal to answer questions may be grounds for termination. Pennsylvania State Troopers Ass'n v. PLRB, 71 A.3d 422, 426 fn. 5 (Pa. Cmwlth. 2013) citing Garrity v. New Jersey, 385 U.S. 493, 87 S.Ct. 616 (1967).

## DISCUSSION

The Union has alleged that SEPTA violated Section 1201(a)(1) of the Act<sup>3</sup> by denying Byrne, Costello, and Gregory their rights to proper Union representation during an investigatory interview, which they reasonably believed could result in discipline. SEPTA contends that the charge should be dismissed because SEPTA did not violate the Weingarten rights<sup>4</sup> of these officers, given that the interviews were not investigatory in nature, and the officers could not have reasonably feared discipline.

It is well settled that a public employe has the right to union representation at an investigatory meeting with his or her employer that the employe reasonably believes may result in the imposition of discipline. Sayre Area Education Ass'n v. Sayre Area School District, 36 PPER 54 (Final Order, 2005) citing Commonwealth of Pennsylvania Emergency Management Agency v. PLRB, 768 A.2d 1201(Pa. Cmwlth. 2001); Weingarten, supra. An employer can effectively rebut an employe's claim of reasonable expectation of discipline by demonstrating that the employer assured the employe that no discipline would result from the meeting. Sayre Area School District, 36 PPER at 153; Fraternal Order of Police E.B. Jermyn Lodge 2 v. City of Scranton, 40 PPER 136 (Final Order, 2009) (where the employer gives the employe reasonable assurances that they will not be disciplined as a result of answering the employer's questions, generally the employe should rely on that representation and not have any fear of discipline). Where, however, the assurances are less than convincing, the right to union representation still prevails. Sayre Area School District, at 153 citing Pennsylvania State Corrections Officers Ass'n v. Commonwealth of Pennsylvania, 34 PPER ¶ 34134 (Final Order, 2003). And, where the employer accuses the employe of lying during the interview or questions the veracity of the answers provided, the employer then has an obligation to reassure the employes that there will be no discipline or to honor the request for union representation. City of Scranton, 40 PPER at 447-448.

In this case, the record shows that SEPTA assured the three police officers who were subject to the criminal investigation interviews on February 19, 2018 that no discipline would result from the meetings. Indeed, the Chief credibly testified that he specifically told the officers that they were in no jeopardy of discipline or of even becoming a criminal target and that the inquiry was focused solely on the actions of Lanciano and Simcox. There is no credible evidence to suggest that the Chief's assurances were less than convincing. In fact, Byrne testified that he had no reason not to trust the Chief in this regard. As a result, the officers could not have reasonably believed an adverse impact could occur from the meetings.

The Union argues that this case is controlled by Pennsylvania State Troopers Ass'n v. PLRB, 71 A.3d 422 (Pa. Cmwlth. 2013), wherein the Commonwealth Court held that a state police corporal was entitled to union representation during an interview with a superior officer that was allegedly focused on the conduct of another employe. However, PSTA is readily distinguishable from the instant matter. Indeed, the Court there emphasized that the corporal was never assured that he would not be subject to

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<sup>3</sup> 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.

<sup>4</sup> NLRB v. Weingarten, 420 U.S. 251, 95 S.Ct. 959 (1975).

discipline as a result of what he said during the interview. *Id.* at 427. Further, the Court noted that the employer told the corporal he had the right to union representation when the superior officer read him the administrative warnings and then inexplicably deprived him of that representation. This is dramatically different from the record here, where the commanding officer of the entire agency specifically assured all three employes that they were in no jeopardy of discipline and the interview actually focused on the actions of Lanciano and Simcox.

The Union points to the written counseling that Byrne received following the February 19, 2018 interview, presumably as evidence that the Chief's assurances were false. However, the record clearly shows that the Police Board of Inquiry recommended the counseling as a result of the internal affairs interview, during which Byrne had Union representation, long before the alleged unfair practices were committed during the interviews on February 19, 2018. Of course, as the Board noted in Sayre Area School District, *supra*, SEPTA "is not immune from future charges should it elect to renege on its assurances and impose discipline as a product of the [February 19, 2018] meeting. Clearly, any subsequent discipline resulting from information gathered at the meeting would provide conclusive support that [SEPTA's] assurances were false." *Id.* at 153.<sup>5</sup> <sup>6</sup>

Finally, the record is devoid of any evidence that Saunders ever became accusatory of the employes during the February 2018 interviews. To the contrary, Byrne acknowledged that Saunders did not ask any questions that concerned him regarding potential discipline and instead focused on the actions of Lanciano and Simcox. As such, SEPTA did not have any obligation during the February 2018 interviews to reassure the employes there would be no discipline or to honor their requests for Union representation. Accordingly, the charge under Section 1201(a) (1) of the Act must be dismissed.

#### CONCLUSIONS

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

1. SEPTA 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.

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<sup>5</sup> Likewise, as the Board further noted in Sayre, the Union is not prejudiced by PERA's limitations period from waiting until discipline is imposed or until it obtains other adequate evidence that SEPTA's assurances were false because the four-month limitations period begins to run when the Union knew, or should have known, of SEPTA's alleged commission of unfair practices. *Id.* at 153.

<sup>6</sup> SEPTA contends that the written counseling Byrne received is not discipline. Such a notion, however, has previously been rejected. East Allegheny Education Ass'n, PSEA/NEA v. East Allegheny School District, 47 PPER 55 (Proposed Decision and Order, 2015) (written documentation designed to correct an employe's conduct constitutes discipline).

4. SEPTA has not 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 complaint is rescinded, and the charge is dismissed.

**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 31<sup>st</sup> day of January, 2020.

PENNSYLVANIA LABOR RELATIONS BOARD

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John Pozniak, Hearing Examiner