

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNSYLVANIA STATE TROOPERS :
ASSOCIATION :
 :
v. : Case No. PF-C-19-69-E
 :
COMMONWEALTH OF PENNSYLVANIA :

PROPOSED DECISION AND ORDER

On December 4, 2019, the Pennsylvania State Troopers Association (Association) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) against the Commonwealth of Pennsylvania (Commonwealth or Employer) alleging that the Commonwealth violated Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA), as read with Act 111.

On February 5, 2020, the Secretary 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 March 18, 2020, in Harrisburg, as the time and place of hearing, if necessary.

The hearing was continued with the consent of the parties. The hearing was held on July 28, 2020, in Harrisburg, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The Association submitted a post-hearing brief on October 8, 2020. The Commonwealth submitted a post-hearing brief on November 23, 2020.

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

FINDINGS OF FACT

1. The Commonwealth is a public employer and political subdivision under Act 111 as read *in pari materia* with the PLRA. (N.T. 7).

2. The Association is a labor organization under Act 111 as read *in pari materia* with the PLRA. (N.T. 7).

3. Corporal Jay Pollick has been a member of the Pennsylvania State Police for the past fifteen years. At the time of the hearing, he had been a corporal for one year. At the time of the hearing, he was assigned to the Rockview barracks. (N.T. 9).

4. Prior to being posted at Rockview, Pollick was one of the two crime corporals at the Bedford barracks. His main assignment at Bedford was the management of the evidence room. (N.T. 11).

5. When Pollick was stationed at Bedford, his station commander was Lieutenant Robin Maher. (N.T. 11-12).

6. On Monday, October 28, 2019, Pollick was at the Rockview station working on a case in Centre County. At approximately 10:30 am, Pollick

received a text from Maher demanding that Pollick call Maher. Pollick called Maher at approximately 11:00 am. Maher questioned why Pollick was at Rockview for the day. The two discussed scheduling issues and Maher informed Pollick that Pollick was not following Maher's instructions and informed Pollick that Pollick should be in Maher's office on Monday morning, November 4, for "counseling and discipline". Maher wanted to meet with Pollick because Maher believed that Pollick had not followed scheduling procedures and was disrespectful to Maher on the phone. Maher wanted to let Pollick know that Pollick's behavior was unacceptable and that he needed to change his behavior. As a result of the phone call, Pollick believed that he would be disciplined. (N.T. 12-14, 29, 75-76).

7. Before the November 4, 2019, meeting, Pollick spoke with Corporal Jeff Hetzel and Corporal Johnson. Hetzel and Johnson are Association officers. After these conversations, Pollick decided that he wanted Hetzel to be his union representative at the November 4, 2019 meeting. (N.T. 15).

8. The meeting ultimately happened on November 5, 2019. On November 5, Maher found Pollick working in the evidence room. Maher told Pollick to get in his office. As he was going to Maher's office, Pollick asked Hetzel to accompany him and Hetzel did. Both Pollick and Hetzel went to Maher's office. As Pollick was entering the office, he informed Maher that Hetzel was his union representative. Maher said "no, you are excused" and dismissed Hetzel. Hetzel then asked if there was going to be any form of discipline. Maher said there would be no discipline. Hetzel left and the meeting proceeded. The meeting lasted approximately 10 minutes. Maher questioned Pollick. He asked Pollick such questions as "Why do you think you can get away with the things you do?" and "Why were you trained the way you are?" and Maher advised Pollick that Pollick "was lucky that he wasn't Blue Teaming [Pollick]." Blue Teaming is shorthand for an internal affairs process. Maher also asked Pollick about Maher's policy of emailing him whenever Pollick would be out of the office for a shift and about the phone call on October 28, 2019. After about ten minutes, Maher pulled out a Supervisor's Notation and said he was issuing the Supervisor's Notation for insubordination. Pollick was shocked and said that he thought there would not be disciplined. Maher sat up in his chair, got a big grin on his face, and said "Oh well." Pollick refused to sign the Supervisor's Notation. The Supervisor's Notation was prepared by Maher prior to the meeting with Pollick. (N.T. 16-23, 39, 55-60, 75, 77-80).

9. The Supervisor's Notation states in relevant part:

That I have previously counseled you regarding advising me when you would be working out of your previous Station or not going to be in the office for the day. I had requested that you send me an email when you will not be here at Bradford. You clearly understood my directive . . .

On 10/28/19, you were listed on the Daily Schedule working 0500-1300 hrs. with a handwritten [note] "@ Rockview". I searched my email file and found nothing from you indicating that you would be out of the office for this date. At 1025 hrs. I texted you and requested that [you] call me. At 1059 hrs., you called me back.

During the course of that conversation, I inquired as to your schedule and activities . . . You then became insubordinate and indicated that you didn't take a promotion [to corporal] to be micro-managed and that you weren't supposed to even come to Bedford Station . . . that the only reason you were assigned here was to fix the evidence room

Your department during the phone conversation was in violation of Field Regulation 1.38. In the future, I expect you to follow my directive of keeping me informed via email of days when you will be out of the office for the full day. I also expect that you will interact with me and all members of higher rank than you in a respectful and professional manner.

Should your decision to accept a promotion and move to Bedford be weighing on you, I would suggest that you speak with MAP. I can also inquire as to your other options on your behalf if you desire.

(N.T. 22; Exhibit CW-1).

10. Field Regulation 1-1.38 prohibits insubordination. (N.T. 119).

11. The Supervisor's Notation was still in Pollick's file at the time of the hearing. Maher forwarded the supervisory file to Rockview when Pollick transferred. (N.T. 24, 68).

DISCUSSION

In its charge, the Association alleges that the Commonwealth violated Section 6(1)(a) and (e) of the PLRA by not permitting a bargaining unit member to have union representation present during a meeting with a supervisor.¹

Bargaining-unit police officers in the Commonwealth of Pennsylvania have a right to union representation during investigatory interviews, also known as Weingarten rights. Township of Shaler, 11 PPER ¶ 11347 (Nisi Decision and Order, 1980). Both the Pennsylvania Supreme Court and the Commonwealth Court 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 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, supra. The right only arises, however, when the

¹ The Association did not present any evidence of a violation of Section 6(1)(e) of the PLRA in this matter and does not argue in its brief that any violation of Section 6(1)(e) occurred. The Association's charge pursuant to Section 6(1)(e) is therefore dismissed.

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 case, I first find that Maher's Supervisor's Notation is clearly discipline in the form of a written reprimand of Pollick for insubordination. Key to this finding is the explicit language of the Notation: "Your department during the phone conversation was in violation of Field Regulation 1.38." This is nothing other than a written, official rebuke informing Pollick that he violated the rules of Pennsylvania State Police for insubordination.

In its Brief, the Commonwealth argues that Supervisor's Notations are not discipline. The Commonwealth argues "Additionally, Pollick was not disciplined as a result of the meeting because a supervisor's notation does not constitute discipline. PSP has a formal and detailed process to issue discipline to enlisted members upon allegations of misconduct." (Commonwealth's Brief at 9). The Commonwealth did present at the hearing detailed testimony about the formal disciplinary process for Pennsylvania State Police. It appears from this record that Maher's Supervisor's Notation did not comport with the policies of the Pennsylvania State Police. However, the Supervisor's Notation's compliance with policy is not relevant to this matter. What is relevant is if it was discipline or not. As found above, the Supervisor's Notation in this matter is clearly discipline in the form of a written reprimand in this case, notwithstanding any conformity with established policies.

Turning now to the meeting, Pollick reasonably believed that the meeting would lead to discipline. Maher had told Pollick earlier on the phone that the meeting would be for "counseling and discipline". Prior to the meeting, Pollick asked Hetzel to be his union representative for the meeting. As Pollick was entering the office with Hetzel, he informed Maher that Hetzel was his union representative. This clearly established that Pollick wished to exercise his Weingarten rights. Maher said "no, you are excused" and dismissed Hetzel. Hetzel then asked if there was going to be any form of discipline. Maher said there would be no discipline. Both Pollick and Hetzel relied on this representation and Pollick began the meeting with Maher without union representation. In the meeting, however, I find that Maher did ask investigatory questions of Pollick and, at the end of the meeting, issued discipline in the form of a written reprimand. This is a bald violation of Weingarten.

The case Fraternal Order of Police E.B. Jermyn Lodge 2 v. City of Scranton, 40 PPER 136 (Final Order, 2009), had similar facts to these. In City of Scranton, the employer denied two officers union representation at a meeting to discuss the resolution of a grievance. Although the meeting was initially non-investigatory because the officers were not the object of discipline, the Board found that the employer triggered their Weingarten right to union representation when the employer representative began to

question their responses and suggested they were being untruthful with him. The Board held:

The Board has recognized, however, that where the employer gives the employe reasonable assurances that they will not be disciplined as a result of their answering the employer's questions, generally the employe should rely on that representation and not have any fear of discipline. In that case, there would be no right to a Weingarten representative.

However, what may start out as a non-investigatory interview without the intent of imposing discipline, may in fact turn into an investigation of the employe being questioned. AFSCME v. Commonwealth of Pennsylvania, Pennsylvania Emergency Management Agency (PEMA), 31 PPER 91 31034 (Final Order, 2000), affirmed, 768 A.2d 1201 (Pa. Cmwlth. 2001). Indeed, where the employe has a reasonable fear of discipline and has made a request for union assistance, the employe does not need to make repeated demands for representation at every permutation of the investigation. New Jersey Bell Telephone Company, 300 NLRB 42 (1990) (rejecting the employer's claim that an employe must wait until the employer explains purpose of the interview before a timely request for union representation can be made). Thus, at any time during a meeting where the employer's assurances are, or become, less than convincing, the employe retains a right to union assistance. Sayre Area Education Association v. Sayre Area School District, 36 PPER 54 (Final Order, 2005). Accordingly, an employe's Weingarten right to union assistance arises any time the employe comes to reasonably believe that unfavorable responses to the employer's questions may lead to discipline. Amalgamated Transit Union, Local 85 v. Port Authority of Allegheny County, 22 PPER ¶ 22010 (Final Order, 1990).

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Accordingly, once Mr. Hayes began to question the responses given by Officers Forsette and Foley and suggested that they were being untruthful with him, the officers then had a right to their requested union representation. This is so notwithstanding Mr. Hayes' prior assurances that were given at the start of the meeting. At the point of the investigation when Mr. Hayes became accusatory and began questioning the veracity of the answers that were being provided by Officers Foley and Forsette, it is then that the City had an obligation to either reassure the officers that they would not be disciplined, or to honor the officers' request for union representation. On these particular facts, having done neither, the City violated the Weingarten rights of Officers Foley and Forsette. Accordingly, we shall sustain the FOP's exceptions and find a violation of Section 6(1) (a) of the PLRA.

Applying City of Scranton to this case, the Commonwealth had the obligation to not discipline Pollick or to honor Pollick's request to have a union representative with him during the meeting with Maher. Notwithstanding Maher's reassurances at the beginning of the meeting that there would be no discipline, the meeting included investigatory questioning and, ultimately, the issuance of discipline. By denying Pollick's request for a union representative, the Commonwealth violated Section 6(1)(a) of the PLRA.

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 and political subdivision under Act 111 as read *in pari materia* with the PLRA.
2. The Association 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 Commonwealth has committed an unfair labor practice in violation of Section 6(1)(a) of the PLRA and Act 111.
5. The Commonwealth has **not** committed an unfair labor practice in violation of Section 6(1)(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 the Commonwealth 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) Immediately rescind the Supervisor's Notation issued to Pollick (Exhibit CW-1) and expunge it from Pollick's record;
 - (b) 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;
 - (c) 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
 - (d) 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 twenty-third day of December, 2020.

PENNSYLVANIA LABOR RELATIONS BOARD

/s/ Stephen A. Helmerich
Stephen A. Helmerich, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNSYLVANIA STATE TROOPERS :
ASSOCIATION :
v. : Case No. PF-C-19-69-E
COMMONWEALTH OF PENNSYLVANIA :

AFFIDAVIT OF COMPLIANCE

The Commonwealth of Pennsylvania 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 immediately rescinded the Supervisor's Notation issued to Pollick (Exhibit CW-1) and expunged it from Pollick's record; 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