

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PSCOA :
 :
 v. : Case No. PERA-C-21-20-E
 :
 COMMONWEALTH OF PA :

PROPOSED DECISION AND ORDER

On February 9, 2021, 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 prohibiting Community Corrections Center Monitor Jason Henry from caucusing with his Union representative during an investigatory interview on February 1, 2021.

On April 2, 2021, the Board Secretary issued a Complaint and Notice of Hearing, assigning the charge to conciliation, and directing a hearing on August 17, 2021, if necessary. The hearing ensued, as scheduled on August 17, 2021, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The Union filed a post-hearing brief in support of its position on December 13, 2021. The Commonwealth filed a post-hearing brief in support of its position on December 14, 2021.

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. 6)
2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 6)
3. Robert Hendricks is currently employed as Corrections Officer I with the Commonwealth at State Correctional Institution-Greene (SCI Greene). He has been the Local Union Vice President for approximately six years, while he has worked for the Commonwealth for 12 years. As the Local Union Vice President, Hendricks is responsible for representing members at SCI Greene, as well as at the Progress Community Correction Center (PCCC), which is a facility for inmates transitioning to parole. (N.T. 9-11)
4. Jason Henry has been employed as a Corrections Monitor with the Commonwealth at PCCC for more than two years. He testified that the PCCC houses parole violators in lockdown units, in addition to inmates trying to reenter the community. (N.T. 26-27)
5. Allen Lynch has been employed as a Security Lieutenant with the Commonwealth at PCCC since March 2011. He has worked for the Commonwealth's Department of Corrections since July 2000. As a Security Lieutenant, Lynch

is responsible for conducting several types of investigations, including staff misconduct, and serves as Henry's immediate supervisor. (N.T. 27, 41-43)

6. David LeMasters has been employed with the Commonwealth as the Director of PCCC for approximately five years. His prior experience includes being a security lieutenant, along with 21 years in the Department of Corrections. As the Director, Lynch oversees the operations of PCCC. (N.T. 90-91)

7. On February 1, 2021, Lieutenant Lynch summoned Monitor Henry to an investigatory interview for allegedly making racially insensitive comments to his coworkers. Lynch acknowledged during his testimony that discipline could result from his investigation. Director LeMasters was also present as a witness. Prior to the start of the interview, Henry specifically requested that Corrections Officer Hendricks serve as his Union representative, which the Commonwealth allowed. (N.T. 12, 14, 27-28, 30, 44-45, 91-92; Exhibit C-2)

8. Lynch advised Henry and Hendricks what the purpose of the interview was prior to starting and provided them the opportunity to confer with each other, which they did. (N.T. 13, 28-29, 45-46, 78-79, 92)

9. After the first question of the interview, Henry requested a caucus with Hendricks, which the Commonwealth allowed. Henry and Hendricks then left the interview room for a few minutes and rejoined the interview when they had finished. When they returned, Hendricks requested that the interview be started over and that Henry be given the chance to answer the previous question again. Lynch denied this request, as the question had already been answered. (N.T. 16-17, 47-50)

10. After the initial exchange with Hendricks, Lynch resumed the interview with Henry. Lynch testified that Henry did not make any additional requests to caucus throughout the remainder of the interview. (N.T. 51)

11. Lynch testified that Corrections Officer Hendricks made another request to caucus at one point later on in the interview, which Lynch denied because it came from the Union representative, and not the actual employee being investigated. Lynch stated that Hendricks' request was not prompted in any way by Henry, nor did Henry make a request to caucus himself after Lynch denied the request from Hendricks. LeMasters confirmed this testimony. (N.T. 51-52, 88, 93, 96)

12. The request to caucus from Hendricks came after Lynch asked Henry why his coworkers would report that he made the alleged racially insensitive remarks if he, Henry, did not recall making them. (Exhibit C-2, C-3, C-4)

13. Lynch continued with the interview until Henry had answered all of his questions. At that point, Hendricks and LeMasters left the room for approximately 20 to 30 minutes to privately discuss the role of a union representative, and Henry wrote his witness statement. Lynch testified that Hendricks left the room on his own and that he, Lynch, did not ask Henry any further questions while Hendricks was gone. Lynch did not direct Henry regarding what he could or could not write in his written statement. (N.T. 20, 53-54, 81-82; Union Exhibit 1)

14. The Commonwealth introduced as Exhibit C-1 the February 1, 2021 written statement of Monitor Henry, which provides in relevant part as follows:

I do hereby state that [CO3 A. Lynch] has identified himself...to me as a Manager employed by the Pennsylvania Department of Corrections. [initial]

The following statement is being given by me freely and without coercion for official Commonwealth business and will be considered for all purposes, including actions under the Statutes of this Commonwealth, just as though it had been sworn or affirmed before a court of law or formal arbitration panel. [initial]¹

I do not agree with the above statement, but am [sic] bound by the code of ethics to comply with any and all investigations. On 2/1/21, I was investigated by Lt Lynch regarding alleged comments that I may have made. I was informed that multiple coworkers had claimed to overhear me say something to the effect of "is it still a white day if Blanton is here?"² I don't specifically recall the incident, but if witnesses state or record the [sic] heard me make a similar comment, then it is possible I said something along those lines, but if so it would have been in a joking manner. We joke a lot at work regarding various things. Additionally, I was informed by Lt Lynch that a coworker had said I made a comment referencing that I had not put a black kid on the wall in 6 months. I do not recall the exact conversation, but have been told by coworkers in the past that its [sic] been a certain time period since I picked up a black coworker.³ I recall replying "I haven't picked up anyone, black, white or any other race." I have made comments that my prior discipline regarding the incident with Blanton has help [sic] me up with advancing my career, but did not specifically blame Blanton. I don't blame Blanton for my discipline or having the job opportunity pulled from me. I understand that the discipline I received was a result of my own actions. I am and have been remorseful since the incident occurred and served my discipline. I took ownership immediately and self reported the incident. To be clear, there has never been an issue regarding race, it was about quality of work and I believe I have had a good working relationship with Blanton and my other coworkers since the incident originally occurred...

(Exhibit C-1)

¹ The first two paragraphs of the form are preprinted by the Commonwealth and initialed by Henry. The remaining portion of the exhibit quoted above appears in Henry's own handwriting. (Exhibit C-1).

² The record shows that Henry is a Caucasian male, while CCCM Blanton is an African-American male. White day is apparently a reference to a day in the color group pass day system where no corrections monitors have a regularly scheduled day off, as opposed to blue, red, and green days. (Exhibit C-2).

³ The record shows that these alleged comments were apparently in reference to a prior physical altercation in March 2020 between Henry and Blanton, in which Henry allegedly grabbed Blanton by his shirt collar and lifted him out of a chair, and for which Henry was suspended. (Exhibit C-2).

15. During his testimony, Lynch pointed out where Henry had signed the witness statement. Lynch also testified that Hendricks returned to the interview room and had the opportunity to review the statement. Lynch pointed out the multiple places where Hendricks signed the document. Henry did not indicate on the witness statement that he made a request to consult with his Union representative that was denied. (N.T. 54-55, 75; Exhibit C-1)

16. The Commonwealth entered a February 4, 2021 confidential report summarizing the investigation of the alleged incident(s), which included interviews with Henry's coworkers, several of whom confirmed that he made the alleged statements separate and apart from Henry's own investigative interview on February 1, 2021. The investigation determined that the allegations were substantiated and recommended further disciplinary action for violation of the Commonwealth's Code of Ethics. (Exhibit C-2)

17. On February 11, 2021, Henry was disciplined by the Commonwealth when he was issued a written reprimand. (N.T. 34)

DISCUSSION

The Union has alleged that the Commonwealth violated Section 1201(a)(1) of the Act⁴ by prohibiting Community Corrections Center Monitor Jason Henry from caucusing with his Union representative during an investigatory interview on February 1, 2021. The Commonwealth contends that the charge should be dismissed because the Commonwealth did not violate the statutory rights of Henry since the Commonwealth only denied a caucus request from his Union representative Robert Hendricks. The Commonwealth asserts that since Henry did not make a subsequent request to caucus after the Commonwealth denied Hendricks' request, that no unfair practice was committed.

It is well settled that the Weingarten⁵ 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 employe, and may attempt to clarify the facts or suggest other employes 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:

⁴ 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.

⁵ NLRB v. Weingarten, 420 U.S. 251, 95 S.Ct. 959 (1975).

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.

In addition, the Commonwealth Court has held that an employe's request to consult with his or her union representative prior to answering a question posed during an investigatory interview does not interfere with the employer's control over the investigatory process, and the employer's refusal to permit such a consultation constitutes an unfair practice. Commonwealth v. PLRB, 826 A.2d 932 (Pa. Cmwlth. 2003). The Court went on to opine that an employe is not permitted to interfere with the interview process by using delay tactics and that such a request is permissible only if there are reasonable grounds for it. *Id.* at 935-936. The Court explained that "[a]n example of such reasonable grounds would only be when a significant question is asked such as one that could result in the discipline of the employe or when the question asked may be interpreted in more than one way." *Id.* at 936.

In this case, the parties have offered starkly different versions of what occurred during the investigatory interview on February 1, 2021. For example, the Commonwealth witnesses, Lynch and LeMasters, both testified that Henry was evasive during the interview and frequently looked to Hendricks for guidance on how he should respond to their questions. (N.T. 46-47, 104-105, 108-109). Similarly, Lynch and LeMasters indicated that Hendricks was disruptive by prompting Henry how to respond, demanding the interview be started over, telling Henry to respond with "I don't recall," and even directing Henry to falsify his written statement. (N.T. 46-47, 104-105, 108-109). Conversely, the Union presented testimony from Hendricks, who indicated that Henry was obviously confused by the Commonwealth's aggressive and loaded questioning and that Hendricks simply tried to clarify his responses by advising him "if you don't recall, then you don't recall." (N.T. 15-22, 24). Of course, Henry corroborated this testimony from Hendricks and explained how he was intimidated and felt nervous by the questioning and conduct of Lynch and LeMasters. (N.T. 30-32). Nevertheless, it is undisputed that the Commonwealth gave Henry the opportunity to caucus with Hendricks prior to starting the interview and after the first question of the interview. Likewise, the parties agree that, at some point later in the interview, Hendricks requested to privately caucus with Henry after Lynch asked him why his coworkers would report that he made the alleged racially insensitive remarks if he, Henry, did not recall making them. The parties further agree that the Commonwealth denied the request to caucus from Hendricks because it came from the Union representative, and not the employe under investigation.

Once again, the parties' versions of the interview diverge at this point, with the Union claiming Henry immediately then requested a private caucus, which was also denied, (N.T. 18, 31-32), and the Commonwealth asserting that Henry made no such request and simply continued on providing responses to the questions. (N.T. 51-52, 88, 93). On this latter point, the

Commonwealth's version of the story has been accepted as more credible and accurate than the Union's account. As the Commonwealth points out, Henry failed to mention any alleged request he made to caucus that was denied when he filled out his written statement towards the end of the interview. (Commonwealth Exhibit 1). Indeed, the written statement Henry provided, which was reviewed and signed by Hendricks, was completely devoid of any such allegation.⁶ And, although Henry provided another written statement to the Union on February 2, 2021 for purposes of a subsequent grievance, that account is completely inconsistent with his February 1, 2021 written statement. (Union Exhibit 2).⁷ This lends more support for the Commonwealth's version of the events that transpired on February 1, 2021, insofar as there is a dispute regarding whether Henry requested a caucus with his Union representative at this later point during the interview.

However, regardless of whether or not Henry requested to caucus with his Union representative, the record shows and the parties agree that Hendricks did make such a request to caucus, which the Commonwealth denied. The Commonwealth argues that this was not an unfair practice because the right to invoke Weingarten is within the sole prerogative of the bargaining unit member subject to the investigatory interview, not the union representative. The Commonwealth cites Upper Gwynedd Township, 33 PPER ¶ 33133 (Final Order, 2002) as support for this rule. The Commonwealth's reliance on Upper Gwynedd Township, however, is misplaced.

In Upper Gwynedd Township, the Board dismissed a charge of unfair practices alleging that the township disciplined three members of the bargaining unit in retaliation for their protected activity. The Board found that the three unit members were not engaged in protected activity because the employe they were attempting to assist did not request union representation; his interview was not with his township employer, but rather with the county as part of a criminal investigation; and the interview was not calculated to form the basis for taking disciplinary action against the employe since it was part of a criminal investigation, which was not being conducted by his employer. The Board's decision in Upper Gwynedd Township does not stand for the proposition that the Commonwealth need not honor a request for consultation by the union representative after the employe has already invoked his Weingarten rights, as alleged by the Commonwealth in this matter. Indeed, such a notion has been specifically rejected in the federal sector. The Pacific Telephone and Telegraph Co. v. NLRB, 711 F.2d 134, 137 (9th Cir. 1983). And, while the Board stated in Upper Gwynedd Township that Weingarten rights attach only to the employe subjected to the investigatory interview, the record clearly shows that, in this case, Henry did seek Union representation at the start of the interview when he requested that Hendricks be his representative.

⁶ The Union has neither alleged, nor argued that the Commonwealth violated the Act by compelling Henry to make a written statement without the assistance of his Union representative. And, although the Union has alleged a violation of Henry's Weingarten rights, the Board has clearly held that the charge of a discrete Weingarten violation, such as ordering the union representative to remain silent or be removed, is insufficient to encompass a separate alleged Weingarten violation of denying a private consultation during the interview. The Board will not accept a generalized Weingarten violation as sufficient to encompass each separately identifiable Weingarten claim. PSCOA v. Commonwealth of Pennsylvania, 34 PPER ¶ 34 (Final Order, 2002).

⁷ The parties stipulated that the grievance is no longer pending. (N.T. 61-62).

As the Ninth Circuit Court of Appeals explained:

...the Supreme Court has stated that the right to union representation at an investigatory interview as defined by the [NLRB] is a right which must be requested by the employee and which the employee may choose to forego. We read this to mean that the employer need not suggest that an employee have union representation, and not, as [the employer] argues, that only the employee himself may so request. In our judgment, 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.

The Pacific Telephone and Telegraph Co. v. NLRB, 711 F.2d 134, 137 (9th Cir. 1983) (internal citations omitted).

The Commonwealth has not made any convincing argument why this Board should not adopt the same rule. In fact, this Board has generally relied on federal law concerning the scope of Weingarten rights. Pennsylvania State Troopers Ass'n v. Commonwealth of Pennsylvania, Pennsylvania State Police, 35 PPER 21 (Proposed Decision and Order, 2004). Moreover, this Board has held that where an employee has a reasonable fear of discipline and has made a request for union assistance, the employee does not need to make repeated demands for representation at every permutation of the investigation. Fraternal Order of Police E.B. Jermyn Lodge 2 v. City of Scranton, 40 PPER 136 (Final Order, 2009). Nor does it matter that Pacific Telephone applied to a union representative's request for a pre-interview conference. As set forth above, the Pennsylvania Commonwealth Court has expressly held that refusing to allow an employee to consult with his or her Union representative prior to answering a question posed during an investigatory interview constitutes an unfair practice, as long as there are reasonable grounds for the request. Commonwealth v. PLRB, 826 A.2d 932 (Pa. Cmwlth. 2003).

The Commonwealth does not argue that the request for a caucus from Hendricks was unreasonable. While the record shows that the Commonwealth permitted Henry to caucus with his Union representative both prior to the interview and right after the first question was asked, the 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 employee 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 employee reasonably believes that the employer is accusing him of lying during an interview and there is the potential for discipline, the employee clearly has the right to union assistance in accordance with Weingarten. *Id.*

On these facts then, the Union has sustained its burden of proving that the Commonwealth violated the Act by denying the request from Hendricks to caucus with Henry following Lynch's question about why Henry's coworkers would report such allegations against him if he, Henry, did not recall making them. There is no dispute that the interview was investigatory in nature and that discipline could result. There is also no dispute that Henry invoked his Weingarten rights by requesting that Hendricks serve as his Union representative at the outset of the interview. The parties further agree that Hendricks made a request to caucus with Henry following Lynch's question, which the Commonwealth denied. In light of the nature of Lynch's question about Henry's veracity and truthfulness, it must be concluded that there were reasonable grounds for Hendricks to make his request to caucus with Henry at that point. Such a request does not transform the interview into an adversarial contest, nor would it deprive the Commonwealth of its ability to control the investigation. And, to the extent the Commonwealth has raised an argument that Henry waived his Weingarten rights by not then requesting a caucus himself and instead providing a response to Lynch's question, the record shows that both Lynch and LeMasters admitted that Henry was told he had to answer the question first before any caucus could be permitted. (Commonwealth Exhibits 2, 3, 4). As such, the Commonwealth made it plain to Henry that it would be futile for him to attempt to confer with his Union representative at that point, at least until after he answered Lynch's question, and any belief that he had to respond was reasonable. Accordingly, the Commonwealth must be found in violation of Section 1201(a)(1) of the Act.

With regard to the remedy, the Union seeks a rescission of the written reprimand that Henry received on February 11, 2021. The Board has held, with court approval, that once a Weingarten violation has been established, an employer can avoid a conventional make-whole remedy only by showing that the discipline meted out was not based upon information obtained at the unlawful interview. AFSCME Council 13 & William O'Donnell v. Commonwealth of Pennsylvania, Pennsylvania Emergency Management Agency, 31 PPER ¶ 31034 (Final Order, 2000) *aff'd sub. nom. Commonwealth of Pennsylvania, Pennsylvania Emergency Management Agency v. PLRB*, 768 A.2d 1201 (Pa. Cmwlth. 2001).

In this case, the Commonwealth entered a February 4, 2021 confidential report summarizing the investigation of the alleged incident(s), which included interviews with Henry's coworkers, several of whom confirmed that he made the alleged statements separate and apart from Henry's own investigative interview on February 1, 2021.⁸ Based on this evidence, the investigation determined that the allegations were substantiated and recommended further disciplinary action for violation of the Commonwealth's Code of Ethics. As a result, the Commonwealth has demonstrated that the discipline meted out was not based upon information obtained at the unlawful interview with Henry on February 1, 2021. Therefore, the remedy must be limited to a cease and desist order, along with the Board's usual posting requirements.

⁸ During the hearing, the Union objected to the admission of the February 4, 2021 report as Commonwealth Exhibit 2 on the basis that it was inflammatory. The exhibit was conditionally received into evidence pending arguments by the parties in their post-hearing briefs. (N.T. 110-111). The objection is now overruled.

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 first day of
February, 2022

PENNSYLVANIA LABOR RELATIONS BOARD

/s/ John Pozniak
John Pozniak, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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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