

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNSYLVANIA STATE CORRECTIONS :
OFFICERS ASSOCIATION :
 :
v. : CASE NO. PERA-C-23-173-E
 :
COMMONWEALTH OF PENNSYLVANIA :

PROPOSED DECISION AND ORDER

On July 31, 2023, 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 (Commonwealth or DOC) violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (Act or PERA). The Union specifically alleged that the Commonwealth violated a negotiated agreement by authorizing the Suspension Pending Investigation (SPI) of Corrections Officer Lora Miranda (Miranda) prior to completing the requirement of an informal Loudermill hearing and prior to considering her responses to the charges against her during the Loudermill.

On August 30, 2023, the Secretary of the Board issued a Complaint and Notice of Hearing designating a hearing date of November 13, 2023, in Harrisburg. 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 February 28, 2024, both parties filed separate post-hearing briefs in support of their respective positions.

The examiner, based upon all matters 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. Maximilian Kauert (Kauert) is a Business Agent (BA) for the PSCOA and a Sergeant at SCI Somerset. As a BA, Kauert is a liaison between PSCOA Headquarters and Local Unions at SCI Coal Township, SCI Mahanoy, SCI Camp Hill, as well as the York and Harrisburg Community Corrections Centers. (N.T. 11-13)
4. Kauert oversees local PSCOA unions and ensures that the locals are conducting business within the Union constitution. He also enforces the contract and files grievances for discipline cases, contract violations, and SPIs. PSCOA local unions have a President, Vice President, Secretary, Treasurer, and 5 Executive Board members for each institution. (N.T. 12-14)
5. Joshua Kerstetter is the Local Union President at SCI Coal Township. In his role as President, Kerstetter works with Kauert, and he

files grievances on behalf of bargaining unit employees at SCI Coal Township. Kerstetter also attends Step-1 grievance meetings and Labor-Management meetings. (N.T. 56-58)

6. SPIs are used to remove an employe from the workplace without pay for 60 days when the allegations, if substantiated, would result in termination. SPIs are used where the employe is alleged to have engaged in egregious conduct within the jail which could compromise the safety and security of the jail with respect to both staff and inmates. To address management's alleged abusive use of SPIs, the Union and the Commonwealth negotiated an SPI settlement agreement, dated June 26, 2020, which incorporates a May 22, 2020 Memo from the Secretary of Corrections at the time, John Wetzel. (N.T. 14-15, 69; JX-1)

7. The June 26, 2020 SPI agreement provides, *inter alia*, that "The Department agrees that prior to imposing a Suspension Pending Investigation upon an H-1 bargaining unit member, that employee shall be afforded the right to an informal Loudermill hearing with management where they will be given notice of the allegation(s) against them and an explanation of the evidence, then-known, giving rise to those allegations. The employee shall also be afforded the opportunity to respond to the allegations, but will not be obliged to do so." (JX-1)

8. Secretary Wetzel's May 22, 2020 Memorandum provides, *inter alia*, that, "[b]ased upon the information provided [at the pre-suspension or Loudermill hearing], the Superintendent/Facility Manager (Acting Facility Manager/Bureau Director/District Director) will consult with their respective Deputy Secretary/Executive Deputy Secretary to determine whether to suspend the employe pending investigation. . . ." (JX-1)

9. Robert Marsh (Marsh) is the Regional Deputy Secretary (RDS) of Corrections for the Central Region of Facilities. In the course of overseeing and monitoring 8 institutions, RDS Marsh performs quality inspections, consults with superintendents on disciplinary matters, reviews monthly reports, and approves SPIs within his region, which includes SCI Coal Township. (N.T. 131-135)

10. Thomas McGinley (McGinley) is the Superintendent of SCI Coal Township. Victor Mirarchi (Mirarchi) is a Deputy Superintendent at SCI Coal Township, and he investigates employe discipline when directed. McGinley and Mirarchi normally work an 8:00 a.m.-4:00 p.m. shift. (N.T. 67-68, 92-93, 154)

11. Miranda was a Corrections Officer 1 at SCI Coal Township. On April 14, 2023, certain information came to light regarding Miranda, which caused McGinley to have several pre-Loudermill conversations with RDS Marsh throughout the day as the Miranda investigation was developing. McGinley did not discuss SPI at this time with Marsh. Lieutenant Cahoon (Cahoon) is in charge of Intelligence and Investigations at the Jail. He was present at the Jail the night of April 14, 2023, to support the investigation of the DOC Bureau of Intelligence and Investigations (BII) agent. (76-79, 82-83, 88, 90-91, 95-96, 170-174; UX-1)

12. On April 14, 2023, when Miranda arrived at the Jail for her 10:00 p.m.-6:00 a.m. shift, a BII agent interviewed her about the allegations against her for approximately 20-25 minutes. This interview was not the Loudermill hearing. McGinley was off on April 14, 2023, and Mirarchi was the Designated Facility Manager. After BII interviewed Miranda, the BII agent

briefed Mirarchi, who was present at the Jail late at night specifically for the Miranda investigation. The BII agent informed Mirarchi that Miranda admitted to all the charges and allegations as well as the evidence presented against her. (N.T. 76-77, 90-93, 95-103, 141, 156-157, 165-167)

13. After the meeting with the BII agent, Mirarchi telephoned McGinley at home to update him on the investigation. After Mirarchi spoke with McGinley and gave him the BII investigation update, McGinley telephoned RDS Marsh and told him that Mirarchi was going to conduct a Loudermill hearing with Miranda and that Mirarchi would call back after the Loudermill. McGinley credibly testified that he discussed SPI with Marsh after the BII investigation and before the Loudermill, but he never sought approval from Marsh and Marsh never gave approval for an SPI for Miranda prior to her Loudermill hearing. McGinley directed Mirarchi to conduct a Loudermill with Miranda to see if she could provide any information to cause management to pause and to relay that information to Marsh. The Miranda Loudermill was conducted because the DOC requires it and because McGinley and Marsh needed to determine whether Miranda could continue working, while the investigation continued, without posing a security risk. McGinley apprised Marsh that Mirarchi was going to conduct the Loudermill. (N.T. 78-81, 89, 96-103, 107-108, 125-127, 134-137, 145, 157-158, 168-174)

14. Shift Commander Captain Russell Dalton (Dalton) was also present for the Miranda Loudermill, and Human Resources Analyst Roberta Boyles (Boyles) was on speaker phone. After the Loudermill hearing, Mirarchi again called McGinley and told him that Miranda admitted culpability regarding the allegations and evidence against her, which mirrored the BII investigation. McGinley was simultaneously on two phone calls: one with Mirarchi and one with Marsh. McGinley relayed to Marsh that Miranda admitted to everything and asked Marsh if he could move forward with SPI. Marsh agreed to the SPI, and McGinley immediately told Mirarchi to move forward with the SPI based on Miranda's admissions during both the BII interview and the Loudermill hearing. Marsh credibly testified: "we can't make a decision without Loudermill." Mirarchi did not speak directly with Marsh on April 14, 2023. (N.T. 48, 81-82, 85-86, 108, 111-113, 125, 139-141, 143, 157-160, 178-182)

15. Miranda was given a verbal SPI on the evening of April 14, 2023.¹ The SPI letter is dated April 14, 2023, the day of Miranda's Loudermill, but the letter was prepared, signed, and mailed after April 14, 2023. The Local Union notified Kauert of the Miranda SPI, and Kauert directed the Local to file a grievance, investigate, and file a Request for Information (RFI). The collective bargaining agreement (CBA) provides that the Union has 15 days from the date it learned of an alleged occurrence or contract violation to file a grievance. RFIs are used to acquire then-known facts in the possession of management used in presenting its case at the Loudermill and relied upon when imposing discipline. (N.T. 16-22, 175-178; UX-1)

16. Charles Martz (Martz), the Local Union Vice President, filed Grievance No. 23-005 on April 20, 2023, on behalf of Miranda stating that "[m]anagement violated the CBA by suspending member pending investigation on April 14, 2023 without just cause. Make member whole." Also on April 20, 2023, Martz filed an RFI with Boyles of Human Resources. (UXs-2, 3, 4)

¹ Miranda was eventually terminated, but the record does not indicate the date of her termination. (N.T. 51)

17. A Labor-Management meeting was held on May 17, 2023. A Step-1 grievance meeting was held after the Labor-management meeting that day. At the Step-1 meeting, Miranda's grievance was presented and discussed. The Commonwealth had not fulfilled the RFI by that time, and the Union did not have much information to present at the Step-1 meeting. (N.T. 22-28; UX-4)

18. Jeffrey Gibson is a Deputy Superintendent at SCI Coal Township. McGinley, Gibson, and Mirarchi were present on behalf of management at the Labor-Management meeting and the subsequent Step-1 grievance meeting on May 17, 2023. Kauert and Kerstetter, among other Union representatives, were also present. (N.T. 27-28, 44, 46-47, 59, 67-68, 154; UX-4)

19. During the Step-1 grievance meeting, Kauert asked a series of questions regarding the presentation of the Miranda grievance such as: was there a Loudermill hearing; was there a statement given by the employe; was a Union representative present during the Loudermill; were management documents received; and did somebody call the RDS and ask permission to suspend Miranda. Kauert credibly testified that the main violation of the SPI process is that management does not call the RDS after a Loudermill for permission to SPI. Often a decision is made prior to the Loudermill, the SPI letter is prepared before the Loudermill, and the employe is handed the SPI letter before he/she leaves the Loudermill. (N.T. 36-38)

20. Under the SPI agreement and incorporated Memo, the institution Superintendent or his/her designee is supposed to contact the RDS after hearing facts presented from the employe during the Loudermill and then seek approval from the RDS for permission to SPI. (N.T. 38-39, 162-163; JX-1)

21. When Kauert asked about who contacted the RDS, McGinley responded that he was not at the institution on April 14, 2023, but he had contacted the RDS for approval from home. In a follow-up, Kauert asked: "in regards to the Loudermill hearing, when did you call the RDS? Was it before or after? He stated before." Kauert asked: "did you call prior to or after the investigation? which he said before." McGinley used the term "investigation" and not the term "Loudermill." Kauert again followed-up so his Union representatives present at the meeting could confirm McGinley's statement and again asked McGinley: "So you're the one who called, and you called before the Loudermill, to which he responded, "yes, I did." Kauert again testified that he asked McGinley: "So you're saying that you called the RDS prior to the Loudermill hearing? He said yes, I did." (N.T. 41-48, 162)

22. McGinley credibly testified that Kauert never asked him during the May 17, 2023 Step-1 meeting whether McGinley got approval for the SPI from Marsh prior to the Loudermill. Kauert only asked whether McGinley spoke with Marsh prior to the Loudermill. Mirarchi credibly testified that, at no time during the May 17, 2023 meeting, did McGinley state that management made the decision or sought approval to SPI Miranda prior her Loudermill. (N.T. 82-83, 161-162)

DISCUSSION

The decision in this case turns on whether McGinley, in fact, obtained the approval from RDS Marsh before or after Miranda's Loudermill and not what the parties believed they understood about that process during the May 17, 2023 meeting. Consequently, there is no conflict in the evidence regarding what actually transpired on the evening of April 14, 2023. I credit the testimonial accounts of what happened on April 14, 2023, as given by Marsh,

McGinley, and Mirarchi because they are the only individuals who experienced the events of April 14, 2023, first hand, and in real time. Marsh, McGinley, and Mirarchi know better than anyone else when the approval was obtained and a decision was made to SPI Miranda. Kauert's and Kerstetter's accounts were based on what they believed they heard from McGinley during the May 17, 2023 meeting. The record, as a whole, yields the inference that a misunderstanding arose in the way the parties were communicating during the May 17, 2023 meeting about whether McGinley was stating that he contacted Marsh before the Loudermill to keep him apprised of the Miranda situation or whether he actually sought approval to SPI Miranda from Marsh before the Loudermill. McGinley testified that Kauert never asked him during the May 17, 2023 Step-1 meeting whether McGinley got approval for the SPI from Marsh prior to the Loudermill. Rather, according to McGinley, Kauert only asked whether McGinley spoke with Marsh prior to the Loudermill. Mirarchi testified that, at no time during the May 17, 2023 meeting, did McGinley state that management made the decision or sought approval to SPI Miranda prior her Loudermill. McGinley's and Mirarchi's account of the May 17, 2023 meeting conflicts with Kauert's account of what was said during the May 17, 2023 meeting. I do not discredit anyone's personal recollection of what was asked and stated on May 17, 2023. However, I do conclude that the parties were cross-communicating and misunderstanding each other and that those statements are secondary to the actual events of April 14, 2023.

Kauert testified that he specifically asked McGinley if he obtained approval to SPI Miranda prior to the Loudermill, and that McGinley answered in the affirmative. Also, Kerstetter wrote a witness statement, which he authenticated and corroborated at the hearing, stating that, during the May 17, 2023 meeting, "McGinley admitted to calling the RDS for authorization of SPI prior to the union member's hearing." (N.T. 62-65; UX-5). I conclude that there was a misunderstanding at the May 17, 2023 meeting between McGinley and Kauert about what Kauert was specifically asking and what McGinley understood Kauert's questions to be. Although I believe and credit Kauert's testimony, that he asked the approval question, I do not believe that McGinley or Mirarchi understood the question or that McGinley meant to convey to Union representatives that he obtained approval from Marsh before the Loudermill when, in fact, that did not occur, as corroborated by McGinley, Mirarchi, and Marsh.

There is no evidence that Miranda was handed her SPI letter before or during her Loudermill, which could suggest that a decision was made before finishing the Loudermill hearing process. In fact, the evidence is clear that the SPI letter was prepared after April 14, 2023, and that Mirarchi called McGinley after the Loudermill to phone caucus and to discuss Miranda's Loudermill answers. It was only then that McGinley received authorization to SPI Miranda from Marsh. One of the reasons why Marsh, Mirarchi, and McGinley were up so late at night was because they had to wait for Miranda's due process to be provided and completed before Marsh could make a decision. Accordingly, the record shows by a preponderance of substantial, competent evidence that McGinley obtained RDS Marsh's approval to SPI Miranda after her Loudermill and after Marsh and McGinley weighed Miranda's Loudermill answers. Also, I do not interpret the SPI agreement and the Wetzel Memo to require the Facility Manager, who personally conducts the Loudermill, to directly contact the RDS. Absent authority to the contrary, I conclude that McGinley's transmission of Loudermill facts to Marsh, as given to him by Mirarchi who conducted the Loudermill, was in compliance with the due process protections delineated in the SPI agreement and the Wetzel Memo.

The Union argues that "Superintendent McGinley did, in fact, commit the mortal sin of being truthful at the step one proceeding when he admitted to Kauert that the decision to SPI Miranda was made prior to the Loudermill" and that McGinley "made up for that temporary bout of candidness by providing untruthful testimony at the ULP hearing." (Union Brief at 14). I disagree. First, I found McGinley's hearing testimony to be absolutely credible and truthful about what transpired on both April 14, 2023, and on May 17, 2023. Second, the Union's argument ignores the fact that RDS Marsh and Deputy Superintendent Mirarchi were both sequestered at the Union's request during the hearing. (N.T. 7-8). After having been sequestered, Marsh and Mirarchi both independently corroborated McGinley's testimony. All 3 credibly corroborated the fact that approval from Marsh for Miranda's SPI on April 14, 2023 was sought and obtained after Miranda's Loudermill hearing, which caused all 3 of them to stay up until almost midnight for the process to be completed.

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 under PERA.
2. The Union is an employe organization under PERA.
3. The Board has jurisdiction over the parties hereto.
4. The Commonwealth did not violate the SPI settlement agreement incorporating the May 2020 Wetzel Memo in violation of Section 1201(a)(1) or (5) of PERA because McGinley and Mirarchi sought and obtained approval to SPI Miranda from RDS Marsh after completing a Loudermill hearing with Miranda.

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 first day of March 2024.

PENNSYLVANIA LABOR RELATIONS BOARD

/S/ JACK E. MARINO

Jack E. Marino, Hearing Examiner