

D.U.P. NO. 2022-9

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

STATE OF NEW JERSEY
(DEPARTMENT OF CORRECTIONS),

Respondent,

-and-

Docket No. CO-2022-018

PBA LOCAL 105,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismissed an unfair practice charge filed by PBA Local 105 (PBA) against the New Jersey Department of Corrections (DOC). The charge alleged the DOC violated sections 5.4a(1), (3), (5) and (7) of the New Jersey Employer-Employee Relations Act (Act) by denying PBA counsel's request to participate in a meeting between two unit correctional officers and a major at South Woods State Prison. The DOC argued the unit officers were not entitled to representation at the meeting because the meeting was not an investigatory interview, but rather intended to effectuate an arrest of the officers in a confidential location. The Director agreed with the DOC and found, under NLRB v. Weingarten, 420 U.S. 251 (1975), that the officers neither requested a union representative or counsel at the site of the arrest, and the meeting was not an investigatory interview. The Director also declined to address the PBA's separate federal and state constitutional due process claims, finding those questions should be decided by the courts and their adjudication are not necessary to deciding the unfair practice charge.

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Appearances:

For the Respondent,
Matthew J. Platkin, Acting Attorney General
(Kendall J. Collins, Deputy Attorney General)

For the Charging Party,
Alterman & Associates
(Stuart J. Alterman, of counsel)

REFUSAL TO ISSUE COMPLAINT

On July 30 and August 2, 2021, the Policemen's Benevolent Association, Local No. 105 (PBA or Charging Party), filed an unfair practice charge and amended charge against the New Jersey Department of Corrections (DOC or Respondent). The charge, as amended, alleges that the DOC violated sections 5.4a(1), (3), (5) and (7)^{1/} of the New Jersey Employer-Employee Relations Act

^{1/} These provisions prohibit public employers, their representatives or agents from "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (3) Discriminating in regard to hire or tenure of employment or any term or
(continued...)"

(Act), N.J.S.A. 34:13A-1 et seq., when, on July 28, 2021, the DOC denied a request by PBA counsel to attend a meeting of unit officers Jared Smith, Ivan Rivera and DOC Major Scott Abbott at South Woods State Prison (SWSP). The PBA alleges that this meeting “. . . directly involved disciplinary and criminal or potentially criminal proceedings and investigations regarding Officers Smith and Rivera” and that the denial of PBA counsel’s request to attend the meeting violated “. . . the New Jersey and Federal Constitutions, the Attorney General Guidelines on policy and procedure, and also the terms and conditions of employment as outlined in the Collective Bargaining Agreement between the parties.”

On December 20, 2021, the DOC filed and served a position statement on the PBA. The DOC contends that the PBA was not entitled to have counsel present at the July 28 meeting because the meeting’s purpose was to effectuate an arrest of Officers Smith and Rivera. The DOC asserts that Officers Rivera and Smith were never “. . . interviewed or otherwise questioned at any

1/ (...continued)
condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by the act; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative, and (7) Violating any of the rules and regulations established by the Commission.” The (a)(1) claim was plead as a derivative violation.

point during their arrest or processing” and, therefore, the officers’ “rights to counsel and/or union representation were not implicated.” (Page 2 of DOC Position Statement). The DOC also maintains the arrest was made at a SWSP office to avoid any indignities to Smith and Rivera associated with an arrest at the officers’ home or in another public setting. The DOC also asserts that a union representative was present with the officers during the arrest and processing “. . . to ask if they needed any food, water or to make telephone calls.” (Page 2 of DOC Position Statement). The PBA did not respond to the DOC’s position statement.

The Commission has authority to issue a complaint where it appears that a charging party’s allegations, if true, may constitute an unfair practice within the meaning of the Act. N.J.S.A. 34:13A-5.4c; N.J.A.C. 19:14-2.1. The Commission has delegated that authority to me. Where the complaint issuance standard has not been met, I may decline to issue a complaint. N.J.A.C. 19:14-2.3; CWA Local 1040, D.U.P. No. 2011-9, 38 NJPER 93 (¶20 2011), aff’d, P.E.R.C. No. 2012-55, 38 NJPER 356 (¶120 2012).

I find the following facts.

The PBA is the exclusive majority representative of corrections officers and parole officers employed by the DOC,

State Parole Board, and Juvenile Justice Commission.^{2/} Jared Smith and Ivan Rivera are DOC corrections officers and members of the PBA's unit.

On July 27, 2021, Stuart J. Alterman, Esq., counsel for the PBA, emailed DOC Major Brian Labonne. Alterman's email provides, in a pertinent part:

Dear Major Labonne:

Please be advised that my office represents PBA Local 105 along with Officers Smith and Rivera. I understand that you have ordered both officers in for some type of confidential interview.

In order to do so, you must go through me as counsel. Perhaps you were unaware and thus, this email. Kindly contact me in the morning to discuss this matter. I am very curious to learn what a confidential interview is and [how] it applies in the scheme of things.

^{2/} The Recognition Clause in Article 1 of the collective negotiations agreement between the State of New Jersey and the PBA defines the PBA's unit as ". . . those full-time permanent and provisional employees listed in Appendix III in the Department of Corrections, the State Parole Board, and the Juvenile Justice Commission. . . ." The titles listed in Appendix III include: Correction Officer Recruit; Correction Officer Recruit, Juvenile Justice; Parol Officer Recruit; Parole Officer Recruit, Juvenile Justice; Senior Correction Officer; Senior Correction Officer, Juvenile Justice; Senior Interstate Escort Officer; Senior Parole Officer; and Senior Parole Officer, Juvenile Justice. The parties' collective negotiations agreement is available at the Commission's website at the following link: <https://www.state.nj.us/perc/conciliation/contracts/>

On July 28, 2021, at 7:59 a.m., Major LaBonne replied by email to Alterman:

Mr. Alterman,

You have been provided with incorrect information because Officers Smith and Rivera were not ordered in to be interviewed. They are being ordered in the SWSP [South Woods State Prison] Major's Office for a confidential matter. When they arrive at SWSP this morning they will be met by myself, or my partner, Major Abbott, and will then be provided with direction accordingly. Due to the fact that they are not being interviewed, they are not entitled to legal or union representation. This is why you have not been involved in this part of the process and is also why you will not be granted access to the SID Office today.

At 8:24 a.m. on July 28, 2021, Alterman responded, in pertinent part, by email to Major LaBonne:

These Officers are represented by counsel. That's my office and PBA Local 105. Your actions are illegal and violate these officer's rights and are otherwise discourteous. Ignorance of these facts are no excuse and you need to seek counsel yourself.

Please be advised official complaint action will be taken against you. A tort claims notice will be filed against you. A lawsuit will then be filed.^{3/}

According to the DOC's position statement, Officers Smith and Rivera met Major Abbott at a SWSP office to process an arrest on July 28, 2021. The DOC maintains that ". . . neither officer

^{3/} Major LaBonne's and Alterman's printed emails are attached as exhibits to the PBA's charge.

was ever interviewed or otherwise questioned at any point during the arrest processing” and that during their processing, a “Union representative and Major Abbott checked on them [Rivera and Smith] periodically . . . to ask them if they needed any food, water or to make telephone calls.” (Page 2 of DOC Position Statement). The arrest was conducted in a confidential manner to avoid any indignity to Smith and Rivera resulting from arresting them in a more public setting, such as their homes. (Page 2 of DOC Position Statement).

The PBA alleges the “confidential interview scheduled for July 28, 2021 with Officers Smith and Rivera violates Smith and Rivera’s “constitutional rights, the Attorney General Guidelines, and the CBA [collective bargaining agreement].” The PBA also asserts in its charge that “the Constitution demands due process of law”, and that the “Attorney General Guidelines provide that anyone being interviewed . . . is to be afforded Union representation and counsel.”

ANALYSIS

The gravamen of the PBA’s charge against the DOC is that the DOC violated the Act by denying PBA counsel’s request to be present at the July 28, 2021 meeting between Major Abbott, Smith and Rivera. The DOC disagrees and contends the July 28 meeting was not an investigative interview and that Officers Smith and Rivera were therefore not entitled to union representation or

counsel during the processing of their arrest. I agree with the DOC and dismiss the charge. The courts, not the Commission, is the proper forum for addressing the PBA's constitutional due process claims.

An employee has a right to request a union representative's assistance during an investigatory interview that the employee reasonably believes may lead to discipline. This principle was established in the private sector by NLRB v. Weingarten, 420 U.S. 251 (1975), and is known as a Weingarten right.^{4/} It also applies in the New Jersey public sector. UMDNJ and CIR, 144 N.J. 511 (1996); State of New Jersey (Dept. of Treasury), P.E.R.C. No. 2001-51, 27 NJPER 167 (¶32056 2001). If an employee requests and is entitled to a Weingarten representative, the employer must allow representation, discontinue the interview, or offer the employee the choice of continuing the interview unrepresented or having no interview. Dover Municipal Utilities Auth., P.E.R.C. No. 84-132, 10 NJPER 333 (¶15157 1984); State of New Jersey (Dept. of Public Safety), P.E.R.C. No. 2002-8, 27 NJPER 332, 335 (¶32119 2001). The charging party bears the burden of proving that an employee is entitled to a Weingarten representative. Passaic Valley Sewerage Commission, D.U.P. No. 2015-14, 42 NJPER

^{4/} The "denial of this right has a reasonable tendency to interfere with, restrain, and coerce employees . . ." in the exercise of rights guaranteed to them by the Act. Weingarten, 420 U.S. at 257; N.J.S.A. 34:13A-5.4a(1); UDMNJ, 144 N.J. 511.

13 (¶4 2015). The Weingarten right “. . . arises only in situations where the employee requests representation.” 420 U.S. at 257.

Here, the PBA does not allege facts to support a Weingarten claim. First, the PBA does not allege Smith and Rivera ever requested union or legal representation during the July 28, 2021 meeting with Major Abbott. This is an essential element to a Weingarten claim. 420 U.S. at 257 (Supreme Court explains that the right to representation “arises only in situations where the employee requests representation”).

Second, the PBA does not allege specific facts to establish the meeting with Smith and Rivera was an investigative interview, another essential element of a Weingarten claim. 420 U.S. at 257-258. Although the PBA alleges that the July 28th meeting was an “interview”, it hasn’t plead with specificity that questions were asked of Smith and Rivera by the DOC during that meeting, nor has it set forth the subject(s) of that “interview” that could reasonably have led Smith and Rivera to believe that they were at risk of discipline. On the contrary, the PBA does not dispute that the meeting was to effectuate an arrest, not an interview, and it does not allege that Smith and Rivera could have reasonably believed that their arrest was investigative or akin to an interview. The elements of a Weingarten claim are not pled with sufficient specificity to justify our issuance of a

complaint on PBA's charge. N.J.A.C. 19:14-1.3(a) (Charging Party must plead a "clear and concise statement of facts" in support its claims); Edison Tp., D.U.P. No. 2012-9, 38 NJPER 269 (¶92 2012), aff'd P.E.R.C. No. 2013-84, 40 NJPER 35 (¶14 2013); Warren Cty. College, P.E.R.C. No. 2018-25, 44 NJPER 287 (¶80 2017).

The PBA's charge also alleges the DOC's denial of counsel at the July 28 meeting violated the state and federal constitutions, along with Attorney General Guidelines. Those claims are for a court of competent jurisdiction to adjudicate. The Commission cannot address constitutional issues or matters of criminal procedure that are not necessary to decide an unfair practice claim or other issue within the Act's purview. Franklin Lakes Bd. of Ed., P.E.R.C. No. 95-24, 20 NJPER 395 (¶25198 1994), aff'd 21 NJPER 362 (¶26224 1995) (Appellate Division notes the "well-settled principle that constitutional issues should not be decided in the absence of a present, imperative and inescapable need to decide them."); State of New Jersey, D.U.P. No. 97-15, 22 NJPER 339, 341 (¶27176 1996) (Director dismisses charge and notes that First Amendment constitutional claim "does not fall within the purview of the Act and thus we cannot consider its merits").

ORDER

The unfair practice charge is dismissed.

/s/Jonathan Roth
Jonathan Roth
Director of Unfair Practices

DATED: February 28, 2022
Trenton, New Jersey

**This decision may be appealed to the Commission pursuant to
N.J.A.C. 19:14-2.3.**

Any appeal is due by March 10, 2022.