

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE LODGE 5 :  
:  
:  
v. : Case No. PF-C-17-27-E  
:  
CITY OF PHILADELPHIA :

**PROPOSED DECISION AND ORDER**

On March 27, 2017, the Fraternal Order of Police, Lodge 5, (Union) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair labor practices, under the Pennsylvania Labor Relations Act (PLRA or Act), as read with Act 111, and therein alleged that the City of Philadelphia (City) violated Section 6(1)(a) and (e) of the PLRA when the City's Police Department (Department) unilaterally implemented a tattoo/body art policy ("Tattoo Policy" or "Policy") restricting visible tattoos, deemed offensive, extremist, indecent, racist or sexist (collectively "offensive"), and allegedly established new discipline for Policy violations.

On April 5, 2017, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on July 7, 2017, in Harrisburg, Pennsylvania. After two granted continuance requests, the hearing was scheduled for and held on Monday, November 6, 2017. During the hearing on that date, both parties in interest were afforded a full and fair opportunity to present testimonial and documentary evidence and to cross-examine witnesses. Both parties' legal representatives requested and reasonably required delays in the briefing schedule and multiple extensions were granted. On August 27, 2018, the Union filed its post-hearing brief. On December 13, 2018, the City filed its post-hearing brief.

The examiner, based upon witness testimony, admitted documents and all matters of record, makes the following:

**FINDINGS OF FACT**

1. The City is a public employer and political subdivision pursuant to Act 111 and the PLRA. (N.T. 7)
2. The Union is a labor organization pursuant to Act 111 and the PLRA. (N.T. 7)
3. Richard Ross is the Department's Police Commissioner. (N.T. 77)
4. Captain Francis Healy is an attorney with an advanced legal degree (i.e., L.L.M.). He is the Special Legal Advisor to Commissioner Ross. (N.T. 95-95)

5. Christine Coulter is the Deputy Commissioner for labor relations. She is authorized to speak for the City to the Union regarding policies that the City is considering implementing. (N.T. 94-95)

6. John McGrody is the Vice President of FOP Lodge 5. (N.T. 16)

7. Since at least 1988 and prior to the Summer of 2016, officers had tattoos, and the City did not have a policy regulating or restricting tattoos when officers apply for positions with the Department or during their tenure as police officers. During the Summer of 2016, the Philadelphia Convention Center hosted the Democratic National Convention (DNC), during which time there was still no policy governing tattoos. (N.T. 20-22, 24-25)

8. Before the Summer of 2016, no City or Department representative notified the Union that there were problems with or concerns over officers wearing or showing tattoos. The Department leadership had been discussing and planning for a tattoo policy before the Summer of 2016, under former Police Commissioner Ramsey. (N.T. 22, 85-86, 97-98)

9. Officers' uniforms vary with the seasons. During the winter months, officers wear long-sleeved shirts with a tie and a coat. At other times, officers wear a shirt and tie with no coat or jacket. During the warmer months, officers are required to wear a short-sleeved shirt with no tie and an open collar. Bicycle patrol officers wear shorts and short-sleeved shirts. (N.T. 23-24, 41, 67)

10. During the DNC, bicycle Patrol Officer John Smith (which is not his real name) was assigned to patrol protests in Center City. A protester posted on social media that he/she was offended by Officer Smith's tattoo. (N.T. 24)

11. Officer Smith's tattoo depicted an eagle over the top of a German flag with the inscription: "Fatherland." The social media posting likened the tattoo to a Nazi symbol. The news media also covered the outcry over Officer Smith's tattoo, and the City's Mayor issued several statements to the media indicating that he was offended by the tattoo. Many people in the community believed that Officer Smith's tattoo was related to Naziism. The Mayor ordered, and Internal Affairs conducted, an investigation, after which Officer Smith was cleared because there was no policy. (N.T. 24-27, 49-50, 80)

12. People from the Jewish Community and other groups expressed disdain for Officer Smith's tattoo and criticized Commissioner Ross for permitting such a tattoo. (N.T. 84)

13. The public outcry over and media coverage of Officer Smith's tattoo motivated the Department to draft a tattoo policy. Offensive tattoos are a safety concern for officers because they can escalate a citizen-contact situation without the officer knowing what is causing the escalation. Offensive tattoos undermine the integrity and credibility of the officer and the Department. Trust can be lost, and the officer's safety can be placed in jeopardy. (N.T. 80, 85-86, 91, 107, 135)

14. LeAnne Knorr is a police officer assigned to the Research and Planning Unit in the Department. The Research and Planning Unit is the repository for all policies and procedures. Officer Knorr notifies the Union of new policies and policy changes. (N.T. 30, 104-105)

15. The parties' collective bargaining agreement (CBA) requires the Department to give the Union 10-days' notice in advance of implementing any changes to policies or procedures. On Tuesday, February 7, 2017, Officer Knorr issued an email to the Union leadership notifying the Union of a new policy: "Directive 6.7 Appendix E" entitled "Tattoo/Body Art Restrictions" (Tattoo Policy) which had been approved by Police Commissioner Ross. The new tattoo policy was attached to the email with a tentative print date of March 1, 2017. The Union had not responded within 10 days. (N.T. 28-30, 155-157, 169; Joint Exhibits 2 & 6)

16. The Tattoo Policy is part of the Department's Dress Code wherein the Department regulates uniform clothing. The Dress Code also dictates permitted and prohibited pins and emblems as well as their location on the uniform. The Dress Code prohibits officers from wearing personal pins and emblems of their choice. (N.T. 86-87)

17. Captain Healy wrote the Tattoo Policy. He began writing the Tattoo Policy when the Officer Smith tattoo issue arose under Commissioner Ross. (N.T. 97-98, 109)

18. Captain Healy researched Constitutional and free-speech law as well as the legal rights of public employees before writing the Tattoo Policy. He premised the Tattoo Policy on existing case law in determining the limits that can be placed on government employees. In formulating the Policy, Captain Healy considered the impact on officers and pursued a fair and balanced approach to giving officers as much latitude and freedom of expression as possible while accomplishing the goals of the Department. Captain Healy did not consult with the FOP when drafting the Policy. (N.T. 97-99, 106-107, 110, 134-135)

19. The Tattoo Policy and Dress Code amendment provides as follows:

1. BACKGROUND

- A. The Philadelphia Police Department (PPD) has the responsibility of ensuring public safety and maintaining order and to achieve these goals the public must trust and respect its officers. Maintaining a professional and uniform police department is critical to advancing such public trust and respect.
- B. Tattoos and body modifications, as a form of personal expression, are frequently symbolic in nature. These symbols and modifications are often displayed without words, which typically convey precise thoughts and meanings. Consequently, a tattoo or body modification's symbolic nature allows a viewer to attribute any particular meaning to that symbol. As such, the meaning of a single symbol or modification can be easily misinterpreted.

- C. Misinterpretation of visible tattoos and other body modifications worn by police officers while on duty can cause members of the public to question an officer's allegiance to the safety and welfare of the community, as well as the Department's. This misinterpretation can damage the public's trust and respect that is necessary for the Department to ensure public safety and maintain order.

## 2. POLICY

- A. Maintaining a professional and uniform police department is critical to advancing trust and respect.
- B. Visible tattoos and body art worn by employees, while on duty, can compromise public trust, respect and can easily be misinterpreted by the general public. Therefore, all employees, while on duty, are prohibited from having any:
  - 1. Visible tattoos or body art on the head, face, neck or scalp. Any tattoos or body art on any of these areas will be covered by cosmetics or clothing.
  - 2. Any visible tattoos or body art that is or are offensive, extremist, indecent, racist or sexist. Any such tattoos or body art will be covered by cosmetics or clothing.

EXCEPTION: Tattoos which are not immediately recognizable or discernible as tattoos that are used for cosmetic purposes only and do not conflict with Directive 6.7, "Uniforms and Equipment" are exempt from this policy (i.e., tattooed eyebrows, eyeliner)

## 3. DEFINITIONS

- A. The following definitions shall apply to this Appendix:

1. **Offensive Tattoos and Body Art**— Any tattoo or body art depicting words, pictures, or symbols, which can be interpreted to advocate, promote, or support racial, gender, or ethnic hatred or intolerance. This shall also include any tattoos or body art that can be interpreted to advocate, promote, or support discrimination towards any race, national origin, gender, ethnicity, religion or sexual orientation.

2. **Extremist Tattoos and Body Art**— Any tattoo or body art affiliated with, depicting or symbolizing extremist's philosophies, organizations, or

activities. Extremist philosophies, organizations and activities are those which can be interpreted to advocate, promote, and support hatred and/or violence towards any person or group of persons based on race, national origin, gender, ethnicity, religion or sexual orientation.

3. **Indecent Tattoos or Body Art**— Any tattoo or body art that can be interpreted as grossly indecent, lewd, or sexual that shocks the moral sense because of their crude, vulgar, filthy, or disgusting nature or would be inappropriate to be viewed by any minor child.

4. **Racist Tattoos or Body Art**—Any tattoos or body art that can be interpreted to advocate, promote or support degrading, demeaning or insulting any person or group of persons based on race, ethnicity or national origin.

5. **Sexist Tattoo or Body Art**—Any tattoos or body art that can be interpreted to advocate, promote or support degrading, demeaning or insulting any person or persons based upon gender, but that may not meet the same definition of "Indecent Tattoos or Body Art."

6. **Body Art**—shall include the following:

- a. Tongue splitting or bifurcation;
- b. Complete or trans-dermal implantation of any objects other than hair replacement;
- c. Abnormal shaping of ears, eyes, or nose;
- d. Unnatural contact lens colors or color variations that detract from a professional appearance;
- e. Gauging or gradually increasing the radius of a surgically induced opening in the flesh in areas such as the earlobes or lips;
- d. Branding or scarification; or
- g. Abnormal filing of teeth.

#### 4. PROCEDURE

##### A. District/Unit Level Review

- 1. Commanding Officers shall be responsible to ensure all personnel under their command are in compliance with the tattoo and body art restrictions set forth in this Appendix.
- 2. Supervisors shall monitor all personnel under

their supervision for prohibited tattoos and/or body art and will take the necessary action as follows:

a. Upon observation of a violation of this policy, the supervisor shall order the subordinate personnel to cover the area containing the prohibited tattoos or body art as soon as practical.

b. Should the employee object to whether the tattoos or body art is obscene, extremist, indecent, racist and/or sexist, a memorandum shall be submitted by the employee requesting reconsideration by the Commanding Officer. Until such time that the Commanding Officer can interview the officer and view the tattoo or body art, the employee shall comply with the initial order to cover the tattoo or body art.

c. If the Commanding Officer agrees with the supervisor's determination, the matter will be forwarded to the Tattoo/Body Art Review Board. The Commanding Officer shall:

- 1) Have the employee escorted to the Records and Identification Unit to have the tattoos or body art, in question, photographed.
- 2) Submit a memorandum to the Deputy Commissioner, Organizational Services explaining the rationale for their decision and will attach the photographs and a copy of the employee's memorandum.

3. The Deputy Commissioner shall convene a meeting of the Board, as needed, and will make a final determination if the tattoos or body art are prohibited according to this Appendix. Until a final decision is made by the Board, the employee will continue to cover the tattoo or body art in question.

#### B. Complaints

1. If a complaint is received regarding a specific employee's tattoos or body art, Internal Affairs will determine if the employee's tattoos or body art are on the head, face, neck or scalp or have been previously determined to be a prohibited tattoo or body art (i.e., offensive, extremist, indecent, racist or sexist).

a. If the tattoo or body art is prohibited (i.e., head, neck, face or scalp) or has previously been determined to be prohibited,

Internal Affairs shall take the necessary actions.

2. If a complaint is received [that] involves a tattoo or body art that has not been previously evaluated by the employee's Commanding Officer and the Tattoo/Body Art Review Board, the complaint will be referred to the employee's Commanding Officer.

3. The Commanding Officer shall:

a. Interview the employee, the employee's immediate supervisor and view the tattoos or body art in question.

b. If the tattoo or body art is not prohibited submit a memorandum of this decision to Internal Affairs.

c. If the Commanding Officer agrees with the complainant that the tattoo or body art is prohibited and should be covered, the matter will be forwarded to the Tattoo/Body Art Review Board and shall:

1) Order the employee to cover the tattoos or body art while on duty until a final decision is made by the Tattoo/Body Art Review Board,

2) Have the employee report to the Records and Identification Unit to have the tattoos or body art photographed,

3) Submit a memorandum to the Deputy Commission, Organizational Services explaining the rationale for their decision and will attach the photographs and a copy of the complaint.

4. The Deputy Commissioner shall convene a meeting of the Board, as needed, and will make a final determination as to whether the tattoos or body art are prohibited according to this Appendix. Until a final decision is made by the Board, the employee will continue to cover the tattoo and/or body art in question.

(Joint Exhibit 1)

20. On February 27, 2017, Union Vice President McGrody wrote to Deputy Commissioner Christine Coulter as follows:

I was surprised to receive a copy of the Police Department's revised Directive 6-Tattoo/Body Art Policy. A review of the revised Directive 6 reveals that this policy will significantly impact members of the FOP. Furthermore,

this directive has been revised and an entirely new policy on Tattoo/Body Art has been created without the input or bargaining with the FOP.

Additionally, it is clear that the issues contained in this Directive are mandatory subjects of bargaining that must be addressed within the collective bargaining process. With this background, I am quite astonished to discover that the FOP was not consulted regarding the revision of this Directive and its unilateral release. I trust that the department will not implement the provisions and requirements of this directive until such time as the collective bargaining process is followed. It is my hope that an Unfair Labor Practice Charge is not necessary to compel compliance.

Accordingly, I look forward to meeting with you at your earliest convenience to discuss Directive 6.

(Joint Exhibit 3)

21. The Tattoo Policy was distributed and implemented on March 15, 2017. (N.T. 38, 106-107)

22. The Tattoo Policy does not preclude officers from obtaining any tattoos, including offensive ones, before they are hired or while they are on the job. The Tattoo Policy requires officers to cover head and neck tattoos and offensive tattoos. The Policy does not create any new discipline or amendments to the Disciplinary Code. (N.T. 88-89, 136, 159-161; Joint Exhibit 4)

23. Captain Healy interviewed officers about concealer creams and body sleeves and learned that these products are readily available, not expensive and not overly burdensome. (N.T. 106-107, 138-140)

24. The Policy contains standard language explaining to officers what is prohibited. Captain Healy adopted the definitions of the terms "offensive," "extremist," "indecent," "racist" and "sexist" from the rules and regulations of various branches of the military. He approached the Policy completion slowly so that the Policy would not have to be changed; he wanted to prevent confusion and enforcement problems. The definition of "body art" was adopted from another police department. (N.T. 99-101, 103, 114-115; Joint Exhibit 1)

25. Under the Policy, officers' first line supervisors, i.e., the sergeant during roll call, is responsible for initially enforcing the Policy. There is due process and multiple layers of review built into the Policy. If the officer wants the sergeant's determination reviewed, The officer's commanding officer will review the tattoo for a second opinion. If the captain agrees with the sergeant that the tattoo should be covered, the officer may appeal to the Tattoo Review Board (TRB) for final review. (N.T. 101)

26. Officers are given a uniform allowance for 6 long-sleeved and 6 short-sleeved shirts. The Department does not monitor how officers actually spend their uniform allowance. Officers may use their uniform allowance for the purchase of cover-up garments and concealer creams to



cover "offensive" tattoos. The Union never discussed these possible expenses with the City. (N.T. 38-40, 52, 145-146)

27. Officers with head and scalp tattoos would be required to wear make-up and/or wear a hat all day. Commissioner Ross wanted the Policy to require covering face, scalp, head and neck tattoos regardless of content because he determined that citizens are offended by tattoos on those parts of the body regardless of content. (N.T. 71, 119-120)

28. The actual individuals who will serve on the TRB have not been identified. No officer has yet gone before the TRB, and the TRB has not yet convened. The City intends to have Deputy Commissioner Coulter, the Executive Director of the Police Advisory Committee and a member of the FOP serve on the TRB. Union Vice President McGrody was notified that an FOP member would sit on the TRB. The TRB will decide whether a tattoo is offensive by majority vote. There has been no discipline as a result of the Tattoo Policy. If an officer is told to cover a tattoo and the officer complies, there will be no discipline. (N.T. 42-43, 54-56, 103-104, 137)

29. The Dress Code regulates every detail about an officer's appearance. It dictates the types and/or colors of acceptable trousers, coats, hats, socks, belts, protective vests, ties, shirts, boots, sweaters, pins and insignia. It regulates hairstyles and hair length as well as sideburns, mustaches and beards. For female officers, the Dress Code regulates cosmetics, hair length and fingernail length as well as hair accessories such as clips and barrettes. (Joint Exhibit 5)

30. The parties' Act 111 interest arbitration award, dated July 30, 2014, contains the Philadelphia Police Department Disciplinary Code. Article V provides for discipline for the following: "Failure to comply with any Police Commissioner's orders, directives, memorandums, or regulations; or any oral or written orders of superiors. The Department charges officers under this section of the Disciplinary Code for Dress Code/uniform violations. (N.T. 160-161; Joint Exhibit 4, 5-§011-10)

## **DISCUSSION**

The Union argues that, although the Board has concluded that the imposition of police dress codes is a managerial prerogative, hearing examiners have found that officers have a significant interest in uniform policy when changes to those policies result in cost to the officers. (Union's Post-hearing Brief at 17). The Tattoo Policy at issue, contends the Union, has a financial impact on the officers who have tattoos that violate the policy. Officers with those types of tattoos must wear clothing, sleeves, concealer cream, make-up, gauze or tape to conceal the offensive tattoos. The Union asserts that covering up tattoos as required will cost the officers money and compromise their comfort and performance on the job. (Union's Post-hearing Brief at 19-20). The Union also maintains that the Tattoo Policy exposes officers to potential discipline for conduct previously not chargeable. (Union's Post-hearing Brief at 20).

The Union further argues that the City's position (that offensive tattoos and tattoos on the head, face, neck and scalp compromises the

public's trust and respect in the Department and the officers) is undermined by the fact that the City has never previously imposed a tattoo policy even though numerous officers have worn tattoos for decades. (Union's Post-hearing Brief at 21). The Union further maintains that the City's claim, that every tattoo on the neck, head, face or scalp is offensive and violative of the public trust, is overly broad and not reasonably tailored to achieve the City's goals. (Union's Post-hearing Brief at 22-24). The Union also argues that the restriction against tattoos that are "offensive," "extremist," "indecent," "racist" or "sexist" in nature is overly broad and vague. The Union maintains that tattoos can fall into these categories simply by being subjectively "interpreted" as such. The Policy does not articulate a standard that a supervisor, commanding officer or the TRB could apply when reviewing tattoos or body art to make objective determinations. The Policy's vagueness and subjectivity is manifested by its failure to identify the composition of the TRB and the vagueness of the definitions of prohibited types of tattoos. (Union's Post-hearing Brief at 24-25). The City, contends the Union, also violated the Act by failing to engage in impact bargaining over the Policy, even if the Policy is deemed a managerial prerogative. (Union's Post-hearing Brief at 25-26).

The Supreme Court of Pennsylvania, in Borough of Ellwood City v. PLRB, 606 Pa. 356, 998 A.2d 589 (2010), provided the test for determining whether a matter constitutes a managerial prerogative or a mandatory subject of bargaining for Act 111 bargaining units. The Court stated as follows:

[O]nce it is determined that, as here, the topic is rationally related to the terms and conditions of employment, i.e., germane to the work environment, the proper approach is to inquire whether collective bargaining over the topic would unduly infringe upon the public employer's essential managerial responsibilities. If so it will be considered a managerial prerogative and non-bargainable. If not, the topic is subject to mandatory collective bargaining.

Ellwood City, 606 Pa. at 375, 598 A.2d at 600. The Tattoo Policy in this case is rationally related to the terms and conditions of officers' employment and germane to their work environment. If an officer is deemed to have a prohibited tattoo or body art and is thereby required to cover the tattoo or body art, there is an associated expense and inconvenience in covering the tattoo for the duration of a shift, especially for bicycle officers who typically cover up less for riding comfort and efficiency. The make-up and/or cover up may also make officers warmer in the summer and impede movement. However, requiring the City to bargain over the Policy would unduly infringe on its essential managerial responsibilities.

In Pennsylvania Liquor Enforcement Association v. Commonwealth of Pennsylvania, Pennsylvania State Police, Bureau of Liquor Control Enforcement, 41 PPER 41 (Proposed Decision and Order, 2010), the union claimed that the Commonwealth had a duty to bargain a tattoo policy for liquor enforcement officers where the commanding officer of the Bureau of Liquor Control Enforcement and human resources personnel passed judgment on whether a prospective, exposed tattoo would be unacceptable. In that case, the hearing examiner concluded that the

public appearance of an officer while working for the Commonwealth is a managerial prerogative. In this context, the examiner stated the following:

The Commonwealth's regulation of tattoos that are exposed on an employee's body while performing their Commonwealth duties and serving the public is analogous to an employer's imposition of a dress code or the Commonwealth's requirement for officers to wear uniforms. Both involve the Commonwealth's managerial determination of acceptable public appearance while representing the Commonwealth in a certain capacity.

Bureau of Liquor Control Enforcement, 41 PPER at 152. The examiner relied on the Board's dress code decision in PSSU, Local 668 v. Commonwealth of Pennsylvania, Department of Public Welfare, 31 PPER ¶ 31020 (Final Order, 1999), noting that a public employer has a "substantial interest in the professional delivery of services, and that appropriate . . . attire by employees who deal with the public furthers that interest." Id. at 50.

The City, like any public employer, has a substantial and legitimate interest in maintaining the public's perception of integrity, fairness and equality in law enforcement and public service, especially in a city as culturally, ethnically, religiously and racially diverse as the City of Philadelphia. Indeed, these managerial interests are expressly embodied in the Tattoo Policy, which provides that "[t]he Philadelphia Police Department (PPD) has the responsibility of ensuring public safety and maintaining order and to achieve these goals the public must trust and respect its officers. Maintaining a professional and uniform police department is critical to advancing such public trust and respect." (Joint Exhibit 1, § 1(B)). The City has an absolute managerial right to control the appearance of its officers when exposed to the public at large in a uniform manner that ensures trust. The Tattoo Policy is an Appendix to the Department's Dress Code because the uniform and consistent appearance of officers are Dress Code related. Requiring the City to bargain the Tattoo Policy in this case would unduly infringe on and hamstring the City's critical mission of ensuring that the public trusts the credibility and integrity of the officers and the Department.

In fact, the entire Dress Code demonstrates the City's necessary and unquestionable control over the professional, unbiased and uniform appearance of the officers. The Dress Code already regulates every detail of every officer's appearance while on duty. When the seasons change, the Department requires officers to change their uniformity of dress for the season so that all officers make the same appearance, and experience the same working conditions, at the same time. If the Department can mandate that officers cover up for winter, which may impede their movement, then the Department can similarly make officers cover prohibited tattoos for the paramount purpose of presenting a unified, unbiased and trustworthy professional appearance to everyone in a diversified population.

Moreover, the record shows that offensive tattoos can create a safety concern for officers, and the Department has a managerial prerogative to take steps to prevent known dangers to its officers and improve safety. The record demonstrates that, even where there was no officer-to-citizen law enforcement confrontation, there was a

tremendous public outcry over the Officer Smith tattoo. The record also establishes that offensive tattoos can escalate a law-enforcement contact with a person or the public without the officer knowing why the situation has escalated, thereby jeopardizing the officer's safety and perhaps requiring the use of additional force that otherwise may not have been necessary. Consequently, the financial, work-related impact on officers as a result of the Tattoo Policy (including some amount of possible restricted movement or discomfort and overheating in summer months) pales in comparison to the City's need, responsibility and mandate to control the uniform appearance of its officers in a manner that ensures public trust and the appearance of unbiased neutrality in law enforcement, as well as ensuring the safety of its officers. Officers would seemingly have to adjust to and contend with restricted movement anyway during winter months while wearing layers of outer and under garments and coats (although the trade-off for being warm may be favored). Accordingly, the Tattoo Policy is a managerial prerogative, and the City did not have a duty to bargain the policy.

The Union argues that the City's position (that the tattoo policy is necessary to ensure the maintenance of the public trust and the integrity of operations) is undermined by the fact that officers have had tattoos for many years and the City is only now restricting tattoos, which demonstrates that tattoos have not undermined the public trust. The City and the Policy acknowledge that tattoos in general do not jeopardize the trust in the officers or the Department or the perception of officer and Departmental integrity. Only visible, offensive tattoos undermine the mission and perception of the Department. Moreover, the record is clear that the Department leadership had been discussing a tattoo policy for a long time. Also, as with most issues that require attention, there were no tattoo related public incidents brought to the Department's attention until the Officer Smith incident at the DNC in the Summer of 2016.

Indeed, the Department properly and proactively responded to the public outcry in 2016, which actually supports the City's position that the trust in and integrity of the Department were questioned by the public perception that it permitted Officer Smith to expose an offensive tattoo. Through mainstream and social media, the public criticized Commissioner Ross. The Mayor was offended by the tattoo as was the Jewish community. The negative public uprising over Officer Smith's tattoo absolutely supports the City's position that offensive tattoos compromise the public's perception of and trust in the Department. After the DNC in 2016, the Department had to regain the public trust that had been lost by the viral public criticism over Officer Smith's tattoo.

Accordingly, the implementation of the Tattoo Policy after decades of not having one was a timely response to a public crisis and public demands challenging the Department and its integrity of operations after not having been presented with that type of public criticism before. Therefore, the Union's argument that the City did not act out of concern for the public trust and integrity of operations, because it lacked a policy on tattoos for decades, is simply not supported by the record. In fact, the record overwhelmingly supports the City's reasons for the policy in responding to the acute public outcry and criticisms in 2016.

The Union contends that the Tattoo Policy exposes officers to discipline which is a mandatory subject of bargaining. In State College

& University Professional Association, PSEA/NEA v. Pennsylvania State System of Higher Education (PASSHE), 48 PPER 88 (Final Order, 2017), the Board held that where the discipline for violating new work rules is already subsumed within the existing collective bargaining agreement, there is no new discipline with a severable impact on employees that has to be bargained. PASSHE, supra. The Board, in this regard, stated as follows:

[I]t does not follow that issuance of a set of rules that are a managerial prerogative necessarily raises a duty to bargain by the employer over discipline imposed for a refusal to comply with the rules. Indeed, as the Board recognized in Lincoln University Chapter, AAUP v. Lincoln University, 37 PPER 173 (Final Order, 2006), Code of Conduct held that "[i]f a disciplinary scheme has been negotiated in an existing collective bargaining agreement, when an employee violates a work rule, the employer is generally contractually privileged to impose discipline in accordance with the terms of the collective bargaining agreement."

Here, similar to Code of Conduct, there is no suggestion that an employee's refusal to comply with PASSHE's directive to complete background screenings is not subsumed under the disciplinary provisions of the parties' collective bargaining agreement. Thus, on this record, discipline for an employee's refusal to complete background screening is not new, but discipline typically imposed for an employee's refusal to abide by an employer directive. Therefore, consistent with Code of Conduct, on this record, SCUPA has failed to establish that the discipline for an employee's refusal or failure to undergo the background screenings is a change from the disciplinary provisions under the collective bargaining agreement.

PASSHE, 48 PPER at 369 (emphasis added).

The record shows that there are no new disciplinary actions or provisions born out of the Tattoo Policy. An officer cannot be disciplined for having a tattoo or for having a prohibited tattoo. Indeed, discipline cannot arise under the Tattoo Policy itself. Discipline, if any, would arise under the existing Disciplinary Code provisions for violating the uniform and Dress Code policy and an order from a superior officer or the TRB to cover up a prohibited tattoo. Pursuant to PASSHE, this is not new discipline that must be bargained. The existing contractual disciplinary provisions, therefore, do not present changed disciplinary circumstances or a newly severable impact on officers.

The Union further claims that the Tattoo Policy is vague and overbroad. The Union asserts that the Policy's prohibition of any tattoo on the head, neck, scalp or face without evaluating the particular tattoo is overbroad and does not accomplish the City's goals. The Union contends further that the definitions of prohibited tattoos (i.e., offensive, extremist, indecent, racist or sexist) are vague for officers and that those definitions are premised upon the subjective interpretation of a citizen, superior officers or the TRB, also rendering those definitions vague and ill-defined.

The Board has held that an employer may unilaterally implement work rules that promote integrity and public confidence in government operations, such as a code of conduct. Fraternal Order of Police, Lodge No. 9 v. City of Reading, 29 PPER ¶ 29146 (Final Order, 1998). However, the Board has also held that work rules are bargainable if they are not "narrowly tailored in substance, to meet with particularity only the employer's legitimate and necessary objectives, without being overly broad, vague or ambiguous." Abington Transportation Association v. Abington School District, 18 PPER ¶ 18188 at 528 (Proposed Decision and Order, 1987), aff'd, 19 PPER ¶ 19067 (Final Order, 1988), aff'd, 570 A.2d 108 (Pa. Cmwlth. 1990). In City of Reading, supra, the Board opined that "vague and overly broad work rules can create a bargaining obligation so that employees are on notice of conduct which may be subject to discipline." City of Reading, 29 PPER at 344.

Pennsylvania State Troopers Association v. Commonwealth of Pennsylvania, Pennsylvania State Police, 44 PPER 95 at 374 (Proposed Decision and Order, 2013).

A review of the Policy language itself, along with testimony from Captain Healy and Commissioner Ross, demonstrates that the Policy is neither vague nor overbroad. The definitions of "offensive," "extremist," "indecent," "racist," "sexist" and "body art" are clear and concise. There is no ambiguity in what falls within the meaning of these terms as applied. Captain Healy, after thoroughly researching Constitutional and free-speech law as well as military regulations and other police departments, artfully crafted a comprehensive Policy that is as objective and clear as it can be. The Union complains that the operative term in all these definitions, i.e., the word "interpreted," renders the definitions subjective and ambiguous.

The reality of this type of Policy is that persons other than the officer with the tattoo have to evaluate the tattoo. Captain Healy constructed the Policy with built-in safeguards to remove subjectivity and ambiguity through a tier-review due process system. The fact that multiple layers of ranking officers, and ultimately the TRB by majority vote, can review a questionable tattoo removes as much subjectivity and ambiguity as practically possible. The definitions and the multi-tiered due process review system Captain Healy designed is narrowly tailored to yield objective determinations regarding tattoos and to make as clear as possible the types of tattoos that can run afoul of the policy. While no system can be perfect, the one developed by Captain Healy is a practical and balanced system narrowly tailored to achieve the City's pronounced goals. There is no way around the fact that human beings are going to evaluate these tattoos. Whatever biases and experiences they bring to their determinations is unavoidable as with any third-party determination process. The layered review process built into the Policy as well as the well-crafted definitions and standards contained in the Policy will even out the peaks and valleys of different points of view.

The Union further claims that prohibiting any tattoos on the head, scalp, face or neck without evaluating those particular tattoos

is overly broad, and it assumes that the public is offended by such tattoos by virtue of their placement on the officer's body. Requiring officers to cover any and all tattoos on the head, scalp, neck or face is a clear, targeted and objective criteria narrowly tailored to achieve the City's goals of protecting the credibility and perception of the officer and the Department. The City has the managerial discretion to determine the outward appearance of its officers. The City, therefore, has the discretion to determine that head, neck, face or scalp tattoos of any kind are offensive or intimidating and could cause insecurity among citizens in need of police services or during a confrontation with police officers.

The City did not prohibit tattoos anywhere on the officers' bodies going forward in time. That would certainly be overbroad because nonvisible tattoos cannot offend the public. The City's prohibition of head, neck, scalp and face tattoos is targeted at a specific appearance that it has deemed offensive to the public and the prohibition narrowly accomplishes the City's laudable and lawful goals of protecting the image of the Department and its officers. If the City can require officers to wear clean, unripped uniforms, hats and ties to make a certain respectable and professional appearance, then it can order its officers to cover head, face, scalp and neck tattoos to accomplish the same result.

Finally, the Union claims that the City violated the Act by refusing to engage in impact bargaining. The Union argues that there are financial hardships to officers under the Policy. The Union claims that its February 27, 2017 letter (Joint Exhibit 3) requested the City to bargain the impact to officers and that the City refused to engage in impact bargaining. The Union further argues that it properly preserved an impact bargaining claim in its specification of charges.<sup>1</sup>

In Lackawanna County Detectives Ass'n v. PLRB, 762 A.2d 792 (Pa. Cmwlth. 2000), the Commonwealth Court held that a union must establish the following four elements in an impact bargaining case: (1) the employer must lawfully exercise its managerial prerogative; (2) there must be a demonstrable impact on wages, hours, or working conditions, which are severable from the managerial decision; (3) the union must demand to negotiate these matters following management's implementation of its prerogative; and (4) the public employer must refuse the union's demand. Id. (citing Borough of Ambridge, 30 PPER ¶ 30218 (Final Order, 1999)).

There are several problems with the Union's impact bargaining claim. A union is required under Lackawanna County Detectives, supra, to demand impact bargaining after management implements its prerogative. The February 27, 2017 letter, designated Joint Exhibit 3, was a bargaining demand on the policy itself before its implementation. Indeed, Union Vice President McGrody stated in that letter: "I trust that the department will not implement the provisions and requirements of this directive until such time as the collective bargaining process is followed." (F.F. 20). Moreover, the record is devoid of any evidence demonstrating that the City refused an express impact bargaining demand. The City may have proceeded to exercise its

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<sup>1</sup> In its post-hearing brief, the Union mistakenly refers to the date on this letter as March 27, 2017 instead of February 27, 2017. (Union's Post-hearing Brief at 25-26 (citing Joint Exhibit 3)).

prerogative to implement its Tattoo Policy without negotiating the Policy with the Union, but the City did not refuse a post-implementation demand for impact bargaining.

Also, contrary to the Union's claim, it did not preserve an impact bargaining claim in its specification of charges. To properly preserve an impact bargaining claim, and thereby place the respondent on notice to defend such a claim, it is necessary to include allegations that a post-implementation demand was made by the union and refused by the employer. The Union did not make any such allegations in its specification of charges. The Union did allege that "[t]he Tattoo Policy directly impacts the working conditions of Police Officers." (Specification of Charges at ¶ 10). However, the allegation is complaining of the implementation of the Policy and changes to the scope and level of discipline that could allegedly be imposed by the Policy.

It is in the context of establishing a claim that the Policy itself constituted a mandatory subject of bargaining that the Union used the phrase: "impacts the working conditions." Indeed, it is in the next sentence that the Union identifies its claim that the Policy constituted a mandatory subject in the first instance and prior to implementation when it stated: "The City unilaterally implemented changes in working conditions without first bargaining with the FOP and in complete disregard of the FOP's expressed desire to bargain over the issue." (Specification of Charges at ¶ 11). The Union did not allege that it made a specific post-Policy implementation demand to bargain the severable, identifiable impact on officers as a result of Policy implementation. Accordingly, the Union did not allege or preserve an impact bargaining claim, it did not adduce evidence satisfying all the elements of Lackawanna County Detectives, supra, and, consequently, the City did not defend such a claim. Therefore, the Union's impact bargaining claim, raised for the first time after the hearing, must be dismissed.

### **CONCLUSION**

The examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds as follows:

1. The City is an employer within the meaning of the PLRA and Act 111.
2. The Union is a labor organization within the meaning of the PLRA and Act 111.
3. The Board has jurisdiction over the parties hereto.
4. The City has not committed unfair labor practices in violation of Section 6(1) (a) and (e) of the PLRA and Act 111.



**ORDER**

In view of the foregoing and in order to effectuate the policies of the PLRA and Act 111, the 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 pursuant to 34 Pa. Code § 95.98(a) within twenty (20) days of the date hereof, this decision and order shall be and become absolute and final.

SIGNED, DATED and MAILED at Harrisburg, Pennsylvania, this thirty-first day of December 2018.

PENNSYLVANIA LABOR RELATIONS BOARD

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JACK E. MARINO, Hearing Examiner