

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE, FORT PITT :
LODGE NO. 1 :
: :
v. : Case No. PF-C-22-30-W
: :
CITY OF PITTSBURGH :

FINAL ORDER

The City of Pittsburgh (City) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) on April 21, 2023, challenging a Proposed Decision and Order (PDO) issued on April 17, 2023. The City excepts to the Hearing Examiner's conclusion that the City violated Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA), as read *in pari materia* with Act 111 of 1968, when it denied a request made by the Fraternal Order of Police, Fort Pitt Lodge No. 1 (Union) for copies of camera footage of an incident for which police officers were disciplined. The Union filed a response to the exceptions on April 24, 2023. Following extensions of time granted by the Secretary of the Board, the City and the Union filed briefs on exceptions on May 22, 2023 and May 31, 2023, respectively. Upon review of the exceptions, and all matters of record, the Board makes the following:

ADDITIONAL FINDING OF FACT

18. The County's District Attorney's Office did not place any stipulations on the City's dissemination of copies of the body-worn camera footage to the Union. (N.T. 123; City Exhibit 9).

DISCUSSION

The facts relevant to the exceptions pertain to the Union's request for body-worn and in-car camera footage from an October 13, 2021, incident on Harriet Street involving a Mr. Jim Rodgers for which eight City police officers were disciplined, and for which they were subject to a related criminal grand jury investigation. (Findings of Fact (FF) 3 and 5).¹ The City and the Allegheny County District Attorney's office entered into a Memorandum of Understanding (MOU) on November 27, 2017, regarding law enforcement video and audio recordings. Pursuant to the MOU, the City agreed to refer to the District Attorney all requests for audio and video recordings which may contain evidence of criminal matters pursuant to 42 Pa.C.S. §67A01 *et seq.* Pursuant to the MOU, the District Attorney determines if such recordings are confidential or may be released. (FF 10).

The disciplined police officers and Union representatives were given access to view the body-worn and in-car camera footage of the incident during Step 1 and Step 2 of the grievance process which occurred in February 2022,

¹ Body-worn camera footage comes from a camera mounted on the police officer's chest which records audio and video. The in-car camera footage of this incident shows the back of the transport truck and the attending police officers. (FF 4).

at the Police Bureau headquarters. (FF 3). On April 8, 2022, the Union sent a letter to the City requesting in relevant part:

As you know, the [Union] has appealed the disciplinary action taken by the City as it relates to the affected [eight police officers]. Each case was processed to arbitration and assigned an arbitrator. We are in the process of confirming dates for a hearing. In anticipation of that hearing please forward a copy of the entire file maintained by the City as it related to Harriet Street and Jim Rogers. This includes the Critical Incident Review Board investigation, all attachments and media (audio and video).

(FF 5). The Union requested copies of the body-worn and in-car camera footage (and not just access) because it intends to have an expert in use-of-force review the camera footage and assist Union counsel in preparation for the arbitration proceedings. (FF 7).

The City did not immediately provide the information requested in the Union's April 8, 2022 request because Wendy Kobee, Esq., Associate Solicitor for the City, inadvertently overlooked the email. (FF 9). On May 17, 2022, the Union sent a letter to the City enclosing the Charge of Unfair Labor Practices filed with the Board on May 13, 2022, as well as reminding the City that the Union had not yet received the information requested in its April 8, 2022 letter. (FF 8).

After receiving the Charge and considering the request at that time, the City did not release the requested information because there was a related grand jury investigation which subjected the body-worn and in-car camera footage to legal confidentiality agreements with the County's District Attorney. (FF 9). In lieu of handing over physical copies of the body-worn and in-car video evidence, the City on June 24, 2022, offered the Union the ability to schedule as much time as necessary to view the footage at the Police Bureau headquarters with any prospective expert witness. (FF 11).

On September 16, 2022, by email, the City advised the Union as follows:

This afternoon the DA's office responded with approval for the City to provide copies of the BWC footage to the [Union]. The City will make arrangements to provide you with copies.

When we first started discussion of this, you had indicated that we could provide copies subject to a confidentiality agreement. Understanding that the Union may also want to provide copies to prospective experts, the City would like the confidentiality agreement to cover third parties with the Union agreeing to make the confidentiality terms known to the third parties. . . .

(FF 14). The County's District Attorney's Office did not place any stipulations on the City's dissemination of copies of the body-worn and in-car camera footage to the Union. (FF 18).

On September 19, 2022, the City sent an email to the Union indicating that the City would provide the in-car camera footage for the transport vehicle, which was then provided to the Union. (FF 15).

In September and October 2022, the City and the Union engaged in discussions over a draft confidentiality agreement between the parties over the City giving physical copies of body-worn camera evidence to the Union. No agreement over the language in the confidentiality agreement was reached. (FF 16). On October 17, 2022, the City advised the Union via email that:

The Union is refusing to commit to confidentiality. That failure potentially interferes with the City's confidentiality interests. Therefore, we renew our offer of June 24, 2022 to provide access to the information for the Union's partisan arbitrators and prospective expert witnesses through scheduled viewings of these videos at [the Police Bureau headquarters].

(FF 17).

Based on the evidence and testimony presented, the Hearing Examiner found as follows:

Compared to the Union's interest in the requested materials, the City's confidentiality interest in the body-worn camera footage, on this record, is not as compelling. I note here again that the City had the burden of showing that its interests outweighed the Union's.

* * *

On this record, the City has not met its burden of showing that its confidentiality interests in the body-worn camera footage outweigh the Union's interests in the material. Therefore, the City has committed unfair practices by refusing to produce a copy of the body-worn camera footage pursuant to the Union's request.

(PDO at 7-8).

On exceptions, the City argues that the Hearing Examiner erred in failing to find that the City has a legitimate and substantial confidentiality interest in the ongoing criminal investigation and concerns of the Union's possible disclosure of information from the body-worn camera footage. The City also contends that the Hearing Examiner failed to address the City's offer of a confidentiality agreement to accommodate the Union's need for the body-worn camera footage, under the analysis of AFSCME, Council 13 v. Commonwealth, Department of Revenue, 22 PPER ¶22069 (Final Order, 1991).

Absent the most compelling of circumstances, the Board defers to the credibility determinations of its hearing examiners who are able to observe the manner and demeanor of the witnesses during their testimony. Mt. Lebanon Education Association v. Mt. Lebanon School District, 35 PPER 98 (Final Order, 2004). The hearing examiner is free to accept or reject the testimony of any witness in whole or in part. AFSCME, District Council 84, AFL-CIO v. Commonwealth of Pennsylvania, 18 PPER ¶18028 (Final Order, 1986). Based on the credited evidence and testimony, the Hearing Examiner is permitted to make relevant findings of fact based on reasonable inferences supported by the record evidence. St. Joseph's Hospital v. PLRB, 373 A.2d 1069 (Pa. 1977); International Association of Firefighters Local 840 v. Larksville Borough, 48 PPER 82 (Final Order, 2017).

First, there is no compelling reason presented to overturn the Hearing Examiner's rejection of the City's alleged concerns that the Union would indiscriminately disclose information from the body-worn cameras. In this regard the Hearing Examiner found that "[i]n this matter, the Union has only discussed allowing Union leadership, expert witnesses, the disciplined employes, and Union counsel the opportunity to view the body-worn camera footage. The record does not support the City's concern that the Union would disclose the requested information irresponsibly." (PDO at 8). This finding is supported by substantial evidence of record, including the testimony of Robert Swartzwelder, a police officer with the City and president of the Union, who testified that "[w]e know it's confidential information and not going to release it. We don't believe we have an obligation ... to respond to you in any way than we accept responsibility for the acceptance of our documents." (N.T. 79). The substantial evidence of record supports the conclusion that the Union understood the City's concerns and intended to use the body-worn camera footage exclusively in connection with its prosecution of the grievance and in the arbitration proceedings regarding the City's discipline of its members. Accordingly, the Hearing Examiner did not err in rejecting the City's concern that the Union would disclose information from the body-worn camera footage outside the context of the grievance and arbitration process.

Secondly, the Hearing Examiner did not err in finding that the Union's interest in the body-worn camera footage for purposes of the grievance and arbitration process outweighed the City's claims of a confidentiality interest in the ongoing criminal investigation. In this regard, notably the City did not allege before the Hearing Examiner, nor on exceptions, any confidentiality interests of its own in the body-worn camera footage but only as it related to the pending criminal investigations.²

Further, we agree with the Hearing Examiner that neither 42 Pa.C.S. § 67A01 et seq., nor the November 27, 2017, MOU between the City and the Allegheny County District Attorney's office entered pursuant thereto, usurped the City's obligations to the Union under Act 111 and the PLRA. Commonwealth, Department of Revenue, supra. However, for purposes of assessing the City's claim of a confidentiality interest in the criminal matter, the MOU is telling of the City's good-faith dealings with the Union. Under the MOU, the City agreed to refer to the District Attorney all requests for audio and video recordings which may contain evidence of criminal matters and that the District Attorney will determine if such recordings may be released. (FF 10).

Thus, relevant here, under the MOU upon which the City relies, whether the City had a confidentiality interest in releasing the body-worn camera footage relevant to a pending criminal matter, was to be determined by the County District Attorney's Office. In that regard, on September 16, 2022, the County District Attorney's Office approved the City's release of copies of the body-worn camera footage to the Union, without any stipulations on the City's dissemination of copies of the body-worn camera footage to the Union. Thus, the District Attorney's Office, in whom the City deferred to for the release of confidential information in criminal matters, did not require a confidentiality agreement or other conditions for the release of the body-worn camera footage to the Union. Accordingly, as of September 16, 2022, the

² "No reference may be made in the statement of exceptions to any matter not contained in the record of the case[, and] [a]n exception not specifically raised shall be waived." 34 Pa. Code §95.98(a)(2) and (3).

City no longer had a good-faith claim of a confidentiality interest in the ongoing criminal investigation as regards the release of the body-worn camera footage to the Union.

Likewise, the Hearing Examiner did not err in rejecting the City's offer of a confidentiality agreement to accommodate the Union's need for the body-worn camera footage as a defense to the unfair labor practice charge. After the District Attorney's Office approved the release of the body-worn camera footage without stipulations or conditions, the City had no stated viable interest in the criminal matter to impose a confidentiality agreement. Accordingly, the City's attempts to impose a confidentiality agreement after September 16, 2022, is not a defense to the finding of an unfair labor practice for a failure to bargain in good-faith under Section 6(1)(e) of the PLRA. See Commonwealth, Department of Revenue, *supra*.

After a thorough review of the exceptions and all matters of record, the Hearing Examiner properly concluded that the City violated Section 6(1)(a) and (e) of the PLRA by refusing to provide copies of the body-worn camera footage requested by the Union. Accordingly, the Board shall dismiss the exceptions and make the Proposed Decision and Order final.³

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 City of Pittsburgh are hereby dismissed, and the Proposed Decision and Order issued on April 17, 2023, shall be, and the same is, hereby made absolute and final.

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 twenty-first day of November, 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.

³ On April 17, 2023, the City filed with the Board an Affidavit of Compliance evidencing that the City has provided copies of the body-worn camera footage in accordance with the PDO. Accordingly, no further remedial relief is necessary in this Final Order.