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Recent Developments in the Law: Public Sector Labor Relations

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I. INTRODUCTION

The Commonwealth Court of Pennsylvania recently rendered two notable decisions[2] raising the specter of a potential sea change in the breadth of individual employee rights under the Public Employe Relations Act (PERA)[3] and those statutory provisions giving police and firefighters collective bargaining rights commonly known as Act 111.[4] While these determinations are distinct in their facts, one concerning the ability of a public employee to have his choice of union representative during an employer's investigatory interview and the other involving the rights of probationary employees, they share an important significance — both decisions impart far-reaching statements regarding the nature of these statutes, the rights of public employees under Pennsylvania's three primary labor laws, and the contours of that complex and ever evolving interrelationship between employee, employer, and union. Not surprisingly, the Pennsylvania Supreme Court has granted allocatur in both of these matters, and thus, will ultimately provide the final word with respect to individual employee rights in these important areas of public sector labor relations in the Commonwealth.

This article will summarize and analyze these two prominent labor decisions in an effort to highlight current issues and themes in this critical area of the law. This article is not a comprehensive attempt to address all recent Pennsylvania appellate court deci-

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1. Adjunct Professor of Law, Duquesne University School of Law. I would like to thank Zachary Erwin, Duquesne University Law School Class of 2006, for asking me to contribute this piece and for his patience in the process of bringing it to fruition. I am especially grateful to Leslie Kozler and Joy McNally for their insightful comments on prior drafts of this article. Any and all opinions expressed herein, as well as mistakes, are solely that of the author.

2. Gehring v. Pennsylvania Labor Relations Board, 850 A.2d 805 (Pa. Commw. Ct. 2004); Office of Administration v. Pennsylvania Labor Relations Board, 848 A.2d 1063 (Pa. Commw. Ct. 2004).

3. Act of July 23, 1970, P.L. 563, as amended, 43 P.S. §§ 1101.101-1101.2301.

4. Act of June 24, 1968, P.L. 237, 43 P.S. §§ 217-217.10.

sions which concern public sector labor relations. The importance of this area of the law, however, cannot be understated.[5] Not only do these decisions impact the vast number of men and women who serve as public employees in the state, and who perform essential functions for the Commonwealth, but inasmuch as each state that grants its public employees certain employment rights, both individually and collectively, is a unique laboratory in and of itself, these decisions will offer a fresh contribution to the ongoing greater experiment that is public sector labor relations.

II. PUBLIC SECTOR EMPLOYEE *WEINGARTEN* RIGHTS: *OFFICE OF ADMINISTRATION V. PENNSYLVANIA LABOR RELATIONS BOARD*

A. *Introduction*

In *Office of Administration v. Pennsylvania Labor Relations Board*, a majority of a three-member panel of the Commonwealth Court of Pennsylvania reversed the Pennsylvania Labor Relations Board's (PLRB) determination that during an investigative interview, a public employee has the right to the union representative of his choice, absent extenuating circumstances under PERA. Previously, in *National Labor Relations Board v. J. Weingarten, Inc.*,[6] the federal High Court found that under the National Labor Relations Act (NLRA)[7] a union employee has the right to have a union representative attend an investigatory interview, i.e., an interview in which the employee reasonably believes that the investigation may result in disciplinary action. In setting the parameters of this right, subsequent National Labor Relations Board (NLRB) decisions have embraced the idea that absent extenuating circumstances, an employee also has the right to choose his or her union representative for participation in such an interview.[8] In rejecting this approach under PERA, the Commonwealth Court majority distinguished federal statutory labor law and decisions rendered by the NLRB as inapt by characterizing PERA as solely

5. Vijay Kapoor, *Public Sector Labor Relations: Why it Should Matter to the Public and to Academia*, 5 U. PA. J. LAB. & EMP. L. 401 (Spring 2003) (emphasizing the scant attention that academia has given to public sector labor law even in light of the millions employees who work for public sector entities and the high percentage of public expenditures that are devoted to labor-related costs).

6. 420 U.S. 251 (1975).

7. 29 U.S.C. §§ 151-69.

8. See, e.g., Anheuser-Busch, Inc., 337 NLRB 3 (2001).

a collective bargaining statute. As such, according to the Pennsylvania Commonwealth Court, *all* rights under PERA are vested in a union and only a union; an individual employee has no rights in relation to his or her employer. Thus, the Commonwealth Court not only spurned the federal approach to this issue and ended a public employees' choice of representative under the *Weingarten* rule for Pennsylvania's public employees, it also raised significant questions regarding the continued validity of *Weingarten* rights in the public sector and the very nature of PERA itself.

B. Facts and Procedural History

On November 13, 2001, State Correctional Officer Donald Vogel, who was employed by the Commonwealth of Pennsylvania (Commonwealth) and whose supervisor was Captain Soroko, was told to report to the Captain's office for counseling. Upon arriving outside of Captain Soroko's office, he met with Officer Paul Lennert, a member of the Pennsylvania State Corrections Officers Association's (PSCOA or Union) local executive board. PSCOA was the bargaining representative for the corrections officers including Officer Vogel. Officer Vogel and Officer Lennert discussed the reason for the meeting — numerous missed roll calls. After entering Captain Soroko's office, Officer Vogel requested that Officer Craig Panko represent him during the counseling session. Officer Panko was a union steward and had himself been previously counseled for missing role calls. Officer Lennert had not received steward training. Captain Soroko denied this initial request, as well as Officer Vogel's reassertion that Officer Panko represent him during the session. While Officer Lennert volunteered to relieve Officer Panko from his duties to facilitate Officer Panko's representation of Vogel, this was also rejected by Captain Soroko. In fact, Captain Soroko insisted that Officer Lennert stay to represent Officer Vogel during the interview.

During the interview, Captain Soroko admonished Officer Vogel for being tardy to roll call on fifteen occasions. While Officer Vogel disputed these allegations, Captain Soroko informed him that he had documentation to support his assertions and that he would inform Officer Vogel later as to whether his conduct would result in discipline. Ultimately, Captain Soroko did not discipline Officer Vogel for his shortcomings.

As a result of the interview, the Union filed a charge of unfair labor practices with the PLRB. The Union alleged that by refusing to allow Officer Vogel to have Officer Panko represent him

during the interview, the Commonwealth violated Section 1201(a)(1) of PERA, contending that the Commonwealth interfered with Officer Vogel's right as an employee to be free from interference, restraint and coercion in exercising his individual rights under PERA and Section 1201(a)(5), asserting that the Commonwealth violated the rights of the Union for purposes of collective bargaining.[9] The PLRB issued a complaint and held a hearing on May 17, 2002, before a hearing examiner.

The hearing examiner issued a Proposed Decision and Order on June 26, 2002, dismissing the charge of unfair labor practice. According to the hearing examiner, the Union failed to establish both that Officer Panko was readily available and that Officer Vogel was entitled to Officer Panko's representation; thus, the examiner dismissed the Union's charge regarding Officer Vogel's individual employee rights under Section 1201(a)(1). The hearing examiner also dismissed the Union's claim under Section 1201(a)(5) that its collective bargaining rights were violated. The Union filed exceptions to the hearing examiner's Proposed Decision and Order.

On January 28, 2003, the PLRB issued a Final Order, rejecting the findings of the hearing examiner and concluding that the Commonwealth had committed an unfair labor practice by failing to provide Officer Vogel with his choice of available union representative. Focusing on Captain Soroko's accusation of past misconduct which could lead to discipline and his lack of a decision as to whether discipline would be meted out, the PLRB first found that Officer Vogel was subjected to an investigatory interview, which implicated Officer Vogel's *Weingarten* rights. The PLRB then questioned whether, in exercising his *Weingarten* rights, an employee has the right to choose from available representatives in the workplace. After reviewing its own decisions and NLRB precedent, the PLRB held that an employee is entitled to an available representative of his or her choice, absent extenuating circumstances. Based upon Officer Lennert's offer to permit Officer Panko to attend the interview, the PLRB concluded that Officer

9. 43 P.S. §§ 1101.1201(a)(1) and (5). Section 1201 of PERA provides in relevant part:

> (a)Public 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.
>
> * * *
>
> (5) Refusing to bargain collectively in good faith with an employe representative which is the exclusive representative of employes in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative.

Panko was present and available to participate in the session with Captain Soroko and Officer Vogel. Thus, the PLRB determined that the Commonwealth violated Section 1201(a)(1) by rejecting Officer Vogel's request for Officer Panko's representation. Importantly, the PLRB rejected the Union's assertion that the Commonwealth violated its collective bargaining rights under Section 1201(a)(5) of PERA, finding that the *Weingarten* right was a right of the employee. The Commonwealth appealed the PLRB's decision to the Commonwealth Court.

C. *Significant Legal Background*

Office of Administration raises the contentious issue of an employee's right to representation during an investigatory interview — an issue which has vexed federal and state tribunals alike. To understand the legal principles involved, a review of the statutory and decisional law is necessary. The NLRA was forged of the Great Depression, which saw the continued rise of the labor movement, violent strikes, the lack of a strong labor policy, and the advent of the New Deal. Enacted in 1935, the purpose of the NLRA, or the Wagner Act,[10] was to end the causes of certain significant impediments to the free flow of commerce by the removal of sources of industrial strife and unrest. This was to be accomplished by the encouragement of the practice of collective bargaining and by protecting employees' full freedom of association, the right of self-organization and collective bargaining,[11] and by prohibiting certain employer unfair labor practices.[12] The heart of the NLRA is Section 7 which catalogues the rights of all covered employees: to self-organize, to form, join or assist labor organizations, to collectively bargaining over terms and conditions of employment and to partake in "other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[13] Section 7's rights are not limited to collective bargaining; indeed, it is hornbook law that the protections of "other concerted activities for

10. Senator Robert Wagner of New York introduced the bill that would become the NLRA in 1934. The bill, faced with vigorous opposition, even at times from President Franklin Delano Roosevelt's administration, owed its success to Senator Wagner's efforts.

11. 29 U.S.C. § 151.

12. 29 U.S.C. § 158.

13. 29 U.S.C. § 157. Section 7 states in relevant part: "Employees shall have the right to self-organize, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ." 29 U.S.C. § 157.

mutual aid and protection" sweeps in — but extends beyond — efforts to form a union and to engage in collective bargaining. It applies accordingly to both the unionized and non-union workplace and, in the latter, to activity that has no obvious relationship to unionization and collective bargaining."[14] Thus, the focus of the Act has been on the rights of employees, both individually and collectively.

Following the example of the NLRA, the Pennsylvania General Assembly sought to give similar rights as those protected by the NLRA to certain Commonwealth public employees. Akin to the events which sparked the enactment of the NLRA, PERA was born of the tumultuous 1960's; a time marked by the distrust of government, labor strife, and the resulting interruption of public services. Enacted in 1970, PERA's purpose was to "promote orderly and constructive relationships between all public employers and their employes subject, however, to the paramount right of the citizens . . . to keep inviolate the guarantees for their health, safety and welfare."[15] Recognizing that unresolved workplace disputes in the public sector were injurious to the public weal, the General Assembly responded by offering that, in order to facilitate harmonious relationships between public employer and public employee, public employees would be granted the right to choose their bargaining representatives, negotiate with public employers, and establish procedures to protect the rights of the public employee, the public employer, and the public at large.[16] Virtually identical to Section 7 of the NLRA, PERA's core is found in Section 401 which makes it "lawful for public employes" to organize, join or assist in employee organizations or to "engage in lawful concerted activities for the purpose of collective bargaining or other mutual aid and protection . . ."[17]

In 1975, in its landmark decision in *Weingarten*, the United States Supreme Court recognized under the NLRA what is now commonly referred to as an employee's *Weingarten* rights. Specifically, in a 6-3 decision the Supreme Court affirmed the NLRB's

14. THE DEVELOPING LABOR LAW 397 (Patrick Hardin and John E. Higgins, Jr. eds., 4th ed. 2005).

15. 43 P.S. § 1101.101.

16. *Id.*

17. 43 P.S. §1101.401. Section 401 states in relevant part: "It shall be lawful for public employees to organize, form, join or assist in employe organizations or to engage in lawful concerted activities for the purpose of collective bargaining or other mutual aid and protection or to bargain collectively through representatives of their own free choice . . ." 43 P.S. § 1101.401.

holding that a union employee, pursuant to Section 7 of the NLRA, is entitled to have a union representative be present at an investigatory interview where the employee reasonably believes that the session may result in discipline.[18] Furthermore, the employer's refusal of an employee's request for union representation during such an investigatory interview constitutes an unfair labor practice under Section 8(a)(1) of the NLRA[19] as it interferes with the individual employee's core rights as provided for in Section 7 of the Act.[20]

In *Weingarten*, an employer, while conducting an investigation regarding the suspected theft of money at its retail establishment, repeatedly interrogated an employee, who was represented by a union, about the alleged short-changing of a cash register during the purchase of food.[21] After her numerous requests for a union representative to be present during the interrogation were denied, the employee ultimately confessed to an unrelated violation of the employer's policy against eating "free lunches" while at work.[22]

In finding that the employer's denial of the employee's request for a union representative violated the NLRA and that an employee was entitled to a union representative during an investigative interview, Justice William Brennan, writing for the majority, was clear as to the primary source of this right:

> [T]he action of an employee in seeking to have the assistance of his union representative at a confrontation with his employer clearly falls within the literal wording of §7 that "[employees] shall have the right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection."[23]

The High Court explained that this right to representation is found within the employee's Section 7 right "even though the employee alone may have an immediate stake in the outcome; he seeks 'aid or protection' against a perceived threat to his employment security."[24] The Court offered various reasons in support of its construing the statute in this fashion.

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18. *J. Weingarten, Inc.*, 420 U.S. at 260.
19. 29 U.S.C. § 158(1).
20. 29 U.S.C. § 157.
21. *J. Weingarten, Inc.*, 420 U.S. at 254.
22. *Id.* at 254-55.
23. *Id.* at 260.
24. *Id.*

First, the Court noted the dual nature of the NLRA's protections, individual as well as group, as the presence of a union representative during interrogation protected "not only the particular employee's interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly."[25] Furthermore, the Court pointed to the inequality of the relative power of employees and employers and offered that "requiring a lone employee to attend an investigatory interview" was inconsistent with the Act's intention of ending this inequality.[26]

Finally, the Court emphasized the positive aspects that union representation would bring to the investigatory process — for both employee and employer. Specifically, the Court maintained that a lone employee "confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating circumstances."[27] According to the Court, a well-versed union representative "could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview."[28] Recognizing the practical nature of the disciplinary process, and the importance of timing, the Court countered the argument that representation could be deferred until the filing of a formal grievance challenging the employer's discipline and determination of guilt by offering that at that point "it becomes increasingly difficult for the employee to vindicate himself, and the value of representation is correspondingly diminished. The employer may then be more concerned with justifying his actions than re-examining them."[29] Thus, for these reasons, the Court concluded that a union representative would positively impact the investigatory process and embraced the concept of union representation during an investigatory interview where the employee reasonably believed that the meeting may result in discipline.

The PLRB embraced the concept of *Weingarten* rights for purposes of PERA a mere five years after the United States Supreme

25. *Id.* at 260-61.
26. *J. Weingarten, Inc.*, 420 U.S. at 262.
27. *Id.* at 262-63.
28. *Id.* at 263.
29. *Id.* at 263-64.

Court's seminal decision. In *PLRB v. Township of Shaler*,[30] the PLRB adopted the rule announced in *Weingarten*, finding that the rights granted to public employees pursuant to Section 401 of PERA included the right to union representation during an investigatory interview. The PLRB's adoption of *Weingarten* has been upheld on appeal by the lower Pennsylvania appellate courts ever since.[31]

While the *Weingarten* rule has now become an entrenched part of the labor law landscape in both this state and federally for over a quarter century, the breadth and implications of this right continue to be the subject of re-evaluation and debate. Specifically, the NLRB was left to determine various aspects of the right, including the issue of whether employees in a non-union setting were also entitled to have a co-worker present during an investigatory session; [32] the remedies for a violation of an employee's Weingarten right;[33] and whether an employee had his or her choice of representative when faced with an investigatory interview.

The NLRB recently spoke to the question of employee choice of representative for purposes of federal law in *Anheuser-Busch, Inc.*[34] In that case an employee was confronted with an investigatory interview that could result in discipline. When the employee asked for representation, the employer provided such representation, but not the employee's choice of representative. Finding the requested representative available to engage in the interview, the administrative law judge found that the employer had violated the employee's rights under *Weingarten*. The NLRB affirmed the administrative law judge's ruling, findings, and conclusions, and, after considering certain prior NLRB precedent,[35] concluded that "in a *Weingarten* setting, an employee has the right to specify the representative he or she wants, and the employer is obligated to

30. 11 PPER ¶ 11347 (Nisi Decision and Order, 1980); *see also* PLRB v. Conneaut School District, 10 PPER ¶ 10082 (Nisi Decision and Order, 1979), *aff'd* 12 PPER ¶ 12155 (Final Order, 1981).

31. See Commonwealth of Pennsylvania v. PLRB, 826 A.2d 932 (Pa. Commw. Ct. 2003); AFSCME v. PLRB, 514 A.2d 255 (Pa. Commw. Ct. 1986)

32. Christine Neylon O'Brien, *The NLRB Waffling on Weingarten Rights*, 37 LOY. U. CHI. L.J. 111 (Fall 2005); Sarah C. Flannery, *Extending Weingarten to the Nonunion Setting: A History of Oscillation*, 49 CLEV. ST. L. REV. 163 (2001).

33. Michael D. Moberly and Andrea G. Lisenbee, *Honing Our Kraft?: Reconciling Variations in the Remedial Treatment of Weingarten Violations*, 21 HOFSTRA LAB. & EMP. L.J. 523 (Spring 2004).

34. 337 NLRB 3 (2001).

35. *See* Consolidation Coal Co., 307 NLRB 976 (1992); GHR Energy Corp., 294 NLRB 840 (1989); Pacific Gas & Electric Co., 253 NLRB 1143 (1981).

supply that representative absent some extenuating circumstances."[36]

This approach by the NLRB was formally adopted for purposes of PERA by the PLRB in *Pennsylvania State Corrections Officers Association v. Commonwealth*.[37] In reaching its conclusion that employee choice was mandated under *Weingarten*, the PLRB relied primarily upon the NLRB's prior decision in *Anheuser-Busch, Inc.* as well as public sector precedent. The PLRB also noted that on two prior occasions, Pennsylvania hearing examiners had embraced such a view.[38]

D. *The Commonwealth Court's Decision in Office of Administration v. Pennsylvania Labor Relations Board*

When faced with the same issue, the Commonwealth Court of Pennsylvania rejected the PLRB's reliance upon NLRB precedent and negated a public employee's right to choose a representative of his choice when invoking his *Weingarten* right. In reaching its decision, the majority of the three-judge panel first agreed with the PLRB that the counseling session constituted an "investigatory interview" implicating Officer Vogel's *Weingarten* rights. Not only did Officer Vogel focus on the potential disciplinary action to be taken as a result of the interview, but Captain Soroko explained that he was deferring a decision regarding discipline until some later time.[39]

With respect to the issue of a public employee's choice of union representative, the Commonwealth Court, while acknowledging that the PLRB may look to federal precedent in interpreting provisions of PERA that are similar to the NLRA, cautioned that the PLRB nevertheless must determine if reliance on such precedent is appropriate.[40] The Commonwealth Court offered a number of reasons why PERA was legally distinguishable and led to a differing result with respect to this question in the public sector.

First, the court offered generalized statements regarding the difference between the NLRA and PERA. "PERA is a much different act than the NLRA and contains many different provisions

36. *Anheuser-Busch, Inc.* 337 NLRB at 8.

37. 34 PPER ¶ 1 (Final Order 2002).

38. District 1199P, SEIU v. Department of Public Welfare, 32 PPER ¶ 32177 (Proposed Decision and Order, 2001); AFSCME v. Department of Corrections, 32 PPER ¶ 32131 (Proposed Decision and Order, 2001).

39. *Office of Administration*, 848 A.2d at 1067.

40. *Id.*

that make an enormous difference in how the acts should be interpreted."[41] Likewise, the court continued "NLRB's interpretations may not apply because those interpretations involve only private employers and private unions and a relationship that only affects them, not public employers and public unions, whose relationship determines how the public is served and what faith the public has in its government."[42]

The court went on to give its most significant reason for rejecting employee choice of representative. "Nothing in PERA gives the Board the power to vest in any particular employee any particular collective bargaining rights because PERA is a collective bargaining statute vesting all rights in a union, and only it and no individual employee has any individual collective bargaining right vis-à-vis the employer."[43] The court continued that PERA's relevant sections

> have nothing to do with the rights of individual employees, but only the rights of the union. The *Weingarten* rule rests solely on the provisions of PERA that involve collective bargaining rights giving the union the right to be present to protect its interest; however, nothing in *Weingarten* confers any individual rights.[44]

Additionally, an employee's right to the representative of his or her choice would also violate "an inherent management right to discipline and the right of the union to determine how the collective bargaining agreement is to be administered."[45] The court noted that unlike the NLRA, which does not require a grievance and arbitration procedure, PERA mandates arbitration in cases of disputes arising from the interpretation of a collective bargaining agreement. Thus, because discipline is a management prerogative, all that is required for *Weingarten* is that a union representative be present to protect the union's rights for future grievance-arbitration proceedings.[46]

Consistent with its characterization of PERA, the court went on to opine that the employer is under no obligation to honor a request for a particular union representative unless the collective

41. *Id.*
42. *Id.* at 1067-68.
43. *Id.* at 1068.
44. *Office of Administration*, 848 A.2d at 1068.
45. *Id.* at 1069.
46. *Id.*

bargaining agreement contains such a requirement.[47] That being the case, the court turned to the grievance and arbitration provision in the collective bargaining agreement. The court focused on the first step of the process concerning the presentation of a written grievance for consideration by the employer. As the agreement did not provide the employee with the option of choosing his or her representative, according to the majority, this choice was not available to the employee.[48] Finally, the court concluded that permitting the employee to choose his representative would undermine the employer union relationship and could lead to "additional problems" if the selected representative did not have the time or inclination to assist.[49] Thus, the court reversed the PLRB's decision.

Senior Judge Joseph McClosky filed a dissent, focusing on a different aspect of the appeal. He opined that even if one conceded that the right of representation belongs to a union, under the facts of the case, the majority permitted the employer to select Officer Vogel's representative. This was because even after the Union, through Officer Lennert, supported Officer Vogel's selection of Officer Panko as his choice for representative by offering to relieve Officer Panko from duty to represent Officer Vogel, the employer rejected the proposition and insisted upon representation by Officer Lennert.[50] Somewhat poetically, the dissent concluded, "The right to representation, where the adversarial party has the power to choose who will represent the other party, is not a right to representation at all."[51]

E. Analysis

The Pennsylvania Commonwealth Court's decision is multifaceted. On one hand, the opinion is remarkable for its sweeping description of the character of PERA, which if taken on its face calls into question the very existence of the rights of individual employees under that statute and the *Weingarten* right itself. Unfortunately, the opinion also leaves the reader wanting for more in terms of its justification for the court's parting from federal labor policy. In its resolution of the narrow issue of an employee's

47. *Id.*
48. *Id.*
49. *Office of Administration*, 848 A.2d at 1070.
50. *Id.* at 1070-71.
51. *Id.* at 1071.

choice of union representative, however, its analysis is not without foundation, and indeed challenges current thought regarding limitations upon public sector employee *Weingarten* rights.

First, the Commonwealth Court's breathtakingly broad commentary regarding the nature of PERA being a "collective bargaining statute" which vests "all rights" exclusively in the union, would seemingly constitute a drastic change in how that legislative enactment has been interpreted by the PLRB and Pennsylvania courts. By its terms, PERA's nucleus recognizes the right of "public employes" to engage in various activities, including concerted activities for mutual aid and protection.[52] Consistent with this statutory language, Pennsylvania Supreme Court case law and prior Commonwealth Court decisions suggest that PERA continues to recognize both collective bargaining rights as well as individual employee rights and that the Commonwealth Court's statements to the contrary were simply too blunt an instrument to be used in describing the entire spectrum of rights under PERA.[53] Additionally, and as noted above, Section 7 of the NLRA and Section 401 of PERA are virtually identical. This would, at least on the surface, intimate similar constructions to be accorded to these analogous statutes. The Supreme Court of Pennsylvania has at least insinuated that while certainly not bound by the federal labor experience, NLRB decisions interpreting similar provisions are of persuasive value unless distinguishable.[54]

Conversely, the Commonwealth Court's decision is parsimonious with respect to its discussion of the roots of the *Weingarten* rule in determining the rights of public employees under PERA. More specifically, the *Weingarten* Court, as offered above, grounded its decision on the employee's right to engage in concerted activities for mutual aid and protection and not in the bargaining rights of the union. Thus, the Commonwealth Court's equating of *Weingarten* rights with collective bargaining rights begs for further elucidation by the court of its collective bargaining approach in light of the foundations of the United States Supreme Court's decision in *Weingarten*. Indeed, while certain scholarship has challenged the *Weingarten* decision itself as a flawed interpre-

52. 43 P.S. § 1101.401.

53. Hollinger v. Dept. of Public Welfare, 365 A.2d 1245 (Pa. 1976) (explaining that PERA was designed to protect the rights of all public employees, not just those who are unionized); PLRB v. Zelem, 329 A.2d 477 (Pa. 1974); PLRB v. Rizzo, 344 A.2d 744 (Pa. Commw. Ct. 1975).

54. *See* Appeal of Cumberland Valley School District, 394 A.2d 946 (Pa. 1978).

tation of the NLRA due to its equating the statutory right of "mutual aid and protection" with a single employee's right of representation — a solely individualized interest rather on behalf of the entire group of employees[55] — the Commonwealth Court does not appear to go as far as the elimination of *Weingarten* rights. This, however, is the logical conclusion that might follow from a collective bargaining construct of the *Weingarten* right. Indeed, the Commonwealth Court's approach raises a number of unanswered questions. For example, if the *Weingarten* right is a collective bargaining right, does an *employer* now have to negotiate over the investigative interview process itself as a mandatory subject of bargaining? Furthermore, if a union has been elected by the appropriate unit of employees, but no collective bargaining agreement has been reached with the employer, does the *Weingarten* right exist at all for those employees who are with a union but without a contract and faced with an investigatory interview? Finally, is the employer really choosing the employee's representative, as suggested by the dissent, when it can dictate which union official will represent the employee and how does this square with the *Weingarten* decision?

Related thereto, while the Commonwealth Court concentrated on the grievance and arbitration procedure and noted that such dispute resolution process is distinct under state law as it is required to be part of collective bargaining agreements under PERA, it did not engage in a discussion of the underlying practical policy reasons that were the engine that drove the *Weingarten* decision. Indeed, the *Weingarten* Court went to great lengths to explain the benefit to both employee and employer by permitting union representation during an investigatory interview. Primary among these benefits was the reduction in disputes subjected to the formal grievance arbitration procedure, a savings in time, money, and effort to both employee and employer. This would appear to transcend any distinction between the private workplace and the public workplace. Explication of how these practical concerns may differ in the public setting would have been beneficial in resolving these questions.

While the Commonwealth Court speaks in broad terms with respect to all rights under PERA being grounded in collective bar-

55. *See* King, Johnson, and Winchester, *Who Let the Weingarten Rights Out? The National Labor Relations Board Compounds Earlier Error by the Supreme Court*, 2002 L. REV. M.S.U.-D.C.L. 149, 156 (Spring 2002).

gaining and vested in the union, if these statements are contextualized to the issue of employee choice of representative, the Commonwealth Court's characterization of PERA becomes more meaningful. Specifically, the court's analysis raises interesting questions regarding the meaning and breadth of exclusive representation by a union of the employees that it represents. The concept of exclusive bargaining representation is foundational to both federal and state labor law. It is the notion that the union, as exclusive bargaining representative, may not be bypassed by an employer with respect to bargaining or the adjustment of employee grievances and the imposition of discipline.[56] Yet, if individual employees could choose their representative, would not this undermine the union's role as exclusive bargaining representative of the unit of employees? The Commonwealth Court's approach becomes even more powerful when one considers that the United States Supreme Court in *Weingarten* emphasized the twin purposes of protecting individual employees and the bargaining unit, thus raising the prospect of a right not limited to possession by the individual employee, but also the suggestion of it being a collective right. If the rights of the entire bargaining unit were implicated, an argument could be made that consistent administration, through the use of a union-selected representative, would be in accord with a collective bargaining paradigm with respect to *Weingarten* rights. While this approach to the right was not fully teased out by the Commonwealth Court, it is clearly implied from the opinion.

Furthermore, there are prior NLRB decisions which to some extent support the Commonwealth Court's conclusion that an employee is not entitled to his or her choice of representative. Specifically, in *Pacific Gas & Electric Co.*,[57] the NLRB addressed a situation in which an employee refused the assistance of a union representative present at the place of employment and demanded the presence of one who was not readily available and who did not represent employees at that location. In holding that the worker's *Weingarten* rights were not violated, the NLRB employed language suggesting that the right to chose representation rests with the union. "To the contrary, the focus of [*Weingarten*] is on the

56. 43 P.S. § 1101.606 (establishing that "representatives selected by public employees in a unit appropriate for collective bargaining purposes shall be the exclusive representative of all employes in such unit to bargain on wages, hours, terms and conditions of employment . . .").

57. 253 NLRB 1143 (1981).

employee's right to the presence of a union representative designated by the union to represent all employees."[58] The NLRB continued, "a duly designated union representative was ready, willing, able, and present. We would inquire no further."[59] While *Pacific Gas & Electric Co.* may be fact specific, and was noted in *Anheuser-Busch, Inc.* as being superseded by subsequent NLRB decisions, the Commonwealth Court's approach in this case is certainly grounded in prior NLRB case law, and thus, is not without support.

In conclusion, on one hand *Office of Administration* has called into question the foundational underpinnings of PERA by suggesting that PERA only protects collective bargaining and that all rights under the statute are vested with the union rather than with the individual pubic employee. Even viewed more narrowly, it suggests a re-examination of the meaning of exclusive representation and the scope of that doctrine in the *Weingarten* context. It has, however, given a clear answer to the question of whether a public employee in Pennsylvania has a choice of union representative when exercising his or her *Weingarten* rights. The Pennsylvania Supreme Court will have the opportunity to not only pass on the more narrow issue of representative choice, but to resolve any doubts that the decision in *Office of Administration* has raised as to the greater issue of the rights of individual employees under PERA.

III. THE RIGHTS OF PROBATIONARY EMPLOYEES: *GEHRING V. PENNSYLVANIA LABOR RELATIONS BOARD*

A. *Introduction*

In *Gehring v. Pennsylvania Labor Relations Board*, a unanimous Commonwealth Court, *en banc*, held that a probationary police officer is protected from discharge for engaging in union activities. In doing so, the court vacated the order of the PLRB and its determination that the protections of the state labor laws do not protect a police officer until after that officer has successfully completed his or her probationary period. Previously, in *Upper Makefield Township v. PLRB*,[60] the Supreme Court of Pennsylvania concluded that police officers who have not passed their

58. *Pacific Gas & Electric Co.*, 253 NLRB at 1143.
59. *Id.* at 1144.
60. 753 A.2d 803 (Pa. 2000).

probationary period do not enjoy the protections of Act 111 with respect to the right to bargain and to have their grievances heard. In distinguishing *Upper Makefield*, the Commonwealth Court reasoned that both the Pennsylvania Labor Relations Act (PLRA)[61] and Act 111 permit employees to engage in collective bargaining. While the Supreme Court in *Upper Makefield* held that Act 111, which governs the rights of police officers and firefighters, does not grant rights to probationary employees, according to the Commonwealth Court, there was an open question as to whether a probationary employee could bring a claim alleging an unfair labor practice under the PLRA if he or she were terminated for engaging in union activities. Ultimately, the Commonwealth Court determined that police officers and firefighters, such as Officer Gehring, could bring an action for a violation of their rights as expressed in the PLRA.

B. Facts and Procedural History.

On February 3, 2003, Rodger Gehring was sworn in as a full-time probationary police officer for the Borough of Hamburg, Pennsylvania (Borough). Prior to becoming a full-time officer, Officer Gehring worked for the Borough as a part-time officer. On the date that he assumed his full-time status, Officer Gehring was informed that he would be considered less senior than another officer who was also newly-hired. The other officer, however, had never worked for the Borough. Officer Gehring challenged his seniority status and the Hamburg Police Officer's Association (Association) filed a grievance on Officer Gehring's behalf. Specifically, the Association sought greater seniority for Officer Gehring based upon his prior years of service with the Borough.

After the Association filed the grievance, Officer Gehring had a number of conversations with the Borough Chief of Police who warned him that the filing of the grievance would adversely impact his career with the Borough. Furthermore, the Chief of Police informed the Borough Mayor that he did not want "an officer working for him that is going to file a grievance against him." Related thereto, the Borough Council President opined that the Borough "was not looking for this in a supervisor or corporal." Officer Gehring, however, contended that he was a model employee and in fact, on March 26, 2003, he received a special commendation as a

61. Act of June 1, 1937, P.L. 1168, as amended, 43 P.S. §§ 211.1-211.13.

result of his work concerning a drug arrest. Somewhat ironically, the same day he received his commendation, Officer Gehring was informed that he was being suspended pending an investigation by the Chief of Police. Shortly thereafter, Officer Gehring's employment with the Borough was terminated.

Believing his termination to be retaliatory for the filing of his grievance and motivated by anti-union animus as expressed by Borough officials, Officer Gehring filed a charge of unfair labor practices against the Borough. The Secretary of the PLRB determined that the protections of the relevant labor laws do not apply until a police officer has successfully completed his probationary period. Thus, on June 5, 2003, the Secretary informed Officer Gehring that no complaint would be issued and that his charge of unfair labor practice would be dismissed. Officer Gehring filed exceptions to the Secretary's determination, and thereafter the PLRB issued a Final Order affirming the Secretary and holding that the PLRB lacked jurisdiction to entertain such a claim of discrimination under the PLRA and Act 111.

C. Significant Legal Background

Two foundational legal principles are implicated in *Gehring*; one involving the construction and interplay between Act 111 and the PLRA and the other concerning the status of probationary employees under the Commonwealth's labor laws. With respect to the construction of the applicable labor statutes, in *Philadelphia Fire Officers Assoc. v. PLRB*,[62] the Supreme Court of Pennsylvania was faced with the issue of how to determine the collective bargaining representative of a unit of firefighters where Act 111 made no express provision for the conduct of elections by the PLRB. The PLRA, which was enacted two years after the NLRA, and which gave individual employee and collective bargaining rights to Pennsylvania employees in the private sector, including certain employees who were not covered by the NLRA, provided express and detailed procedures for the collective bargaining process and the prevention of unfair labor practices. On the other hand, Act 111, which in 1968 recognized the bargaining rights of police officers and firefighters, contained no procedural guidance for the selection of a bargaining representative or resolution of

62. 369 A.2d 259 (Pa. 1977).

unfair labor practices.[63] To resolve this quandary, the Pennsylvania High Court turned to the Statutory Construction Act[64] which offered that statutes that are *in pari materia* are to be construed together as one statute, if possible. The Court concluded that the PLRA and Act 111 were *in pari materia* and were to be construed together as a single statute.[65] Thus, the Court reasonably determined that the gaps found in Act 111 were to be filled by provisions found in the PLRA.

While the approach to the construction of the PLRA and Act 111 has now been settled for almost thirty years, articulation of the rights of probationary employees for purposes of labor relations is of more recent vintage. In 1999, the Pennsylvania Supreme Court decided *Upper Makefield* where a probationary police officer was held to lack the protection of Act 111 until after his completion of probation.[66] A unanimous High Court found that those employees who satisfied their probationary period "assume a status protected by the right to bargain collectively and to have their grievances heard" and those who are probationary employees are engaged in a "strictly 'at will' relationship."[67] While set in the context of a probationary police officer attempting to grieve his dismissal, the Court spoke in broad terms, offering that the probationary status "distinguishes those police and firemen who come within the ambit of Act 111 protections and those who do not."[68]

Only one year later, in *Township of Sugarloaf v. Bowling*,[69] the Supreme Court again faced an issue involving a grievance filed by a probationary employee. Like *Upper Makefield*, the substance of the grievance concerned the officer's termination. While arguably injecting uncertainty into an understanding of the ability of probationary employees to file a grievance, the Court made clear that the question of whether a probationary employee may *initiate* the grievance arbitration process was not at issue, but rather only what tribunal is initially to make that decision, a trial court or an

63. *Philadelphia Fire Officers Assoc.*, 369 A.2d 261.

64. 1 PA. CONS. STAT. § 1932. Section 1932 states that, "(a) Statutes or parts of statutes are in pari materia when they relate to the same persons or things or to the same class of persons or things. (b) Statutes in pari materia shall be construed together, if possible, as one statute." 1 PA. CONS. STAT. § 1932.

65. *Philadelphia Firefighters Association*, 369 A.2d at 261.

66. *Upper Makefield Township*, 753 A.2d at 807.

67. *Id.* at 806.

68. *Id.*

69. 759 A.2d 913 (Pa. 2000).

arbitrator.[70] The Court held that a probationary police officer had a statutory right under Act 111 to have a grievance submitted to an arbitrator for an initial determination regarding the arbitrability of the grievance. Finally, in 2002, the Commonwealth Court's decision in *Pennsylvania State Police v. PLRB*[71] affirmed by the Supreme Court by *per curiam* order, found that probationary police officers did not have an enforceable right to collectively bargain as the protections of Act 111 only covered those who have successfully completed their probationary period.[72]

D. The Commonwealth Court Decision in Gehring v. Pennsylvania Labor Relations Board

The Commonwealth Court determined that probationary police officers were protected from discharge based upon union activities and thus vacated the order of the PLRB. Recognizing the difficulty posed by the inadequacies of Act 111, the court initially engaged in an analysis of both Act 111 and the PLRA, noting that the parties agreed that the statutes were to be construed *in pari materia*.[73] Taking into account the focus of Act 111 as well as the Supreme Court's prior case law which afforded probationary employees "no rights,"[74] the court turned to the PLRA. The Commonwealth Court first addressed the language of the PLRA which recognized the right to collectively bargain by "employees" who, by statute, included "any employe, . . . and shall include any individual whose work has ceased as a consequence of or in connection with ... any unfair labor practice."[75] After turning to the PLRA's protections against employer unfair labor practices, including interfering with the rights of employees to engage in union activi-

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70. *Sugarloaf*, 759 A.2d at 916 n.5.

71. 764 A.2d 92 (Pa. Commw. Ct. 2000), *aff'd per curiam* 810 A.2d 1240 (Pa. 2002).

72. Justice Thomas Saylor dissented, opining that the result was contrary to the Court's decision in *Sugarloaf*, and noting inconsistency with prior precedent under PERA which recognized the rights of probationary employees, citing *Board of Education of the School District of Philadelphia v. Philadelphia Federation of Teachers*, 346 A.2d 35 (Pa. 1975). Justice Saylor advocated that rather than eliminating all probationary officers from the protections of Act 111, only an exception with respect to a grievance over the unsuccessful completion of probation was necessary. Indeed, Justice Saylor's approach may have been the inspiration behind the Commonwealth Court's approach in Gehring.

73. *Gehring*, 850 A.2d at 805.

74. *Id.* at 807.

75. 43 P.S. § 211.5.

ties,[76] and prior Pennsylvania Supreme Court case law in which police officers could file unfair labor practice charges under the PLRA,[77] the Commonwealth Court squarely faced *Upper Makefield*.

The Commonwealth Court, recognizing the *Upper Makefield* Court's seemingly broad holding that probationary police officers were not afforded the protections of Act 111, distinguished *Upper Makefield* on the basis that in that decision, the probationary police officer was attempting to file for mandatory arbitration, a substantive right expressly provided for in Act 111. Here, according to the Commonwealth Court, a substantive right under the PLRA was at issue, the right to engage in union activities, and thus, the probationary status of the police officer did not act as a bar to the PLRB's entertaining the officer's unfair labor practice charge brought pursuant to the PLRA.[78] The court clarified that Act 111 did not address the issue of recourse for termination for engaging in union activities and that the provisions of the PLRA do speak to this issue, and further, that the rights under the PLRA are applicable to "employees," which do not exclude probationary employees; it then went on to hold that the PLRB did not lack jurisdiction to consider Officer Gehring's charges against the Borough for his termination for engaging in union activities.[79]

E. Analysis

In *Gehring*, the Commonwealth Court crafted a unanimous opinion creatively and logically navigating between the seemingly sweeping mandate of *Upper Makefield* with respect to the status of probationary employees and the clear public policy undergirding the applicable labor laws regarding the protection of workers in their right to engage in union activities and to be free from employer coercion. The court embraced a practical middle ground by which probationary employees could not challenge their failure to be made permanent employees, but could vindicate their substantive collective bargaining rights, including the right to be free from discrimination by their employer based upon union activities.

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76. 43 P.S. § 211.6(1)(a) provides: "It shall be an unfair labor practice for an employer to interfere with, restrain, coerce employes in the exercise of the rights guaranteed in this act." 43 P.S. § 211.6(1)(a).

77. Borough of Nazareth v. PLRB, 626 A.2d 493 (Pa. 1993).

78. *Gehring*, 850 A.2d at 808-09.

79. *Id.* at 810.

The difficulty with the Commonwealth Court's approach lies not in its intentions, as it is clear that the court was troubled by the prospect of probationary employees being left without protection and employers discharging probationary employees due to anti-union animus. Rather, it is the Commonwealth Court's attempt to address the arguably all encompassing language used by the Supreme Court in *Upper Makefield* regarding a probationary employee's status as an at-will employee. Furthermore, the Commonwealth Court's approach raises serious questions regarding an *in pari materia* construction of the PLRA and Act 111. As a result of the Commonwealth Court's decision, it would appear that there are two definitions of employee — one for the PLRA and one for Act 111. Whether there are valid reasons underlying such a distinction, in light of the interpretive mandate of reading the statutes together, was not fully explained by the Commonwealth Court.

Of course, the Pennsylvania Supreme Court is not required to repeat the gerrymandering engaged in by the Commonwealth Court. In deciding this matter, and not being bound by a higher appellate tribunal, the Pennsylvania High Court could interpret Act 111 and the PLRA to create a bright-line rule that probationary employees enjoy none of the protections of any of the Commonwealth's labor laws, consistent with at least the suggestion of such breadth in *Upper Makefield*. This approach raises difficult policy questions including the reason why discriminatory and adverse actions against a newly-hired employee due to anti-union animus should be tolerated, or was intended to be tolerated by the Legislature. Furthermore, such an approach might encourage employers to extend probationary periods, perhaps indefinitely, to be free of the strictures of the state's labor laws. A related issue would be whether a union could collectively bargain on behalf of probationary employees since they would seemingly not be part of the bargaining unit. Thus, such an approach could lead to probationary employees not enjoying any of the benefits or protections a union might achieve at the bargaining table with respect to wages, hours, and terms and conditions of employment such as health care, sick leave, and vacation, simply because of their rookie status. Related thereto, are probationary employees eligible to vote in a union election if they are not employees for purposes of Act 111? While such a hands-off approach might make sense with respect to the employer's ultimate decision to hire or to terminate the probationary employee for unsatisfactory performance, the

validity of this option wanes with respect to other aspects of the employment relationship.

A second equally clear option would be to reevaluate the Pennsylvania Supreme Court's position with respect to probationary employees. By limiting *Upper Makefield* and providing probationary employees the full panoply of protections that the General Assembly bestowed upon permanent employees, it would eliminate some the problems mentioned above as well as the dual definition of who is an employee under Act 111 and the PLRA, making these statutes truly *pari materia*. Furthermore, such an approach would bring the Commonwealth in line with the federal treatment of probationary employees under the NLRA.[80] It would also eliminate the misperception that at-will employees are not protected by labor and employment laws. Indeed, while the at-will doctrine, and its teaching that employees may be terminated at any time, for any reason or for no reason, remains strong in Pennsylvania,[81] such employees still enjoy the protections provided in labor and employment statutes — provisions which constitute, in essence, a recognized statutory exception to the at-will doctrine.[82]

Conversely, such a bright line approach would also blind the law to the unique status of probationary employees. These individuals are not permanent employees. They are newly hired employees who are on trial. To grant them the same rights as permanent employees would serve to not only blur or possibly eliminate their unique status, but to handcuff employers and diminish their unfettered discretion with respect to this initial testing period in the employment relationship.

Finally, the Supreme Court could adopt the approach of the Commonwealth Court, in essence creating a dual system of rights for probationary employees requiring a case-by-case determination of the relevant statutory provisions and analysis of the probationary employee's rights. Whether the middle course charted by the Commonwealth Court will be upheld or whether a new point on the compass will be followed is now in the hands of the Pennsylvania Supreme Court.

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80. *See, e.g.*, Gulf States United Telephone Co., 253 NLRB 603 (1980).

81. *See, e.g.*, Rothrock v. Rothrock Motor Sales, Inc., 883 A.2d 511 (Pa. 2005).

82. *See* Christensen and Kight, *Section 7 and the Non-Union Employer*, 60 J. MO. B. 312 (2004); Jon E. Pettibone, *Advising Private-Sector Clients: Don't Forget the NLRA*, 40 AZ Attorney 18 (2003).

IV. CONCLUSION

The Commonwealth Court of Pennsylvania has recently rendered two significant decisions. Each opinion addresses not only the narrow legal question before the court, but also speaks to larger issues concerning individual employee rights under Pennsylvania's labor laws. Viewed perhaps even more broadly, these decisions are part of the growing body of law that is attempting to define the boundaries between employer, employee, and union. Currently, due to the legal and political environment that exists today regarding labor relations, there is a re-examination of the competing interests of these groups and a corresponding realignment in terms of rights and responsibilities suggesting greater rights for the individual employee under current labor laws.[83] The Supreme Court of Pennsylvania will have the opportunity to contribute to this ever-important and evolving area of the law.

83. *See* William R. Corbett, *Waiting For the Labor Law of the Twenty-First Century: Everything Old is New Again*, 23 BERKELEY J. EMP. & LAB. L. 259 (2002) (offering commentary on the vulnerability of workers, the suggested irrelevancy of unions, and the promise of application of labor laws to nonunion employees); Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575 (Spring 1992).