

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNSYLVANIA STATE CORRECTIONS :
OFFICERS ASSOCIATION :
 :
v. : CASE NO. PERA-C-21-283-E
 :
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF HUMAN SERVICES :

PROPOSED DECISION AND ORDER

On December 20, 2021, the Pennsylvania State Corrections Officers Association (Union or PSCOA) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the Commonwealth of Pennsylvania, Department of Human Services (DHS, Department of Commonwealth) independently violated Section 1201(a)(1) and (5) of the Public Employee Relations Act (Act or PERA). The Union specifically alleged that management at the Department's Norristown State Hospital (NSH), violated a side agreement between the Union and the Department of Corrections (DOC) and a DHS policy. The alleged violation occurred when managerial employe Nicole Bonetz left a voicemail for Jared Nichols and Patrick Cooper suspending them pending investigation (SPI) without first discussing the allegations with them and hearing their responses. The Union also alleged a Weingarten violation regarding the same events.

On March 9, 2022, the Secretary of the Board issued a Complaint and Notice of Hearing (CNH) designating a hearing date of May 16, 2022, in Harrisburg. I continued the hearing to September 21, 2022, at the request of the Commonwealth due to witness unavailability. During the hearing on that date, both parties were afforded a full and fair opportunity to present documents and testimony and to cross-examine witnesses. On March 27, 2023, the Union and the Commonwealth filed post-hearing briefs.

The examiner, based upon all matters of record, makes the following:

FINDINGS OF FACT

1. The Commonwealth, DHS 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. Patrick Cooper is a Forensic Security Employe (FSE) at NSH. FSEs secure units, ensure patient safety, monitor daily patient activities, distribute meals, and supervise recreational activities. Patients at NSH are not free to leave the hospital facility. The NSH is on lockdown. The patients are transferred to NSH from various prisons to receive psychiatric evaluations, treatment, and medication. (N.T. 10, 15)
4. Nicole Bonetz was a Registered Nurse Supervisor at NSH. She was Mr. Cooper's supervisor at NSH in November 2021. She is no longer employed at NSH. (N.T. 11-12, 24, 45)

5. On November 16, 2021, Ms. Bonetz left two voicemail messages for Mr. Cooper on his cell phone. Mr. Cooper listened to the voicemails one after the other later that evening. (N.T. 11-13)

6. In the first voicemail, Ms. Bonetz asked Mr. Cooper to call her back. There was no other information provided on the first voicemail. On the second voicemail, Ms. Bonetz informed Mr. Cooper that he was suspended pending investigation regarding an incident in Building 51 on Unit Alpha-2 and that he was not to report to work the next day. Mr. Cooper did not have any discussions with Ms. Bonetz or any other manager prior to his SPI. He was not told what he was accused of doing and not given the opportunity to explain his side of the story. (N.T. 13-14, 16-17; UX-1)

7. Ms. Bonetz's second voicemail message for Mr. Copper stated:

Hey, Patrick, it's Nicole. I didn't hear back from you tonight, so, unfortunately, I need to leave this message on your voicemail. I have to let you know that you are being suspended pending the investigation of the incident that happened on Alpha 2. That means you do not report for work tomorrow. Looks like you're expected to come back-you have some vacation time, but you are not to report to work. And they wanted me to tell you also that they will be sending you all the paperwork in the mail. It also means that you cannot come onto grounds unless you notify somebody first. And they're probably going to want your keys and your badge, but I'll let you talk to HR about that. So if you have any further questions, you can call me, or you could call human resources or one of the managers tomorrow. Thank you.

(N.T. 16; UX-1)

8. On November 17, 2021, Mr. Cooper called Ms. Bonet and spoke with her, but he was already suspended. Mr. Cooper returned to NSH from his SPI on January 12, 2022. Between January 12, 2022, and September 20, 2022, Mr. Cooper was assigned to sit in a room for his shift where he could have no patient contact. (N.T. 18-19)

9. Jared Nichols is an FSE at NSH. Ms. Bonetz was Mr. Nichols supervisor at NSH in November 2021. Mr. Nichols received 2 voicemails from Ms. Bonetz on November 16, 2021. He was serving his second week of COVID leave, and he was not feeling well. On the first voicemail, Ms. Bonetz stated, in relevant part: "Obviously, if you could please give me a call back this evening. I need to talk to you about the investigation that's going on [Alpha-2] so if you could please give me a call back, I should be between 12 and building 51, so should be pretty easy to find. Or if you want to shoot me a text when you are available to talk, I can just give you a call, but I do need to talk to you this evening. So let me know. Thank you, bye-bye." Later that same day, Ms. Bonetz left a second voicemail for Mr. Nichols in which she informed Mr. Nichols that he was suspended pending investigation for an incident that happened in Building 51 on Unit Alpha-2. (N.T. 23-27, 45; UX-1)

10. Ms. Bonetz's second voicemail for Mr. Nichols' stated:

Hey Jared, it's Nicole. It is 10:00. I did not hear back from you tonight. So unfortunately, I need to leave this message on your voicemail. I'm calling to let you know that you are being suspended pending completion of the investigation for the incident that

happened on Alpha 2. That means that even when you get done and get better, you are not to report for duty. You are suspended, out on the street. That also means that you cannot come onto grounds without permission or without notifying human resources or security that you're coming. They will be sending you all of the paperwork in the mail, going over all this, and if you've any further questions, you can call me or you can also call one of the managers tomorrow or human resources. They will probably want you to come to grounds and turn in your badge and your keys. That is standard operating procedure when someone is suspended. But you can probably iron that out with human resources. You can call me if you want. If not, you can call other people tomorrow. Thank you. Bye.

(N.T. 28; UX-1)

DISCUSSION

At the hearing, the Commonwealth moved for the dismissal of the Union's Weingarten claim in Paragraph 8 of its charge. The Commonwealth specifically argued that the basis for the Union's charge was that Messrs. Cooper and Nichols were denied an interview before their SPIs and that, absent such an investigatory interview, Messrs. Cooper and Nichols were not entitled to a Weingarten representative, as a matter of law. (N.T. 6-9). After the Union rested its case-in-chief, the Commonwealth renewed its motion to dismiss the Weingarten claim. (N.T. 34). In its brief, the Commonwealth again renewed its motion. (Commonwealth Brief at 2 fn. 1). The Union agreed in its brief stating that "there is no Weingarten violation here[,]" and that Paragraph 8 may be stricken from the charge. (Union Brief at 1, fn. 1). Under the allegations in the charge, the facts established on the record, and the agreement of the parties, the right to a Weingarten representative was not triggered or violated, as a matter of law, and the Commonwealth's motion to dismiss that claim is granted.

Also, after the Union rested its case-in-chief, the Commonwealth moved to dismiss the Union's claim that DHS unilaterally changed a policy or binding past practice. The Commonwealth argued that the Union's evidentiary case did not establish a unilateral change in a policy or past practice involving a mandatory subject of bargaining. (N.T. 34-40). I deferred my ruling on the Commonwealth's motion to dismiss the bargaining violation. However, invoking the authority under 34 Pa. Code § 95.91,¹ I directed the attorney for the Union to unrest its case, and establish the existence of a policy or practice.

¹ Section 95.91 of the Board's regulations provide, in relevant part, as follows:

- (g) The hearing examiner shall see that a full inquiry is made into the matters in issue and to obtain a complete record of facts necessary for a fair determination of the issues by the Board.
- (h) The hearing examiner may do any of the following:
 - (1) Call and examine witnesses.
 - (2) Direct the production of papers or other matter present in the hearing room.
 - (3) Exclude irrelevant or immaterial testimony.
 - (4) Introduce documentary or other evidence.
 - (5) Take action during the progress of a hearing which will properly effectuate the policy of the act.

The Commonwealth objected to my ruling to re-open the Union's case-in-chief, arguing that the ruling exceeded the limits of a neutral adjudicator and constituted advocacy for the Union. (N.T. 41-42). In its brief, the Commonwealth renewed its objection to the ruling. The Commonwealth contends that, in an unfair practice proceeding, the charging party bears the burden of proving the requisite legal elements of its claim, citing Avery v. PLRB, 509 A.2d 888, 892 (Pa. Cmwlth. 1986). See also, St. Joseph's Hospital v. PLRB, 474 Pa. 101, 323 A.2d 1069 (1977). The Commonwealth argues that "it is the affirmative duty of the charging party, **not the PLRB hearing examiner**, to ensure that relevant evidence is admitted into the record." (Commonwealth Brief at 10, fn. 8) (emphasis original). Indeed, the Avery Court opined that it is the duty of the party with the burden of proof to ensure that necessary, relevant evidence is properly introduced and admitted into the record. Avery, supra.

The Commonwealth further argues that "[a]lthough a hearing examiner may take appropriate action to 'see that a full inquiry is made into the matters in issue,' 34 Pa. Code § 95.91(g), the hearing examiner is not an advocate for the charging party and must not assume such a role." (Commonwealth Brief at 10, fn. 8). In support of this argument, the Commonwealth cites Stugart v. UCPR, 85 A.3d 606, 609 (Pa. Cmwlth. 2014). In that case, where the claimant was pro se, the Commonwealth Court stated that "[a]lthough the law requires that a [UC] referee reasonably assist in development of the facts necessary to render a decision, 'the referee is not required to become and should not assume the role of a claimant's advocate.'" Stugart, 85 A.3d at 609 (quoting McFadden v. UCPR, 806 A.2d 955, 958 (Pa. Cmwlth. 2002)). Certainly, the Stugart rule, that the neutral "should not assume the role of a claimant's advocate," applies even more so where, as here, the complainant is represented by legal counsel. The Commonwealth thus asserts that, "[b]y directing PSCOA to unrest its case and put on evidence of a policy or past practice, the hearing examiner abused his discretion and assumed the role of an advocate. Accordingly, the additional evidence presented by PSCOA should be stricken, and the matter *sub judice* should be decided based upon the evidence presented by PSCOA during its initial case-in-chief." (Commonwealth Brief at 11, fn. 8).

Upon reconsideration, my directive to reopen the Complainant's case-in-chief, over the objection of the Commonwealth, exceeded the authority and the purpose of Section 95.91 of the Board's regulations, especially where the Union was represented by legal counsel. The Commonwealth, or anyone else who practices before the Board, could perceive the ruling as favoritism or my supporting the Union's position by aiding the Union in meeting its burden of proof, which was not the case or the intention. The effect of the ruling exceeded the acceptable neutral role of assisting in the clarification of the evidence already offered by the parties and necessary to render a decision, in an unfair practice proceeding. Stugart, supra. Ensuring and maintaining the integrity and neutrality of the Board's processes, and the perception thereof, precludes considering the improperly admitted post-motion evidence. The ruling was, therefore, in error, and I will evaluate the Commonwealth's motion to dismiss based on the Union's original case-in-chief.

The Union's case-in-chief prior to the Commonwealth's motion to dismiss lacks substantial, competent evidence to establish the existence of a policy or a binding past practice requiring DHS to hold a pre-suspension meeting with employees accused of misconduct to permit them to respond to the allegations against them. Accordingly, the Union did not meet its burden of establishing a *prima facie* case that DHS unilaterally changed a term or

condition of employment that constituted a mandatory subject of bargaining, in violation of Section 1201(a)(5). Similarly, the record lacks the necessary factual predicate to establish that DHS independently 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, DHS is a public employer under PERA.
2. The Union is an employe organization under PERA.
3. The Board has jurisdiction over the parties hereto.
4. DHS did not violate the Weingarten rights of Cooper or Nichols under Section 1201(a)(1) of PERA. The DHS Motion to dismiss is granted.
5. DHS did not commit a bargaining violation under Section 1201(a)(1) or (5) derivatively or independently. The DHS motion to dismiss is granted.

ORDER

In view of the foregoing and in order to effectuate the policies of PERA, the hearing examiner:

HEREBY ORDERS AND DIRECTS

That the charge is dismissed and the complaint is rescinded.

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 order shall be and become final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this third day of April 2023.

PENNSYLVANIA LABOR RELATIONS BOARD

JACK E. MARINO/S

Jack E. Marino, Hearing Examiner