

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

ALLEGHENY COUNTY POLICE ASSOCIATION :
v. : Case No. PF-C-21-83-W
ALLEGHENY COUNTY :

FINAL ORDER

The Allegheny County Police Association (Union) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) on September 23, 2022 challenging a Proposed Decision and Order (PDO) issued on September 7, 2022.¹ In the PDO, the Hearing Examiner concluded that Allegheny County (County) did not violate Section 6(1)(a) or (e) of the Pennsylvania Labor Relations Act (PLRA), as read in *pari materia* with Act 111 of 1968, by implementing a COVID-19 Vaccine Policy (Vaccine Policy) requiring all bargaining unit member police officers to be fully vaccinated against COVID-19 by December 1, 2021. Pursuant to an extension granted by the Secretary of the Board, the Union filed a brief in support of its exceptions on October 26, 2022. After an extension of time granted by the Secretary, the County filed a brief in response to the exceptions on January 6, 2023.

The facts of this case are summarized as follows. Beginning in March of 2020, the County experienced a large wave of employees missing work due to COVID-19. There were an alarming number of deaths in the County, and many County employees were getting sick with COVID-19. In fact, two County employees passed away from the disease. (FF 3). The County had used COVID-19 mitigation efforts such as masking, social distancing and remote work, where possible. However, in certain work situations, social distancing was impossible, and approximately 72% of the County workforce could not work from home, including 911 operators, police officers, laborers, truck drivers, and corrections officers. The County found that masking and social distancing alone were not sufficient to stop the spread of COVID-19. (FF 6). Thereafter, in the late summer and early fall of 2021, the County received information from the County Health Department, the Pennsylvania Department of Health, and the federal Center for Disease Control (CDC) containing a warning about a huge upcoming spike of COVID-19 cases due to the evolution of new COVID-19 variants. (FF 4).

Based on information it received from the Department of Health and the CDC, the County believed that COVID-19 vaccinations would help slow the spread of the disease and lessen the severity of symptoms for those people who tested positive for the virus. (FF 4). Because its employees deal directly with the public in settings which often make social distancing and masking difficult, and sometimes impossible, the County believed the best way to ensure the continuity of its public service and keep both the public and its employees as safe as possible from severe illness or death from COVID-19 was to mandate vaccines. (FF 5). As such, the County implemented the Vaccine

¹ The Union filed a request for oral argument, which is denied as the matter has been adequately presented in the briefs submitted by both parties.

Policy at issue here in anticipation of the Delta and Omicron variants of COVID-19. (FF 4).

On September 29, 2021, the County promulgated its COVID-19 Vaccine Policy. On that date, a press release was issued stating that employees would have until December 1, 2021, to provide proof of vaccination, and further, *inter alia*, that:

County Executive Rich Fitzgerald today announced that COVID-19 vaccinations will be required of all county employees under the executive branch, subject to such exceptions as required by law. The measure is being taken to promote the health and safety of the county workforce, and to ensure the continued protection of the public with whom the workforce interacts and communities they serve.

* * * *

The Centers for Disease Control and Prevention (CDC) has determined that the best way to slow the spread of the virus, and to prevent infection by the Delta variant or other variants, is to be vaccinated. COVID-19 vaccines are widely available in the United States, and in Allegheny County. Data on the vaccines show that they protect people from getting infected and severely ill, and significantly reduce the likelihood of hospitalization and death.

One of the vaccines, the Pfizer-BioNTech vaccine (now known as Comirnaty) has received full approval from the Food and Drug Administration (FDA). Two other vaccines, Moderna and Janssen, have been authorized by the FDA for emergency use. All three vaccines have met the rigorous standards for safety, effectiveness and manufacturing quality.

* * * *

The health and safety of the county workforce, and the health and safety of the members of the public with whom they interact, are integral parts of the services provided to residents. To ensure that the county can continue to meet the needs of residents and provide critical services, county employees must take all available steps to protect themselves and avoid spreading COVID-19 to their co-workers and members of the public.

* * * *

Beginning on December 2, anyone in violation of the requirement who does not meet an exception will face termination.

This announcement follows on the heels of the decision in early August to require all new hires to be vaccinated and to require current employees who are unvaccinated to wear masks and be tested regularly for COVID.

(FF 8).

The Vaccine Policy covered police officers, corrections officers, other employees of the jail and police department, and employees in the following departments: Kane Senior Living Home, Facilities, and the Departments of Parks, Economic Development, Health, Law and Human Services. The Vaccine Policy covered a total of approximately 5,000 employees. (FF 10).

On September 29, 2021, an email was sent to every County employee notifying them of the new Vaccine Policy and providing links to the CDC COVID-19 Vaccine website and the County COVID-19 website. (FF 11, 12). In addition, a letter was sent to each County employee who had not been vaccinated, amounting to about 30% of the police department, setting forth the County's belief that "the best way to slow the spread of COVID-19 and to prevent infection by the Delta variant or other variants is to be vaccinated." The letter went on to state that "Allegheny County considers the health and safety of its employees and members of the public with whom they interact to be of paramount importance. . . ." and that all County employees under the Executive Branch must be vaccinated by December 1, 2021, unless approved for an exemption, or face termination of their employment. (FF 13). Approximately 215 exemption requests to the Vaccine Policy were filed with the County, based on either religious or medical grounds. The County granted one or two medical exemptions, and no religious exemptions. (FF 14).

On October 21, 2021, a follow-up letter was sent by the County to all County employees who had not yet provided proof of their vaccination status, reminding them that they were required to be vaccinated by December 1, 2021, or be subject to termination of their employment. A timeline for the various vaccines was also set forth in the letter, along with information on additional resources concerning COVID-19 vaccination. (FF 15). Four members of the Union were ultimately dismissed for failure to comply with the Vaccine Policy, and four grievances were filed alleging that the County violated the discipline provision in the parties' collective bargaining agreement (CBA). (FF 20, 24).

With respect to the Vaccine Policy, the Union had various concerns, which included unit members' loss of jobs, side effects of the vaccine and availability of medical and religious exemptions. The Union was also concerned about the effect on wages and benefits and the effect on future employment of a police officer, given that the termination was reported as insubordination to the Pennsylvania State Police repository pursuant to Act 57 of 2020. Finally, the Union asserted that the discipline with respect to the Vaccine Policy should follow a progressive discipline policy. (FF 19).

The County police department has approximately 217 employees and is made up of two divisions, a Patrol Division,² and a Detective Division. (FF 17, 20). COVID-19 impacted the functions of the police department by negatively effecting manpower and staffing. Prior to the Vaccine Policy, the police department had problems with staffing and overtime due to employees being off work for COVID-19 related reasons. (FF 23). In 2020, the police department had 12 employees miss work due to positive test results, 30 missed work due to COVID-19 exposure, and 13 missed work due to COVID-like symptoms. Between January and May of 2021, the police department had 10 employees miss work due to positive test results, 20 missed work due to COVID-19 exposure, and 1 missed work due to COVID-like symptoms. From July of 2021 until December of

² The Patrol Division covers the Pittsburgh International Airport. (FF 17).

that year, the police department had 40 employees miss work due to positive test results, 3 missed work due to COVID-19 exposure, and 6 missed work due to COVID-like symptoms. (FF 26). After vaccines became available and the majority of the police department was vaccinated, the police department saw a sharp reduction in the number of employees who missed work due to COVID-19 exposure. (FF 27).

The Union filed a Charge of Unfair Labor Practices with the Board on September 30, 2021, alleging that the County violated Section 6(1)(a) and (e) of the PLRA by unilaterally implementing the COVID-19 Vaccine Policy without first bargaining over the matter. On October 20, 2021, the Secretary of the Board issued a Complaint and Notice of Hearing directing that a hearing be held before the Hearing Examiner on January 26, 2022. After a continuance, hearings were held on February 22, 23, 24 and 25, 2022, and March 22, 2022, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Both parties filed post hearing briefs.

In the PDO, the Hearing Examiner set forth the relevant standards to be employed in determining whether a matter will be considered a mandatory subject of bargaining or a managerial prerogative under Borough of Ellwood City v. PLRB, 998 A.2d 589 (Pa. 2010) and City of Philadelphia v. International Association of Firefighters, Local 22, 999 A.2d 555 (Pa. 2010). The Hearing Examiner concluded that, although the County's Vaccine Policy is germane to the working conditions of the police officers, it must be considered a managerial prerogative under Act 111 because the County's interests in protecting the public, and ensuring the provision of critical services to the public, would be unduly impacted if they were required to bargain with the Union prior to implementing the Vaccine Policy. In this regard, the Hearing Examiner stated:

Based on this record, it is clear that collective bargaining over the Vaccine Policy would unduly infringe on the County's policy of ensuring that all employees were vaccinated by December 1, 2021. In choosing December 1, 2021, the County was relying on information from government health agencies about the coming waves of COVID-19 infections over the winter of 2021-2022. The record shows that the County wanted its employees to be vaccinated by December 1, 2021, to ameliorate the negative effects of the imminent waves of COVID-19 infections. To subject the Vaccine Policy to collective bargaining would likely completely frustrate the timing of the Vaccine Policy. If the deadline to comply with the Vaccine Policy were delayed, I infer from the record that it would have been likely some County employees, including County Police, would not have been vaccinated by December 1, 2021, which would have frustrated the County's interest in protecting the health of its citizens and maintaining critical staffing and its standards of operation through a predicted and realized surge in COVID-19.

(PDO at 19-20). Accordingly, the Hearing Examiner dismissed the Union's Charge and rescinded the complaint.

The Union's exceptions challenge the Hearing Examiner's factual findings and conclusion that the County's Vaccine Policy was a proper exercise of managerial prerogative. In particular, the Union contends that the Hearing Examiner erred in holding that the Vaccine Policy was a

managerial prerogative because the Hearing Examiner failed to consider, *inter alia*, the County's decision as to other mitigation strategies, the County's leave policy for vaccinated employees, the County's refusal to consider an employee's natural immunity to the virus, and the fact that the vaccines are subject to ongoing safety surveillance by the CDC and the FDA.

It is well-settled that the Hearing Examiner's function is to resolve conflicts in evidence, make findings of fact from conflicting evidence, and draw inferences from those findings of fact. PLRB v. Kaufmann Department Stores, Inc., 29 A.2d 90 (Pa. 1942). Absent the most compelling of circumstances, the Board defers to the credibility determinations of its hearing examiners who observe the manner and demeanor of the witnesses during the testimony. Pennsylvania State Corrections Officers Association v. Commonwealth of Pennsylvania, Department of Corrections Pittsburgh SCI, 34 PPER 134 (Final Order, 2003). The hearing examiner may accept or reject the testimony of any witness in whole or in part. Id.; International Association of Firefighters Local 840 v. Larksville Borough, 48 PPER 82 (Final Order, 2017). The Union has failed to present any compelling reasons to warrant reversal of the Hearing Examiner's credibility determinations.

Further, the Hearing Examiner's decision will be upheld if the factual findings are supported by substantial and legally credible evidence, and the legal conclusions drawn from those facts are reasonable, and not capricious, arbitrary or illegal. Abington Transportation Association v. PLRB, 570 A.2d 108 (Pa. Cmwlth. 1990). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Lycoming County v. PLRB, 943 A.2d 333 (Pa. Cmwlth. 2007). Here, the Board finds that the Hearing Examiner thoroughly considered the evidence presented by both parties and cited to the evidence in making findings that are necessary to support the proposed decision.

Next, the Union asserts that the Hearing Examiner erred in balancing the interests of the parties under the test enunciated in Borough of Ellwood City, supra, because any benefit, or burden, of the vaccine to the individual police officers carries more weight than a generalized alleged benefit to public safety. Specifically, the Union contends that the Hearing Examiner erred in rejecting the Union's evidence that the effects of the vaccine are localized in an officer, many of which are negative, and that the benefit of the vaccine to the public is limited, at best, given that the vaccine does not completely eliminate the spread of COVID-19, and its effectiveness wanes over time.

The law is well-established that employers are not required to bargain over matters of inherent managerial policy. South Park Township Police Association v. PLRB, 789 A.2d 874 (Pa. Cmwlth. 2002), appeal denied, 806 A.2d 864 (Pa. 2002). Under the balancing test announced by the Pennsylvania Supreme Court to determine whether a particular subject is negotiable under Act 111, it must first be found that the subject matter in dispute is rationally related to the terms and conditions of employment, or germane to the work environment. Even if the matter is germane to the employees' working conditions, the subject matter will nevertheless be found to be a managerial prerogative if collective bargaining over the topic would unduly infringe upon the public employer's essential managerial responsibilities. Borough of Ellwood City, supra.; City of Philadelphia, supra.

In City of Philadelphia, the Pennsylvania Supreme Court opined that "matters of managerial decision making that are fundamental to public policy

or to the public enterprise's direction and functioning do not fall within the scope of bargainable matters under Section 1 [of Act 111.] Such managerial prerogatives include the standards of service, overall budget, use of technology, organizational structure, and the selection and direction of personnel." 999 A.2d at 569-570. See also AFSCME, District Council 89 v. Lebanon County, 54 PPER 26 (Final Order, 2022) (public employer's decision that strikes at the core of its public purpose to provide necessary standards of services and effectiveness of its operation, is within management prerogative).

In this case, the Hearing Examiner found that the Vaccine Policy concerned the working conditions of the police officers in that it required the officers to undergo one or more medical procedures involving being injected with a needle containing a vaccine that has demonstrable side effects. The Hearing Examiner further noted that side effects from the COVID-19 vaccine are common and may impact the health and safety of the officers as well as other terms and conditions of employment such as sick leave, insurance and pensions. Concerning the County's reasons for implementing the Vaccine Policy, the Hearing Examiner determined that the County's managerial concerns were (1) protecting the health and safety of the members of the public; and (2) ensuring adequate staffing in order to continue providing critical services to the public. In balancing these competing interests, the Hearing Examiner held that requiring bargaining over the Vaccine Policy would unduly infringe on the County's managerial interests as it would delay implementation of the policy thereby frustrating the policy's intended purpose of protecting the health and safety of the public and adequate staffing for the provision of public services.

The Board's decision in Amalgamated Transit Union, Division 1279 v. Cambria County Transit Authority, 21 PPER ¶ 21007 (Final Order, 1989), is instructive. In that case, the Board held that the transit authority's unilateral implementation of a random drug and alcohol testing program was within its managerial authority. In balancing the interests of the parties, the Board found that the transit authority's interest in providing a safe and effective transit system outweighed the intrusiveness of such testing on the employees' expectations of privacy. However, the Board emphasized that its decision was based upon the particular facts of the case stating, in relevant part, as follows:

It is important to note that the result we reach today does not mean that the decision to test employees for drug/alcohol abuse will always be a managerial prerogative. Other public employers, even those engaged in similar enterprises, may not decide unilaterally to test their public employees solely in the name of integrity and efficiency of public service. As we have noted earlier in this decision, the balance in this case tips in favor of the public employer because (1) the [transit authority] has demonstrated a real problem among its employees and (2) the public service involved mandates unimpaired service of its employees to prevent immediate and substantial safety risks. The Board will sanction an employer's unilateral decision to randomly test its employees for drug or alcohol abuse only where a real drug or alcohol problem is demonstrated among the employer's work force and where an immediate and substantial public safety risk is presented.

Cambria County Transit Authority, 21 PPER at 26.

As noted by the Hearing Examiner, the reasons first put forth in the County's press release for implementing the Vaccine Policy were established by the evidence and testimony of record. Indeed, it was shown at the hearing that from the beginning of the worldwide pandemic in Spring of 2020 until the Spring of 2021, and then again from the Summer of 2021 until December of 2021, many employees missed a substantial amount of time from work due to COVID-19. (2/23/22 N.T. 35-39, 153-154). Further, as stated by the Hearing Examiner, "the County needs healthy employees showing up to work to maintain the effectiveness of its vital programs, including the Police Department." (PDO at 19). Additionally, the record established an immediate and substantial public safety risk through the transmission of the COVID-19 virus supporting the County's December 1, 2021 deadline for the officers receiving the COVID-19 vaccine. Therefore, under these unique factual circumstances with regard to the Covid-19 pandemic, based on the reasoning in Cambria County Transit Authority, the Hearing Examiner did not err in finding that the County's implementation of the Vaccine Policy was within its managerial prerogative and not subject to mandatory bargaining. Borough of Ellwood City, supra; City of Philadelphia, supra; Lebanon County, supra.

The Union argues that the County failed to provide evidence of the effectiveness of the COVID-19 vaccine to support its decision to implement the Vaccine Policy. However, as stated by the Hearing Examiner, the Board's review is limited to balancing the competing interests of the parties in this matter, and the Board will not delve into the wisdom of an employer policy once it has been determined to be a managerial prerogative. Correctional Institution Vocational Education Association PSEA/NEA v. Commonwealth of Pennsylvania, Department of Corrections, 37 PPER 118 (Final Order, 2006).

Similarly, in Matter of City of Newark, 469 N.J. Super. 366 (N.J. Super. Ct. App. Div. 2021), several unions challenged the City's mandate requiring all employees to receive a COVID-19 vaccine or suffer termination of employment. In rejecting that claim, and holding that the unions failed to show that the harm to City employees in getting the vaccine was greater than the harm to the City, as a whole, if they did not receive it, the New Jersey Superior Court wrote that:

Responsible health experts uniformly agree that the COVID-19 vaccines are safe and effective. Delaying the implementation of a COVID-19 vaccination mandate puts people who have contact with unvaccinated people at greater risk and is a harm the City has a right to protect against. For those same reasons, the public interest will be furthered, and will not be harmed, by the City's COVID-19 vaccination mandate.

Id. at 388.

Finally, the Union asserts that the Hearing Examiner erred in holding that the Vaccine Policy was not a new form of discipline because it exposes officers to potential discipline for conduct not previously chargeable, i.e. disqualification for failure to get a vaccine. In this regard, the Board agrees and finds that this matter is akin to the situation presented in Cambria County Transit Authority. In that case, the Board held that, although the transit authority's drug and alcohol policy was a matter of inherent managerial prerogative, the policy created an entirely new ground for employee discipline, i.e., discharge for failing to submit to a drug or alcohol test, which required bargaining over the disciplinary aspects of the policy.

Similarly, the police officers were not previously subject to discipline for failure to receive a vaccine and, therefore, the Vaccine Policy's disciplinary consequences of refusing the COVID-19 vaccine are an impact severable from the policy itself, and as such, subject to bargaining. International Association of Firefighters, Local 1803 v. City of Reading, 31 PPER ¶ 31151 (Final Order, 2000) (disciplinary provisions have a severable impact on terms and conditions of employment that are negotiable). However, an employer's obligation to bargain wages, hours and working conditions that are impacted or affected by, but severable from, the employer's implementation of a managerial prerogative, arises only upon an employee representative's demand to bargain those issues. International Association of Firefighters, Local No. 22, AFL-CIO v. City of Philadelphia, 28 PPER ¶ 28100 (Final Order, 1997). See also, Lackawanna County Detectives Association v. PLRB, 762 A.2d 792 (Pa. Cmwlth. 2000) (same). Here, the record is devoid of any evidence to establish that the Union expressly requested impact bargaining, and thus, no unfair labor practice has yet occurred. Therefore, the Union's exception on this issue is sustained, in part, and denied, in part. Accordingly, the Hearing Examiner's conclusion that the Vaccine Policy was not a new form of discipline is vacated.

After a thorough review of the exceptions and all matters of record, the Hearing Examiner did not err in concluding that the County's implementation of a mandatory COVID-19 Vaccine Policy did not violate Section 6(1)(a) or (e) of the PLRA. Accordingly, the Board shall sustain, in part, and dismiss, in part, the Union's exceptions and make the Proposed Decision and Order final as modified herein.

ORDER

In view of the foregoing and in order to effectuate the policies of the Pennsylvania Labor Relations Act and Act 111, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed by the Allegheny County Police Association are hereby sustained, in part, and dismissed, in part, and the September 7, 2022, Proposed Decision and Order be and the same is hereby made absolute and final as modified herein.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, James M. Darby, Chairman, Albert Mezzaroba, Member, and Gary Masino, Member, this sixteenth day of May, 2023. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within Order.