

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE, :
LODGE NO. 5 :
 :
v. : Case No. PF-C-10-84-E
 :
CITY OF PHILADELPHIA :

PROPOSED DECISION AND ORDER

On May 27, 2010, the Fraternal Order of Police, Lodge 5 (FOP or Complainant) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) alleging that the City of Philadelphia (City or Respondent) violated Sections 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA) as read *in pari materia* with the Policemen and Firemen Collective Bargaining Act (Act 111) by unilaterally issuing a new disciplinary code.

On July 21, 2010, the Secretary of the Board issued a Complaint and Notice of Hearing, in which the Board assigned the case to a conciliator for resolution of the matters in dispute through mutual agreement of the parties, and designated September 1, 2010, in Philadelphia as the time and place of hearing, if necessary, before Timothy Tietze, Esquire, a Board Hearing Examiner. The conciliator did not resolve the matters in dispute. Therefore, a hearing was necessary.

On the day of the hearing, the Examiner continued the hearing at the City's request, over the FOP's objection. The Examiner also requested that the parties consider submitting the case on factual stipulations in lieu of a hearing. On November 9, 2010, the Examiner notified the parties that he had not heard from the parties about whether stipulations might negate the need for a hearing. He also notified the parties that he had no hearing dates left in the year and that if stipulations were not feasible, then he would see that the case was transferred to another examiner for hearing next year.

On June 9, 2011, Hearing Examiner Donald Wallace, Esquire informed the parties that the Board had appointed him to hear the case and that a hearing would be held on September 13, 2011.

On September 12, 2011, the Examiner continued the hearing to October 3, 2011, on the City's motion over the FOP's objection. On September 23, 2011, private counsel for the City entered her appearance and requested a continuance of the October 3 hearing since the City just retained her firm's services the day before. The FOP counsel stated he understood and requested that the hearing be rescheduled promptly. The Examiner rescheduled the hearing for November 22, 2011.

On November 17, 2011, the Examiner continued the hearing at the FOP's request without objection from the City. The Examiner notified the parties that the case would be rescheduled once the Board appointed a new Examiner, as he was retiring.

On December 2, the Board appointed Hearing Examiner Thomas P. Leonard, Esquire, to hear the case. On December 22, the Examiner notified the parties that a hearing would be held on April 16, 2012. The Examiner continued the hearing to October 17 and 18, 2012, on the FOP's motion without objection from the City.

The hearing was held on those dates, at which time the parties were given an opportunity to present testimony, cross examine witnesses and introduce documentary evidence. On January 11, 2013, the FOP filed a brief. On March 8, 2013, the City filed a brief.

The hearing examiner, on the basis of the evidence presented by the parties at the hearing and from all other matters of record, makes the following:

FINDINGS OF FACT

1. The Fraternal Order of Police, Lodge 5 is the exclusive representative for approximately 6,500 employees employed by the City of Philadelphia's police department, with the exception of the Commissioner and Deputy Commissioners. (N.T. 14, 44)
2. As the exclusive representative of the police department employees, the FOP has entered into a series of collective bargaining agreements with the City and has been party to several interest arbitration awards, the most recent of which covers the term of July 1, 2009 through June 30, 2014. (N.T. 149, Respondent Exhibit 3)
3. The FOP's exclusive representative status is memorialized in the collective bargaining agreement as follows: "The City recognizes Lodge No. 5 of the Fraternal Order of Police as the exclusive collective bargaining representative of the bargaining unit covered by this Contract, pursuant to Act 111..." (N.T. 149, Respondent Exhibit 3 at 1 (Article II - Scope of Agreement)).
4. The City of Philadelphia's police department has had a Disciplinary Code (Code) in place for over 50 years. (N.T. 10, 147, Complainant Exhibit 1)
5. The City did not bargain with the FOP when it first implemented the Code. The Code was put into place before the General Assembly enacted, the Policemen and Firemen Collective Bargaining Act, (Act 111), 43 P.S. § 217.1 et seq., in 1968. (N.T. 39, 152, 186)
6. In 2004, then-Police Commissioner Sylvester Johnson wanted to make changes to the Code. To that end, proposals to modify the Code were sent to then-FOP President Robert Eddis by Captain James Brady in May 2005. (Complainant Exhibit 2; N.T. 22)
7. President Eddis responded to Captain Brady by letter dated June 28, 2005, stating:

A fair review of the documents that you forward for our consideration quickly revealed that you are not proposing minor or insignificant modifications to existing terms and conditions of employment, but rather are proposing to effectuate what would constitute wholesale complete changes to those terms and conditions under which bargaining unit members are employed..

Simply by way of illustration and not intending to make any effort to be all inclusive, we point out that the Department proposes to modify the existing Disciplinary Policy, and thereby the terms and conditions of employment of the bargaining unit, so as to:

d) *significantly increase the discipline imposed for existing offenses as well as the duration of the reckoning periods for those offenses;*

e) create entirely new offenses for conduct that had not previously been a source of discipline and to impose specific discipline thereon.

In short, we believe that the issues that raised [sic] with regard to the ... proposed modifications addressed hereinbefore constitute mandatory subjects of bargaining which should have been submitted to the collective bargaining process underlying the most recent Act 111 proceedings. We see little purpose in opening the collective bargaining contract for the purpose of now belatedly addressing those issues and specifically decline to do so.

(N.T. 22, Complainant Exhibit 3 (emphasis added))

8. Deputy Commissioner John Gaittens sent the following letter to President Eddis on November 30, 2005:

The Police Department has been utilizing the current Disciplinary Code for many years. As you are aware, according to the report authored by the Mayor's Task Force on Police Discipline, released on November 27, 2001, "Discipline of officers is hampered by an outdated, imprecise Disciplinary Code... In a nutshell, the Code is seriously deficient because it is overly vague in its description of prohibited conduct." The Philadelphia Police Department is committed to updating and revising the current Disciplinary Code. This revision is sought not only for the purpose of clarity and consistency to ensure fair and impartial discipline for all police employees, but to strengthen departmental ethics and accountability.

In according with the 1996-1998 AAA [Act 111 interest arbitration] Award, item #6, the Police Department wishes to establish a Labor Management Committee, along with the Fraternal Order of Police, to discuss proposed changes to the Disciplinary Code...

Please advise me as to your selection of personnel to represent the Fraternal Order of Police. Thank you for your attention in this matter.

(N.T. 36, Respondent Exhibit 2)

9. In turn, the FOP designated three individuals - Roosevelt Poplar, Eugene Blagmond, and Jerry Stanshine - to serve as its representatives on the committee. (N.T. 36, Respondent's Exhibit 2)
10. The committee met on March 22, April 19, and June 21, 2006. The City submitted notes of these meetings during this unfair labor practice hearing. A review of these notes reveals substantial give-and-take between the FOP and the City. During the March meeting, for example, the City's notes reflect the following:
- The City agreed to lower the first offenses for violations of Sections 1.11, 1.12, 1.13, 1.20, 1.21, and 1.25;
 - The City agreed to consider certain other FOP suggestions, such as limiting demotion to certain offenses, and limiting the number of offenses for which the City proposed significantly expanding the reckoning period.

(N.T. 154, 156, Respondent Exhibit 5 at 1)

11. Similarly, at the April, 2006 meeting the City agreed to reduce the penalties for first offenses under Sections 1.60, 1.80, 1.81, 4.10, 4.20, and 4.40 (N.T. 154, Respondent's Exhibit 5 at 2)

12. The City decided to cease holding the sessions after it learned that the FOP had referenced them during a grievance arbitration. (N.T. 156, 171).
13. After the City ended the negotiations over the proposed changes in the 2005 Code, it did not then unilaterally implement any changes in the Code. (N.T. 24).
14. In January, 2008, the Mayor appointed Chief Charles H. Ramsey as Police Commissioner. He concluded that the several parts of the Disciplinary Code were in need of reform. He convened a task force of high level department officers. The task force started with the 2005 draft code that had been the subject of discussions. The Commissioner sought to have any changes to the Code reflect the values of the Department—honor, service and integrity. (N.T. 297-298).
15. In 2008, pursuant to the timelines provided in Act 111, the parties declared impasse during negotiations for a collective bargaining agreement to commence July 1, 2009, and submitted specifications of issues in dispute. The City's specification of issues did not propose changes to the Code. The City did propose, however, limitations on an arbitrator's ability to reduce discipline in cases where he found the officer guilty of the misconduct alleged. (N.T. 150, 162-163)
16. The City was not awarded the proposed changes by the arbitration panel. (N.T. 163)
17. Deputy Commissioner Gaittens conceded in the present hearing that the City could have proposed changes to the Code during the Act 111 process, but did not. (N.T. 163)
18. On April 26, 2010, Commissioner Ramsey communicated to rank and file members of the bargaining unit that there would be a new disciplinary code, effective May 1, 2010. (N.T. 298, Respondent Exhibit 15)
19. The New Code contains three basic parts. First, there is the "notice" component, which advises employees what conduct will result in a discipline. Next are the levels of discipline known as penalties, which are often progressive. Finally, there is a "reckoning period," which is "that period of time during which an employee is expected to have a record free of the same type of offense he/she was found guilty of previously." (N.T. 9, 34, Complainant Exhibit 1 at 1)
20. The New Code increased the penalties for several rule violations. Table 1, developed by the FOP, sets forth the changes in penalties in the New Code for rules that existed in the Old Code, with the increases in penalties in bold:

TABLE 1

SECTION	OLD DISCIPLINE	NEW DISCIPLINE
1-§002-10	30 days to dismissal for 1 st offense	10 days to dismissal for 1 st offense
1-§008-10	Dismissal for 2 nd offense	30 days to dismissal for 2 nd offense
1-§009-10	10 days to dismissal for 1 st offense	Dismissal for 1 st offense
1-§010-10	Dismissal for 2 nd offense	30 days to dismissal for 2 nd offense
1-§013-10	10 days to dismissal for 1 st offense; 30 days to dismissal for 2 nd offense	20 days to dismissal for 1 st offense; dismissal for 2 nd offense
1-§006-10	30 days to dismissal for 1 st offense	Dismissal for 1 st offense
1-§017-10	Reprimand to 5 days for 1 st offense; 5-10 days for 2 nd offense	Reprimand to 10 days for 1 st offense; offense; 10-15 days for 2 nd offense
2-§003-10	Reprimand to 10 days for 1 st offense; 10-15 days for 2 nd offense; 25-30 days for 3 rd offense	20-30 days for 1 st offense; 30 days to dismissal for 2 nd offense; dismissal for 3 rd offense
2-§005-10	15-30 days for first offense of intoxicated off-duty in full uniform; 30 days to dismissal for 2 nd offense	5-10 days for 1 st offense; 10-20 days for 2 nd offense

2-§010-10	5-1 days for 1 st offense; 15-20 days for 2 nd offense; 25-30 days for 3 rd offense	Reprimand to 10 days for 1 st offense; 10-20 days for 2 nd offense; 20-30 days for 3 rd offense
4-§002-10	5-30 days for 1 st offense; 15-30 days for 2 nd offense	15-30 days for 1st offense; 30 days to dismissal for 2nd offense
4-§003-10	5-10 days for 1 st offense; 15-30 days for 2 nd offense	15-30 days for 1st offense; 30 days to dismissal for 2nd offense
5-§002-10	Reprimand to 10 days for 1 st offense; 15 days to dismissal for 3 rd offense	5-10 days for 1st offense; 30 days to dismissal for 3rd offense
5-§007-10	2-5 days for 1 st offense; 15-20 days for 2 nd offense; dismissal for 3 rd offense	Reprimand to 5 days for 1 st offense; 5-10 days for 2 nd offense; 20-30 days for 3 rd offense
5-§009-10 5-§010-10	Reprimand to 5 days for 1 st offense; 5-10 days for 2 nd offense; 15-20 days for 3 rd offense; dismissal for 4 th offense	2-5 days for 1 st offense; 10 days to dismissal for 2nd offense (5-§010-10); Dismissal/15 days to Dismissal for 3rd offense
5-§006-10	Reprimand to 5 days for 1 st offense; 5-10 days for 2 nd offense; 10-20 days for 3 rd offense	Reprimand to 10 days for 1 st offense; 10-20 days for 2 nd offense; 20 days to dismissal for 3 rd offense
5-§013-10	Reprimand to 10 days for 1 st offense; 15-20 days for 2 nd offense; 15-30 days for 3 rd offense	Reprimand to 5 days for 1 st offense; 5-10 days for 2 nd offense; 15-20 days for 3 rd offense
5-§016-10	Reprimand to 5 days for 1 st offense; 5-10 days for 2 nd offense; 15-20 days for 3 rd offense	Reprimand to 10 days for 1 st offense; 10-20 days for 2 nd offense; 20-30 days for 3 rd offense
6-§005-10	15-20 days for 2 nd offense; 25-30 days for 3 rd offense	10-15 days for 2 nd offense; 20-30 days for 3 rd offense
6-§006-10	Dismissal for 3 rd offense	15-20 days for 3 rd offense
6-§007-10	Reprimand to 5 days for 1 st offense; 5-10 days for 2 nd offense; dismissal for 3 rd offense	5 days to dismissal for 1st offense; 15 days to dismissal for 2nd offense; 30 days to dismissal for 3rd offense
6-§011-10	15-20 days for 2 nd offense	5-10 days for 2 nd offense; 15-20 days for 3rd offense
6-§010-10	5 days to dismissal for 1 st offense; 20 days to dismissal for 2 nd offense	Reprimand to dismissal for 1 st offense; 15 days to dismissal for 2 nd offense
6-§023-10	5-10 days for 1 st offense; 15-20 days for 2 nd offense; 25-30 days for 3 rd offense	Reprimand to 5 days for 1 st offense; 5-10 days for 2 nd offense; 10-20 days for 3 rd offense
6-§024-10	5-10 days for 1 st offense; 15-20 days for 2 nd offense; 25-30 days for 3 rd offense	20-30 days for 1st offense; 30 days to dismissal for 2nd offense; dismissal for 3rd offense
7-§003-10	Reprimand to dismissal for 1 st offense	Reprimand to 5 days for 1 st offense; 5-10 days for 2nd offense; 10-15 days for 3rd offense
8-§003-10	Reprimand to 5 days and/or demotion for 1 st offense; 5-10 days and/or demotion for 2 nd offense; 15-20 days and/or demotion for 3 rd offense	2-10 days for 1 st offense; 10-20 days for 2 nd offense; 20 days to dismissal for 3 rd offense

(N.T. 48, 50, Complainant's Exhibit 8)

21. The New Code changed the reckoning periods for 29 sections of the Old Code (34 rules in the New Code). The New Code defines the "reckoning period" as

[T]hat period of time during which an employee is expected to have a record free of the same type of offense. All reckoning

periods shall be completed from the date the first offense was committed. For subsequent violations to apply, it must be shown that the employee was provided formal notice... of the first violation. Second and subsequent violations of the same section committed during the relevant reckoning period shall be treated as second or subsequent offenses. The same type of offenses committed after the reckoning period expires counts as the first offense.

(N.T. 159, Complainant Exhibit 4, Respondent Exhibit 7, p. ii)

22. Table 2, developed by the FOP, sets forth the old and new reckoning periods:

TABLE 2

OLD CODE SECTION	NEW CODE SECTION	CHARGE	OLD PERIOD	NEW PERIOD
1.05	1-§003-10	Failure to report offers of bribes, etc.	2 years	<i>Duration of employment</i>
1.15	1-§010-10	Making a false entry in a record or report	2 years	<i>Duration of employment</i>
1.25	1-§013-10	Fraternization	2 years	<i>Duration of employment</i>
1.35	1-§014-10	Fighting/quarreling on duty	2 years	5 years
1.60	2-§003-10	Odor of alcohol	2 years	5 years
1.75	1-§021-10 1-§020-10	Course of conduct	None	<i>Duration of employment</i>
2.01	2-§002-10 2-§004-10	Drinking/intoxicated	2 years	<i>Duration of employment</i>
2.05 2.15	2-§005-10	Intoxicated on duty	2 years	5 years
3.01	4-§002-10	Refusal to obey	2 years	5 years
3.05	4-§003-10	Profane language	2 years	5 years
4.10	5-§008-10 5-§009-10 5-§010-10	AWOL	None	2 to 5 years
4.15	8-§003-10	Failure to supervise	2 years	5 years
4.20	5-§011-10	Failure to comply with Commissioner's orders	1 years	2 years
4.25	5-§006-10	Failure to investigate	1 years	2 years
4.35	5-§013-10	Failure to report as witness	1 years	2 years
4.40	5-§014-10	Prisoner escape	1 years	2 years
5.01	6-§005-10	Soliciting	1 years	2 years
5.09	2-§010-10	Possession of alcohol	2 years	5 years
5.15	6-§007-10	Firearms procedures	2 years	5 years
5.18	6-§008-10	Firearms use	2 years	5 years
5.24	6-§011-10	Private auto on job	1 years	2 years
5.27	6-§012-10	Failure to report	1 years	2 years
5.33	6-§013-10	Tardiness	1 years	2 years
5.39	6-§014-10	Unauthorized persons in police vehicle	1 years	2 years
5.57	6-§017-10	Failure to salute	1 years	2 years
5.60	6-§010-10	"Leaks"	1 years	5 years
5.63	6-§018-10 6-§019-10	Failure to identify	1 years	2 years
5.78	6-§023-10 6-§024-10	Unapproved/prohibited outside employment	1 years	2/5 years

(N.T. 159, Complainant Exhibit 4, Respondent Exhibit 7, p. ii)

23. In the Old Code, when the City filed charges filed pursuant to 1.00 Unspecified, the reckoning period was for the duration of employment. Charges filed under the Sections 2.00, 3.00 and 4.00 Unspecified had reckoning periods of less than duration of employment. In the New Code, the City set a Duration of Employment reckoning period for the first three unspecified rules, 1-\$001-10, 2-\$001-10 and 3-\$001-10. It set a reckoning period of five (5) years for Unspecified Rules at 4-\$001-10 and 8-\$001-10. It set a reckoning period of two (2) years for Rules 5-\$001-10; 6-\$001-10 and 7-\$001-10. (N.T. 24, 34, Complainant Exhibit 4, Respondent Exhibit 7, 247, 316, Respondent Exhibit 13).
24. During the reckoning period, subsequent similar rule violations during that period will be punished with a progressively more severe discipline. (N.T. 11-13, 15-19)
25. On June 21, 2010, the City explained that infractions committed prior to May 1, 2010 were to be charged under the Old Code, while incidents occurring on or after May 1 would be charged under the New Code. (Complainant's Exhibits 4 and 7, Respondent Exhibit 7, N.T. 126)
26. The New Code repeated many of the same rules as the Old Code or made slight changes to them. The New Code also increased penalties for some of those rules. The New Code also separated some rules from the Old Code into two or more rules. The New Code also added entirely new rules. (N.T. 24, 34, Complainant Exhibit 4, Respondent Exhibit 7)
27. The Introduction in the New Code states,

The intent of this Disciplinary Code is to instill and support the core values of the Philadelphia Police Department by establishing fair and consistent penalties for violations of Philadelphia Police Department rules, policies and principles. The Articles herein are intended to direct the Police Board of Inquiry and all Commanders in administering such fair and uniform penalties. This code shall apply to all personnel of the Police Department. The core values of the Philadelphia Police Department are:

Honor - It is a privilege to serve as a member of the law enforcement community and especially as a member of the Philadelphia Police Department. Each day when you pin on your badge, remember those who went before you and the sacrifices made in the name of this badge. Treat your badge with honor, respect and pride. Do nothing that will tarnish your badge, for one day you will pass it on to another Philadelphia Police officer to honor and respect.

Service - Service with honor means providing police service Respectfully and recognizing the dignity of every person. We can demand that others respect them and their rights. We are in the business of providing police service with the highest degree of professionalism. Every day we come into contact with crime victims, residents afraid to enjoy their neighborhoods, and young people scared to stand up and do the right thing. Our job is to help them and to do so with courtesy and compassion.

Integrity - Integrity is the bedrock of policing and the foundation for building a successful relationship with our partners. Integrity means reflecting our values through our actions. It is not enough to espouse honor, service and integrity. Each of us must live these values in our professional and personal lives. We do this by being honest

in our dealings and abiding by the laws and respecting the civil rights of all. Serving with integrity builds trust between the community and the police.

Members of the Philadelphia Police Department must be morally and ethically above reproach at all times regardless of duty status. All members shall respect the sanctity of the law and shall be committed to holding themselves to the highest standard of accountability. No member shall depart from standards of professional conduct or disobey the law.

The following code includes specific behaviors that have been identified as violating this standard. However, to the extent that an employee's actions are not specifically described in this code, but have the effect of impairing the employee's ability to perform his or her duties, then the employee may be charged under the "Unspecified" charges.

Penalties recommended by either the Police Board of Inquiry or commanders for offenses shall be within the prescribed limit of any penalty which the Police Commissioner may impose. The Police Commissioner is the final authority on all disciplinary matters.

Transfer may be imposed for all disciplinary infractions.

Demotion may be imposed for all disciplinary infractions.

(N.T. 24, 34, Complainant Exhibit 4, Respondent Exhibit 7)

DISCUSSION

The Fraternal Order of Police, Lodge 5, alleges that the City of Philadelphia Police Department committed unfair labor practices when it unilaterally established a new disciplinary code. The New Code impacted the officers in several ways.

The list of rules grew from 58 to 107. The New Code increased the penalties and reckoning periods for many of the rules that were part of the Old Code. The New Code also unilaterally fixed the penalties and reckoning periods for the new rules.

Since at least 2004, the City Police Department leadership has been working to change the disciplinary code. In 2005 and 2006, the City and the FOP began discussions of the City's proposals for changing the disciplinary code, but the discussions ended without an agreement being reached. In 2008, newly appointed Police Commissioner Charles H. Ramsey, concluded that several parts of the code were in need of reform. He convened a task force of high level department officers. The task force started with a 2005 draft code that had been the subject of discussions. The Commissioner sought to have any changes to the code reflect the values of the Department – honor, service and integrity.

Despite holding several meetings, the City and the FOP did not reach agreement on the details in a new disciplinary code. Commissioner Ramsey then proceeded to issue the New Code. On April 26, 2010, the City announced to the rank and file officers that it was implementing the New Code, with an effective date of May 1, 2010. There is no dispute that the City unilaterally implemented a new disciplinary code without bargaining with the FOP.

The City presented various reasons for not bargaining this matter with the FOP. The reasons all appear to be sincerely grounded in a desire to deliver police service to the public with the highest degree of professionalism. However, the City's motivation is not relevant in judging the merits of the FOP's charge that the City violated its duty to bargain, as will be seen in the cases cited below.

Legal Principles

The Pennsylvania Supreme Court has applied a balancing test when deciding whether a managerial decision is a mandatory subject of bargaining for municipalities in collective bargaining relationships with their police and fire employees under the PLRA and Act 111. Once it is determined that the decision is rationally related to the terms and conditions of employment, the inquiry is 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. **Borough of Ellwood City v. Pennsylvania Labor Relations Board**, 606 Pa. 356, 998 A. 2d 589, at 600 (2010); **City of Philadelphia v. International Association of Firefighters, Local 22**, 606 Pa. 447, 999 A.2d 555, at 570-571 (2010).

It was in the non-uniformed employee setting where the Board first held that changes in an employer's policy that substantially increase the severity of discipline are mandatory subjects of bargaining. In **Pennsylvania Department of Transportation**, 18 PPER ¶ 18009 (Final Order, 1986), vacated and remanded, 543 A.2d 1255 (Pa. Cmwlth. 1988), 19 PPER ¶ 19159, the Board held that the Commonwealth violated its duty to bargain by unilaterally implementing revisions in employees' work rules where the rules set forth new gradations of offenses and prescribed penalties for violating the rules.

Later, the Board applied this principle to the Act 111 setting when it held that a public employer violates Section 6(1)(e) of the Pennsylvania Labor Relations Act (PLRA) as read *in pari materia* with Act 111 when it makes a change of policy that substantially increases the severity of discipline. In **IAFF, Local 1803 v. City of Reading**, 31 PPER ¶ 31151 (Final Order, 2000), the Board has concluded that, although the adoption of disciplinary rules is a matter of inherent managerial prerogative, disciplinary provisions have a severable impact on the terms and conditions of employment and therefore, such an impact is negotiable. In that case, the Board held that the implementation of an ethics code was a valid managerial prerogative but the city had a duty to bargain with the union before it could implement the code's disciplinary provisions.

In **Fairview Township**, 30 PPER ¶ 30209 (Proposed Decision and Order, 1998), 31 PPER ¶ 31019 (Final Order, 1999), *aff'd* No. 1890 C.D. 1998 (Pa. Cmwlth. 1999) (unreported decision), the Board held that employer violated its duty to bargain when it unilaterally implemented a change in the retention of disciplinary records policy effectively eliminating a reckoning period for disciplinary action taken against employees.

An employer's unilateral codification of an unwritten disciplinary rule is a change that must be bargained if the rule involves a mandatory subject of bargaining. **Commonwealth of Pennsylvania**, 22 PPER ¶ 22015 (Final Order, 1990) **City of Sharon**, 28 PPER ¶ 28218 (Proposed Decision and Order, 1997); **City of Reading**, *supra*. In the present case, the City argues that several of the rules are merely a codification of the City's longstanding practice of disciplining for misconduct of unwritten rules. However, this argument does not automatically remove the particular rule from a subject of bargaining; it must still be analyzed as to whether it is a mandatory subject of bargaining or a managerial prerogative.

An employer may not argue that the availability of a grievance arbitration procedure to judge whether a work rule is a mandatory subject of bargaining removes the need for the Board to judge the question. In **Pennsylvania Department of Transportation**, *supra*. the Board stated,

If employers may escape their duty to bargain over terms and conditions of employment simply because the alleged contract violations may be arbitrable, then the purpose of the Act is frustrated.

18 PPER at 28.

Even if a work rule is a managerial prerogative, it must not be vague or overbroad. In **Abington School District**, 18 PPER ¶ 18888 (Proposed Decision and Order, 1997), 19 PPER

¶ 19067 (Final Order, 1998), aff'd 570 A.2d 108 (Pa. Cmwlth. 1990) the Board relied upon federal law in determining if a work rule will survive a vagueness or overbreadth challenge. Citing **Peerless Publications**, 283 NLRB 334, 124 LRRM 1331 (1987), the Board held that an employer's work rule that affects the terms and conditions of employment will be allowed to stand if the employer can show that the rule is, on its face:

- (1) Narrowly tailored to substance, to meet with particularity only the employer's legitimate and necessary objectives, without being overly broad, vague, or ambiguous; and
- (2) Appropriately limited in its applicability to affected employees to accomplish necessarily limited objectives.

Peerless Publications, 124 LRRM at 1332.

An employer also violates its duty to bargain when it unilaterally changes a policy of purging disciplinary records after a period of time to a policy of keeping them permanently in the employee's records. **Fairview Township**, *supra*. Similarly, an employer violates its duty to bargain when it changes the "reckoning period" for a discipline which increases the time for which employees would be subject to a more severe level of discipline for the same offense. **City of Reading**, 34 PPER 34 (Proposed Decision and Order, 2003), citing **Fairview Township**, *supra*.

Increases for Existing Penalties and Penalties for New Rules

As set forth in Table 1 (Finding of Fact 20) the New Code made a number of changes to the severity of the discipline imposed upon police officers. It should also be pointed out that, for some matters, the discipline to be imposed was reduced. But all the changes in the penalties were placed in the New Code without bargaining.

Employee discipline is a mandatory subject of bargaining. **City of Reading**, 31 PPER ¶ 31151 (Final Order, 2000). When the City implemented the changes in penalties for the violations of the above rules without bargaining with the FOP, it ran afoul of the PLRA.

As a remedy, the increases in penalties must be rescinded. The City must cease and desist from issuing discipline under the increased penalties until the City and FOP have bargained over the matter.

The New Code includes several changes in which the penalty was decreased. As for those rules, the City will not be required to rescind the disciplinary penalties that have been reduced, even though they have been imposed unilaterally without bargaining. The Board has long held that it will not order a return to the status quo where doing so would penalize employees because the employer, not the employees, is deemed to have committed an unfair labor practice. See, **Warminster Township**, 31 PPER ¶ 31156 (Final Order, 2000); **Philadelphia Housing Authority**, 22 PPER ¶ 22227 (Final Order, 191), *aff'd sub nom.*, **Philadelphia Housing Authority v. Pennsylvania Labor Relations Board**, 620 A.2d 594 (Pa. Cmwlth. 1991).

Additionally, for the New Code's entirely new rules, the City unilaterally set the penalties. For all of those rules, the City should rescind the penalties until it has bargained with the FOP. **AFSCME Council 13 v. Commonwealth of Pennsylvania, Department of Transportation**, 17 PPER ¶ 17086 (Proposed Decision and Order, 1984), 18 PPER ¶ 18009 (Final Order, 1986), vacated and remanded, 543 A.2d 1255 (Pa. Cmwlth. 1988), 19 PPER ¶ 19159.

Increases for Reckoning Periods and Reckoning Periods for New Rules

As set forth in Table 2, in Finding of Fact 22, the City changed the reckoning periods that had been in 29 sections of the Old Code and are now in 34 rules of the New Code.

The "reckoning period" is defined as:

[T]hat period of time during which an employee is expected to have a record free of the same type of offense. All reckoning periods shall be completed from the date the first offense was committed. For subsequent violations to apply, it must be shown that the employee was provided formal notice.. of the first violation. Second and subsequent violations of the same section committed during the relevant reckoning period shall be treated as second or subsequent offenses. The same type of offenses committed after the reckoning period expires counts as the first offense.

As FOP President McNesby testified, the longer the reckoning period, the greater the chance that the officer will face more severe discipline for the same offense.

As an example of what has happened in the New Code, when an officer is found to have violated Rule 1-§010-10 (Section 1.15 of the Old Code), "making a false entry in a record or report" the City increased the reckoning period from 2 years to Duration of Employment. When the Old Code and the New Code are compared, as set forth above in the Findings of Fact, it is clear that the City substantially changed a number of the provisions' reckoning periods. Some reckoning periods have been doubled or extended throughout the entirety of an officer's employment.

The New Code provides that "[t]he 'reckoning period' as used in this code is the period of time during which an employee is expected to have a record free of the same type of offense.. Second and subsequent violations of the same section committed during the relevant reckoning period shall be treated as second or subsequent offenses." (Respondent Exhibit 7, at ii). Thus, the expansion of these reckoning periods significantly increases the time for which employees will be subject to the increasing progressive discipline for the various offenses. By way of example, under the Old Code an individual disciplined in the range of a reprimand to 10 days suspension for quarreling on duty only had a period of two years in which a similar charge could result in his receiving another 10 to 20 days suspension. Under the New Code, an individual is now subject to the increased penalty for quarreling for five years.

In **Fairview Township**, 30 PPER ¶ 30209 (Proposed Decision and Order, 1999, 31 PPER ¶ 31019 (Final Order, 2003), aff'd No. 1890 C.D. 1998 (Pa. Cmwlth. 1999) (unreported decision), the Board found that the employer violated its duty to bargain when it unilaterally changed its policy for the retention of disciplinary records so that it kept records of all discipline permanently, as opposed to their retention for various lengths of time depending on the severity of the discipline. In **Fraternal Order of Police, Lodge 9 v. City of Reading**, 34 PPER 34 (Proposed Decision and Order, 2003), I found that the City violated its duty to bargain when it enacted a new disciplinary code that established new reckoning periods which for which employes would be subject to progressive discipline.

The City argues that the changes it made to the reckoning periods in the various rule violations were a valid exercise of managerial authority. The City argues that the increases were not arbitrary decisions but instead were done after evaluating the severity of the offense and its effect on the perception and integrity of the Department. The City argues that its interest in discouraging recidivism, particularly for the more serious offenses, promotes the managerial interest in punishing repeat offenders more severely.

However, the same employee interests that were cited by the Board in **Fairview Township** and **City of Reading**, are present here, i.e. the extension of the time in which discipline will face more severe discipline for the same offense. Those employe interests are not outweighed by the employer's interest in prohibiting recidivistic behavior by increasing the period of time that the penalty remains over the employee. The City should rescind the new reckoning periods.

The increases in the reckoning periods set forth in the Table 2 were for rules that were not changed. The City has also established reckoning periods for the eight Unspecified rules in the New Code. In the Old Code, there were no reckoning periods for

charges brought under the category of "Unspecified", since the City did not have such a written category of rules. In the New Code, the City has placed a reckoning period of Duration of Employment for the first of the three "Unspecifieds": Rules 1-§001-10, 2-§001-10 and 3-§001-10. The City placed a five year reckoning period For Rules 4-§001-10 and 8-§001-10. The city placed a two year reckoning period for Rules 5-§001-10, 6-§001-10 and 7-§001-10. These new reckoning periods are further enhancements to the penalty scheme and place the officers under the threat of increased penalties during the longer reckoning period. The City should bargain these reckoning periods because they are effectively part of the penalty formula.

Finally, in the New Code, the City has unilaterally set reckoning periods for the entirely new rules as well. In the discussion of each rule, I have identified those reckoning periods. The City should rescind those reckoning periods until the City bargains those reckoning periods with the FOP because they, too, are effectively part of the penalty plan unilaterally implemented by the City.

Rule by Rule Analysis of the New Code

The rules will be analyzed individually pursuant to the legal standards the Board has established in reviewing challenges to disciplinary rules in other unfair labor practice charge cases to determine whether the City should have first bargained with the FOP before using them.

The Old Code had 58 sections. The New Code has 107 rules, divided into eight separate articles. The New Code repeats many of the same rules from the Old Code or makes slight changes to them. The New Code also divides some rules from the Old Code into two or more rules. In one case, the New Code merges two rules into one rule. As for those three types of new rules, the City has no obligation to bargain over the substance of the rules because there has been no change.

The New Code also increased penalties for some of the old rules. In those cases, the City is under an obligation to bargain the increased penalties. See, **IAFF, Local 1803 v. City of Reading**, 31 PPER ¶ 31151 (Final Order, 2000).

The New Code also increased the reckoning periods for some of the old rules. In those cases, the City is under an obligation to bargain the length of the reckoning period. In **Fraternal Order of Police, Lodge 9 v. City of Reading**, 34 PPER 34 (Proposed Decision and Order, 2003), I found that the City violated its duty to bargain when it enacted a new disciplinary code that established new reckoning periods, that changed the time for which employees would be subject to progressive discipline.

The New Code also added entirely new rules. In those cases, whether the new rules are found to be a mandatory subject of bargaining or a managerial prerogative, the City is under an obligation to bargain the penalties and the reckoning periods. See, **IAFF, Local 1803 v. City of Reading**, *supra*. and **Fraternal Order of Police, Lodge 9 v. City of Reading**, *supra*.

Article I: Conduct Unbecoming

1-§001-10 Unspecified

This is a new rule. FOP argues that "conduct unbecoming" is vague and that it provides no notice or guidance to police officers as to what conduct is prohibited. The FOP also argues that the concept of "unspecified" lacks any notice to employees as to what may constitute a violation of the New Code.

In its defense, the City argues that under the Old Code, the Introduction to the Code put officers on notice that "[o]ffenses not included in the following list shall be within the prescribed limits. The schedule shall in no way limit any penalty which the Commissioner may impose." Charges that did not fit within any of the specified charges in the Old Code were charged as "1.00 Unspecified," "2.00 Unspecified," "3.00 Unspecified," "4.00

Unspecified," and "5.00 Unspecified." With this history of the enforcement under the Old Code, the City argues that Rule 1-§001-10 does not represent a change in working conditions.

However, the City's argument is contrary to the Board precedent holding that an employer's unilateral codification of an unwritten disciplinary rule is a change that must be bargained if the rule involves a mandatory subject of bargaining. **Commonwealth of Pennsylvania**, 22 PPER ¶ 22015 (Final Order, 1990) **City of Sharon**, 28 PPER ¶ 28218 (Proposed Decision and Order, 1997); **City of Reading**, *supra*. In the Old Code there was never a written unspecified rule for this section.

It is necessary, therefore, to subject this rule to the balancing test set forth in **Borough of Ellwood City v. Pennsylvania Labor Relations Board**, *supra* and **City of Philadelphia v. International Association of Firefighters, Local 22**, *supra* to determine whether it is a managerial prerogative or a mandatory subject of bargaining.

Under this balancing test, the City made a convincing case that the rule is a proper exercise of a management prerogative. The rule sets out to prohibit conduct that falls below the standards expected of a Philadelphia police officer, as outlined in the Introduction of the New Code. The Introduction explains that the Department expects that no member shall depart from standards of professional conduct or disobey the law and that the code includes specific behaviors that have been identified as violating this standard. However, to the extent that an employee's actions are not specifically described in this code, but have the effect of impairing the employee's ability to perform his or her duties, then the employee may be charged under the "unspecified" charges. Commissioner Ramsey explained in his testimony, the "unspecified" charges are necessary because a disciplinary code cannot possibly encompass and clearly articulate every single act that a person might do that would compromise the integrity of the Department and inhibit the effectiveness of the Department in serving the needs of citizens.

Furthermore, the City made a convincing case that the rule does not violate the prohibition against vague rules. Accordingly, the City does not have to bargain the rule itself.

The rule will stand but the City must bargain the penalty provisions and the reckoning period, which the City has set at duration of employment. **IAFF, Local 1803 v. City of Reading**, *supra*. and **Fraternal Order of Police, Lodge 9 v. City of Reading**, *supra*.

1-§002-10 Accepting bribes or gratuities for permitting illegal acts.

This is the same rule as found in Section 1.01 of the Old Code, so there is no change. Also, in **City of Reading**, 34 PPER 34, (Proposed Decision and Order, 2003), I found a similar rule furthered integrity in government and was a proper exercise of managerial prerogative.

1-§003-10 Failure to immediately report, in writing to their Commanding Officer, offers of bribes or gratuities to permit illegal acts.

This rule adds the word "immediately" to the old rule found at Section 1.05. The addition does not substantially change the old rule. Even if it did, the added word provides a guideline to officers of the acceptable standards of conduct regarding such reporting and is a proper exercise of managerial prerogative. The City increased the reckoning period from 2 years to duration of employment. The City should rescind and bargain the reckoning period.

1-§004-10 Failure to officially report corruption, or other illegal acts.

This is a streamlining of the language found in Section 1.10 of the Old Code. The streamlining does not alter the substance of the rule or the conduct prohibited by the rule. The rule will stand.

1-§005-10 Failure to stop, or attempt to stop, an officer using force when that force is no longer required.

This is a new rule. The FOP argues that this a vague rule because it a highly subjective standard as to "when force is no longer required," particularly so since the department follows a policy with "use of force continuum" depending on the situation the officer finds him or herself facing.

However, the City has presented a convincing argument that the rule is not vague, but rather puts the officer on notice that a certain force response is expected depending on the situation. The City has had a Use of Force Policy at least since Commissioner John Timoney headed the Department in the late 1990s. (N.T. 147-148). This rule is a proper exercise of managerial prerogative because it furthers the integrity of the Department and public confidence in the Department by ensuring that officers do not stand idly by while another officer uses excessive force.

The rule will stand but the City must bargain the penalty provisions and the reckoning period, which is duration of employment.

1-§006-10 Soliciting for attorneys, bondsmen, tow operators or other unauthorized personnel.

This is a new rule, derived from Section 1.40 in the Old Code, which prohibited "[s]oliciting for attorneys, bondsmen, or other business persons or firms for personal gain." The new rule adds the words "tow operators" as a class for whom police officers may not solicit and deletes the words "for personal gain."

The FOP argues that the revisions make the rule overbroad because by removing the words "for personal gain" it removes the spirit of the rule from that which is the employer's concern, i.e. integrity in the police department and now includes situations which might involve harmless or necessary solicitation.

In **IAFF, Local 1803 v. City of Reading**, 31 PPER 31151, (Final Order, 2000) the Board found a prohibition against soliciting to be a valid exercise of managerial prerogative. Accordingly, the rule will stand but the City must bargain the penalty provision, which is dismissal.

1-§007-10 Lying under oath to any material facts in any proceeding.

This is a new rule. Under the Old Code, the City would charge officers for this violation under Section 1.12 which prohibited "Making A False Statement In Response To An Official Departmental Investigation."

However, the rule is aimed at officers' testimony in criminal or civil proceeding, which is a different situation. Nevertheless, this rule constitutes a proper exercise of managerial prerogative because it furthers integrity in government. Accordingly, the rule will stand but the City must bargain the penalty provision, which is dismissal.

1-§008-10 Failure to cooperate in any Departmental investigation.

This rule is substantially the same as Section 1.11 of the Old Code, with the exception that the word "fully" has been eliminated. However, both versions require the same action from officers, that they cooperate in all aspects of a Departmental investigation. It is clear that a failure to "cooperate" in any way, regardless of how small or what stage the investigation may be, is a failure to "fully cooperate." The rule will stand.

1-§009-10 Lying or attempting to deceive regarding a material fact during the course of any Departmental investigation.

This rule is similar to Section 1.12 of the Old Code, which prohibited "[m]aking a false statement in response to an official Departmental investigation" so it is not a change. The addition of the word "lying" requires proof of intent, which provides more protection to the police employee. The rule will stand. The City increased the penalty

from a range of 10 days to dismissal to a penalty of dismissal for a first offense. The City should rescind and bargain the penalty provision.

1-§010-10 Making a false entry in any Department record or report.

This is a new rule. The City revised Section 1.15 of the Old Code, changing "knowingly and willingly make a false entry" to a rule that prohibits "making a false entry." The FOP argues that the elimination gives the City the power to discipline an officer who makes an incorrect entry through an unintentional action. The City's brief admitted that the rule is designed to cover even "inadvertent" entries so as to further its managerial interest in promoting careful record keeping and report writing by officers. Given the City's interpretation, the FOP's concerns are valid. While the City has a managerial interest in ensuring accurate records, if an officer can be disciplined for making inadvertent errors, then the balance tilts towards the employees' interests in having the rule bargained. The rule should be rescinded as it is a mandatory subject of bargaining.

1-§011-10 Abuse of Authority

This is a new rule. The FOP contends that this rule is vague and could lead to an officer being disciplined for something innocuous. The FOP cites as an example an officer who could be disciplined for "asking a shopkeeper for a glass of water." However, it is unclear how this would constitute an abuse of authority. The rule has a basis in the Department's interest in having officers work within the bounds of legal authority. Therefore, it is a valid exercise of managerial prerogative. Accordingly, the rule will stand but the City must rescind and bargain the penalty provisions and the reckoning period, which is five years.

1-§012-10 Unauthorized and/or excessive use of force in your official capacity.

This is a new rule. For the same reasons as set forth in the discussion of Rule 1-§005-10 *supra*, this rule is a proper exercise of managerial prerogative. It furthers the integrity of the Department and public confidence in the Department by ensuring that officers do not use excessive force against a citizen when carrying out police functions. The rule will stand but the City must rescind and bargain the penalty provisions and the reckoning period, which the City has set at duration of employment.

1-§013-10 Knowingly and intentionally associating, fraternizing or socializing with persons of ill repute; such as but not limited to: convicted criminals, persons actively engaged in criminal conduct, or fugitives from justice, that compromises, discredits, prejudices or otherwise makes suspect an employee's authority, integrity, or credibility.

This is a new rule. The rule revises Section 1.25 of the Old Code by adding "socializing" and "persons of ill repute." The FOP argues that those terms are vague and overbroad and they fail to give notice to officers of the conduct prohibited. The City argues that the rule is not vague because it provides examples of the kind of persons defined in the rule. However, the rule says it is "not limited to" those examples. The FOP's argument that the rule is vague has merit. The rule should be rescinded.

1-§014-10 Fighting/quarreling with members of the Department while one or both are on duty.

This rule is the same as Section 1.35 in the Old Code. The rule will stand.

1-§015-10 Engaging in threatening, harassing, intimidating or like conduct towards another member of the Police Department.

This is a new rule but the rule constitutes a proper exercise of managerial prerogative. The rule will stand but the City must rescind and bargain the penalty provisions and the reckoning period, which the City set at duration of employment.

1-§016-10 Inappropriate language, conduct or gestures to Police Department employees while on duty.

This is a new rule. The FOP argues that this rule is vague in that "conduct or gestures" defies definition, exposing police officers to discipline for actions they had no idea were offensive or violent. However, a reasonable police officer should know what is meant by "conduct or gestures." Furthermore, given the paramilitary nature of the police department, a rule prohibiting officers from using "inappropriate language, conduct or gestures" toward police department employees is a proper exercise managerial prerogative. The rule will stand but the City must rescind and bargain the penalty provisions and the reckoning period, which the City has set at two years.

1-§017-10 Inappropriate language, conduct or gestures to the public while on duty.

This is a new rule. The FOP raises the same objections it raised with Rule 1-§016-10 *supra*. However, following the same reasoning, the rule is not vague. Furthermore, the police department has a managerial interest in enhancing the public perceptions of the Department and in establishing a guideline of behavior that prohibits an officer from using inappropriate language or gestures towards a member of the public or exhibiting inappropriate conduct toward the public. The rule will stand but the City must bargain the penalty provisions and the reckoning period, which the City has set at two years.

1-§018-10 Sexual behavior while on duty.

This is a new rule. However, the rule is a valid exercise of managerial prerogative. The rule promotes public confidence in the Department by prohibiting officers from engaging in sexual behavior that would tend to distract them from their official duties of protecting the public. The rule will stand but the City must rescind and bargain the penalty provisions and the reckoning period, which the City has set at duration of employment.

1-§019-10 Sexual behavior in a City, state, or federally owned or leased vehicle or facility while off duty.

This is a new rule. However, this rule is a valid exercise of managerial prerogative. The rule will stand but the City must rescind and bargain the penalty provisions and the reckoning period, which the City has set at duration of employment.

1-§020-10 Repeated violations of any Departmental rules or regulations.

This rule was part of Section 1.75 of the Old Code. Therefore, it is not a change. The rule will stand. The City increased the reckoning period from none to duration of employment. The City should rescind and bargain the reckoning period.

1-§021-10 Any incident, conduct, or course of conduct which indicates that an employee has little or no regard for his/her responsibility as a member of the Police Department.

This rule was part of Section 1.75 of the Old Code. Therefore, it is not a change. The FOP argues that the addition of the word "any" makes the rule vague and overbroad. However, the City points out that Section 1.75 of the Old Code included "any." The rule will stand. The City increased the reckoning period. The City should rescind and bargain the reckoning period.

1-§022-10 Any act, conduct, or course of conduct which constitutes discriminating or harassing behavior based on race, color, gender, religion, national origin, age, ancestry, sexual orientation, disability, or gender identity.

This is a new rule. However, the rule is a proper exercise of managerial prerogative. See, **Fraternal Order of Police, Lodge 9 v. City of Reading**, 29 PPER ¶ 29146 (Final Order, 1998). The FOP argues the word "any" makes the rule vague, but does not offer a persuasive argument for that position. The rule will stand but the City must

rescind and bargain the penalties and the reckoning period, which the City has set at duration of employment.

1-§023-10 Inappropriate communication(s) based on race, color, gender, religion, national origin, age, ancestry, sexual orientation, disability, or gender identity conveyed in any manner.

This is a new rule. For the same reason in the discussion of Rule 1-§022-10, *supra*, the rule is a proper exercise of managerial prerogative. The rule will stand but the City must rescind and bargain the penalty provisions and the reckoning period, which the City has set at duration of employment.

1-§024-10 Any act, conduct or course of conduct which constitutes sexual harassment.

This is a new rule, but for the same reason set forth in the discussion of Rule 1-022-10 *supra*, this rule is a proper exercise of managerial prerogative. The rule will stand but the City must rescind and bargain the penalty provisions and the reckoning period, which the City has set at duration of employment.

1-§025-10 Inappropriate sexually based communication(s) conveyed in any manner.

This is a new rule. The FOP argues that this is a vague and overbroad rule that will result in the discipline of officers for consensual communication while off duty. The City argues that the qualifier "inappropriate" removes its vagueness. The City also argues that its goal of discouraging communication that could constitute sexual harassment removes its overbreadth. The City's arguments are persuasive. The rule is a valid exercise of managerial prerogative. The rule will stand but the City must rescind and bargain the penalty provisions and the reckoning period, which the City has set at duration of employment.

1-§026-10 Engaging in any action that constitutes the commission of a felony or a misdemeanor which carries a potential sentence of more than 1 year. Engaging in any action that constitutes an intentional violation of Chapter 39 of the Crimes Code (relating to Theft and Related Offenses). Also includes any action that constitutes the commission of an equivalent offense in another jurisdiction, state or territory. Neither a criminal conviction nor the pendency of criminal charges is necessary for disciplinary action in such matters.

This is a new rule. FOP argues that the rule is overbroad in that it penalizes off duty conduct of police officers in other jurisdictions, which the FOP argues is a significant intrusion into officers' personal lives and outweighs any managerial policy concerns. However, on balance, the City has a greater interest in having officers will comply with the law at all times, everywhere they may be. This rule constitutes a proper exercise of managerial prerogative. The rule will stand but the City must rescind and bargain the penalty provision, which is dismissal.

Article II: Abuse of Alcohol/Controlled Substances/Prescription Drugs

2-§001-10 Unspecified

This is a new rule. This rule constitutes a proper exercise of managerial prerogative for the reasons stated in the discussion of Rule 1-§001-10 *supra*. The rule will stand but the City must rescind and bargain the penalty provisions and reckoning period, which the City has set at duration of employment.

2-§002-10 Drinking alcoholic beverages while on duty.

This is a new rule. This rule constitutes a proper exercise of managerial prerogative. See, **Fraternal Order of Police v. City of Reading**, 34 PPER 34, (Proposed Decision and Order, 2003). The rule will stand but the City must rescind and bargain the penalty provisions and reckoning period, which is duration of employment.

2-§003-10 Odor of alcohol on breath while on duty.

This rule is the same as Section 1.60 of the Old Code. Also, this rule constitutes a proper exercise of managerial prerogative. See, **City of Reading**, 34 PPER 34, (Proposed Decision and Order, 2003). The rule will stand. The City increased the penalties and reckoning period. The City should rescind and bargain the penalty provisions and reckoning period.

2-§004-10 Impaired on duty.

This is a restatement of Section 2.01 of the Old Code, which prohibited "Intoxication on Duty." The FOP argues that "impaired" is not the same as intoxicated and is an undefined, imprecise term, which is too vague to survive scrutiny. The FOP argues that it could lead to the Department issuing discipline to an officer who did not get enough sleep the night before. However, because the rule falls within Article II, the rules preventing abuse of alcohol and drugs, it would not be reasonable for the City to apply the rule in a way the FOP suggests. The rule will stand. The City increased the reckoning period. The City should rescind and bargain the reckoning period.

2-§005-10 Intoxicated off duty in full or partial uniform.

This rule is a restatement of Sections 2.05 and 2.15 of the Old Code, merging the two rules. The rule will stand. The City increased the reckoning period. The City should rescind and bargain the reckoning period.

2-§006-10 "Driving under the influence" off duty.

This is a new rule. The Department disciplined officers for this conduct under another, more general rule, Section 1.75 of the Old Code. However, the rule constitutes a proper exercise of managerial prerogative. The rule assures the public that police officers will be held to comply with the law that they are charged with enforcing. The rule will stand but the City must rescind and bargain the penalty provisions and the reckoning period, which is duration of employment.

2-§007-10 "Driving under the influence" pleas, convictions or ARD under one of the following circumstances: (a) second or subsequent DUI offense while employed by the City of Philadelphia (regardless of whether on or off duty); (b) involving a hit and run of a person, vehicle or property; or (c) operating, driving or physically controlling a City, State, or Federally owned/leased vehicle.

This is a new rule. The Department disciplined officers for this conduct under another, more general rule, Section 1.75 of the Old Code. However, this rule constitutes a proper exercise of managerial prerogative. The rule assures the public that police officers will be held to comply with the law that they are charged with enforcing. The rule will stand but the City must rescind and bargain the penalty provision, which is dismissal.

2-§008-10 "Operating, driving or physically controlling a City, State, or Federally owned/leased vehicle after imbibing in any amount of alcohol and/or illegal substance.

This is a new rule. The FOP objects to this rule as being vague as there is no time line for "imbibing." The FOP is concerned that an officer who has a drink at lunch at noon prior to starting the "overnight" shift hours later could be accused of operating a vehicle after "imbibing." The FOP is arguing that employees have an interest in knowing there is a fixed time in which they should stop drinking before work.

However, the City has a greater interest in instilling in officers the importance of soberly operating a police vehicle. The effects of alcohol and illegal substances will vary with each individual officer. What this rule does is to promote the safe operation of police vehicles throughout the Department by making all officers aware of the effect of alcohol and illegal substances on their bodies. This rule promotes the integrity of

the Department and the public's confidence in the Department. The rule will stand but the City must rescind and bargain the penalty provisions and the reckoning period, which the City has set at duration of employment.

2-§009-10 Socializing or drinking in an alcoholic beverage establishment in full or partial uniform while off duty

This is a new rule. The FOP argues that this rule is overbroad as it could lead to the discipline of an officer who is in the FOP lounge, not drinking. However, the rule is similar to Section 5.06 of the Old Code, which prohibited officers from being "in an alcoholic beverage licensed establishment in full or partial uniform." The rule will stand but the City must rescind and bargain the penalty provisions and the reckoning period, which is five years.

2-§010-10 Constructive or actual possession of alcoholic beverages not related to the legal confiscation of same while on duty.

The FOP argues that this rule is vague because the word "constructive" is not defined in the Code. However, the rule is a restatement of Section 5.09 of the Old Code, which prohibited the "[c]onstructive possession of alcoholic beverages on the person, in police vehicle, or on any police property." There has been no change. The rule will stand.

2-§011-10 Any use or ingestion of any illegal substances, prohibited under 35 P.S. §780-101 et seq. (Controlled Substance, Drug, Device and Cosmetic Act), or any substance that constitutes the commission or an offense under Federal law or in any other jurisdiction, State or Territory, either on or off duty.

This is a new rule. This rule constitutes a proper exercise of managerial prerogative. The rule assures the public that police officers will be held to comply with the law that they are charged with enforcing. The rule will stand but the City must rescind and bargain the penalty provision, which is dismissal.

2-§012-10 Inappropriate use of a prescription drug.

This is a new rule. This rule constitutes a proper exercise of managerial prerogative. The rule assures the public that police officers will be held to comply with the law that they are charged with enforcing. The rule will stand but the City must rescind and bargain the penalty provisions and the reckoning period, which is duration of employment.

2-§013-10 Constructive or actual possession of a controlled substance not legally prescribed or related to legal confiscation of same.

This is a new rule. The FOP argues that this rule is vague because the word "constructive" is not defined in the Code. However, the word "constructive" was used in Section 5.09 of the Old Code, as discussed in Rule 2-§010-10 *supra*. The rule is the proper exercise of managerial prerogative. The rule will stand. The rule will stand but the City must rescind and bargain the penalty provision, which is dismissal.

Article III: Essential Requirements for Duty

3-§001-10 Unspecified

This is a new rule. This rule constitutes a proper exercise of managerial prerogative for the reasons stated in the discussion of Rule 1-§001-10 *supra*. The rule will stand but the City must rescind and bargain the penalty provisions and the reckoning period, which the City has set at "Duration of Employment."

3-§002-10 Inability to perform the essential duties of a sworn police officer including but not limited to: the exercise of Police powers; the carrying and use of a firearm; legally operating a motor vehicle; provide credible testimony in legal proceedings; maintenance of state certification under the Municipal Police Officer Education and Training Commission (MPOETC).

This is a new rule. However, the rule constitutes a proper exercise of managerial prerogative. The City has a substantial managerial interest in ensuring that officers are not prohibited from performing the duties of a sworn police officer, which is necessary for the efficient functioning of a police department. The rule will stand but the City must rescind and bargain the penalty provision, which is dismissal.

3-§003-10 Prohibited from accessing, inputting or otherwise acquiring information from any law enforcement system, database, or program.

This is a new rule. However, this rule constitutes a proper exercise of managerial prerogative. The City has a substantial management interest in having police officers ready and able to do their jobs which is necessary for the proper functioning of a police department. Thus, it is within the City's interest that officers are not prohibited from performing the duties of a sworn police officer. The rule will stand but the City must rescind and bargain the penalty provision, which is dismissal.

3-§004-10 Failure to maintain a bonafide residence in the City of Philadelphia or Commonwealth of Pennsylvania consistent with the current collective bargaining agreement/civil service regulations.

The FOP acknowledges that this rule essentially restates the Civil Service Regulations applicable to Philadelphia police officers. Also, the rule is encompassed in the CBA between the parties, (Respondent Exhibit 3 at p. 86). The rule does not change any of the terms and conditions of employment of police officers. The rule will stand.

Article IV: Insubordination

4-§001-10 Unspecified

This is a new rule. This rule constitutes a proper exercise of managerial prerogative for the reasons stated in the discussion of Rule 1-§001-10 *supra*. The rule will stand but the City must rescind and bargain the penalty provisions and the reckoning period, which the City has set at five years.

4-§002-10 Refusal to promptly obey proper orders from a superior officer.

This rule adds the word "promptly" to the rule that was found in Section 3.01 in the Old Code. The added word does not substantially change the rule. The rule will stand. The City increased the penalties and reckoning period. The City should rescind and bargain the penalty provisions and reckoning period.

4-§003-10 Profane, insulting, or improper language, conduct, or gestures toward, in the direction of, or in relation to, a superior officer.

This is a new rule, by adding the words "improper" and "gestures" to Section 3.05 in the Old Code. The FOP argues that these additions make the rule vague and overbroad. However, the City has made a convincing case that the rule is a valid exercise of managerial prerogative to ensure that officers treat their superior officers in a respectful manner. This is a proper exercise of managerial prerogative. The rule will stand but the City must rescind and bargain the penalty provisions and the reckoning period, which is five years.

4-§004-10 Threatening or using physical force against a superior officer.

This is a new rule. However, this rule constitutes a proper exercise of managerial prerogative. The City has a substantial management interest in ensuring that officers do not engage in such conduct. The rule will stand but the City must rescind and bargain the penalty provisions and the reckoning period, which is duration of employment.

4-§005-10 Omitting title when addressing any superior officer.

This rule is similar to Section 5.54 in the Old Code. The rule does not change any of the terms and conditions of employment of police officers.

4-§006-10 Reporting off sick in response to receiving an assignment.

This is a new rule, even though similar conduct was charged under the Unspecified Section 3.00 of the Old Code. The rule is a proper exercise of managerial prerogative. The rule will stand but the City must rescind and bargain the penalty provisions and the reckoning period, which is five years.

Article V: Neglect of Duty

5-§001-10 Unspecified

This is a new rule. This rule constitutes a proper exercise of managerial prerogative for the reasons stated in the discussion of Rule 1-§001-10 *supra*. The rule will stand but the City must rescind and bargain the penalty provisions and reckoning period, which the City has set at two years.

5-§002-10 Failure to take police action while on duty.

This rule is a simplification of Section 4.01 of the Old Code. The rule does not change any of the terms and conditions of employment of police officers. The City increased the penalties. The City should rescind and bargain the penalty provisions.

5-§003-10 Failure to properly patrol area of responsibility.

This is a new rule. However, the rule is a proper exercise of managerial prerogative. The rule will stand but the City must rescind and bargain the penalty provisions and the reckoning period, which is two years.

5-§004-10 Failure to respond to an assignment by any means transmitted.

This is a new rule. The City added the words "by any means transmitted" to Section 4.50 of the Old Code. The FOP objects that by adding the words the City has made an overbroad rule. The City responds that the transmittal of assignments is a managerial prerogative and that the added words are to insure that any new technology that becomes available to the police may be used to transmit assignments. The City's position is reasonable. The rule will stand but the City must rescind and bargain the penalty provisions, which the City slightly increased. (The reckoning period of two years is the same as was in the Old Code.)

5-§005-10 Failure to make a required written report.

This is similar version of the rule which existed in Section 4.01 of the Old Code. This rule constitutes a proper exercise of managerial prerogative. This rule is not a change.

5-§006-10 Failure to conduct a proper, thorough, and complete investigation.

This rule is a simplification of a rule found in Section 4.25 of the Old Code and is not a substantive change. The rule will stand. The City increased the penalties and reckoning period. The City should rescind and bargain the penalty provisions and reckoning period.

5-§007-10 Asleep on duty.

This rule was found in Section 4.05 of the Old Code. Accordingly, there has been no change.

5-§008-10 Unauthorized absence from assignment

This rule is derived from the rule found in Section 4.10 of the Old Code, in which being AWOL for less than five consecutive working days was prohibited. The rule does not represent a substantive change. The rule will stand. The City increased the reckoning period. The City should rescind and bargain the reckoning period.

5-§009-10 Absence without leave for less than one working day

Similar to Rule 5-§008-10, this rule is also derived from the rule found in Section 4.10 of the Old Code, in which being AWOL for less than five consecutive working days was prohibited. The rule does not represent a substantive change. The rule will stand. The City increased the penalties and reckoning period. The City should rescind and bargain the penalty provisions and reckoning period.

5-§010-10 Absence without leave for a minimum of one working day, but less than five consecutive working days.

Similar to Rule 5-§008-10, this rule is derived from the rule found in Section 4.10 of the Old Code, in which being AWOL for less than five consecutive working days was prohibited. The rule does not represent a substantive change. The rule will stand. The City increased the penalties and reckoning period. The City should rescind and bargain the penalty provisions and reckoning period.

5-§011-10 Failure to comply with any Police Commissioner's orders, directives, memorandums, or regulations; or any oral or written orders of supervisors.

This is a restatement of the rule found in Section 4.20 of the Old Code. The rule does not represent a substantive change. The rule will stand. The City increased the reckoning period. The City should rescind and bargain the reckoning period.

5-§012-10 Failure to comply with the Department's Off Duty policy.

This rule constitutes a proper exercise of managerial prerogative. In **City of Philadelphia**, 31 PPER ¶ 31023 (Final Order, 1999), the Board found that the creation of the off-duty policy to which this rule relates was a managerial prerogative. However, the City must rescind and bargain the penalties and the reckoning period, which is two years.

5-§013-10 Failure to comply with a court notice or subpoena.

This is similar to the rule found in Section 4.35 of the Old Code, substitutes "failure to comply" for "failure to report." The FOP contends that "comply" makes the rule vague. However, when a subpoena is issued it is usually specific in its instructions. If a subpoena lacks specificity an officer can seek the assistance of a superior to properly comply with the subpoena. The rule is not a change. The rule will stand. The City increased the reckoning period. The City should rescind and bargain the reckoning period.

5-§014-10 Failure to maintain custody of prisoner(s).

This is a new rule. The City argues that the rule is similar to the rule found at Section 4.40 of the Old Code, which prohibited "[a]llowing prisoner to escape through carelessness or neglect." However, the removal of the "carelessness or neglect" standard with a strict liability standard does not take into account a situation where the officer loses custody through no fault of his own. An example could be where a prisoner forcefully overpowers an officer. Balancing the interests of the City and the employee in such a situation, this is a rule that should be bargained.

5-§015-10 Failure to take reasonable efforts to provide for the safety of prisoners while in police custody.

This is a new rule. However, this rule constitutes a proper exercise of managerial prerogative. The City has a substantial management interest in ensuring that officers take reasonable efforts to provide for the safety of prisoners while in police custody.

The rule will stand but the City must rescind and bargain the penalty provisions and the reckoning period, which is two years.

5-§016-10 Failure to remove keys from police vehicle when unattended.

This is the same rule as found in Section 4.60 of the Old Code. Because there is no change, the rule will stand. The City increased the penalties. The City should rescind and bargain the penalty provisions.

5-§017-10 Loss or damage to Police Department property resulting from negligence or from failure to properly care for same (Excludes City owned weapons).

This rule was found in Section 4.65 of the Old Code. Because there is no change, the rule will stand.

5-§018-10 Lost or stolen City owned weapons resulting from negligence or failure to properly care for same.

This is similar to the rule found in Section 4.65 of the Old Code, but focused specifically on city owned weapons. This rule constitutes a proper exercise of managerial prerogative. The City has a substantial management interest in ensuring that officers take reasonable care to not lose city weapons or to have them stolen due to their negligence. The rule will stand.

5-§019-10 Failure to properly care for and maintain a police vehicle.

This rule constitutes a proper exercise of managerial prerogative. The City has a substantial interest in ensuring that officers take reasonable efforts to care for and maintain police vehicles. The rule will stand.

5-§020-10 Performing any activity on duty which does not relate to the duty assignment.

This is a new rule. The FOP argues that this rule is vague and overbroad. The FOP argues that it will lead to the disciplining of officers for such things as reading a paper while on duty. However, the Department has an interest in putting officers on notice that they are expected to pay attention to their duties while working. This rule constitutes a proper exercise of managerial prerogative. The rule will stand but the City must rescind and bargain the penalty provisions and the reckoning period, which is two years.

5-§021-10 Failure to submit form 75-350, Change of Personnel Data, as prescribed.

This is a rule that slightly modifies Section 5.36 in the Old Code, which prohibited "changing residence without giving twenty-four hours prior notification." This rule is not a substantive change. The rule will stand.

Article VI: Disobedience

6-§001-10 Unspecified

This is a new rule. This rule constitutes a proper exercise of managerial prerogative for the reasons stated in the discussion of Rule 1-§001-10 *supra*. The rule will stand but the City must rescind and bargain the penalty provisions and the reckoning period, which the City has set at two years.

6-§002-10 Absence from official duties without proper authorization during a declared emergency in the City of Philadelphia by the Mayor, the Governor of Pennsylvania, the President of the United States or their designees.

This is a new rule. However, this rule constitutes a proper exercise of managerial prerogative. The City has a substantial interest in ensuring that officers report for duty during declared emergencies to prevent chaos, preserve order and uphold the rule of

law. The rule promotes the proper functioning of the Department, provides clear guidelines to employees and increases public confidence in the Department during such emergencies. The rule will stand, but the City must rescind and bargain the penalty provision, which is dismissal.

6-§003-10 Failure to immediately notify the Department about any involvement in criminal litigation as a defendant.

This is a new rule. However, this rule constitutes a proper exercise of managerial prerogative. This rule protects the integrity of the government and increases public confidence in the Department. By providing this clear guideline, the Department sets forth a standard that permits the Department to run efficiently and effectively by ensuring that all officers who are defendants in any criminal matter immediately notify the Department. The rule will stand but the City must rescind and bargain the penalty provision, which is dismissal.

6-§004-10 Failure to notify the Law Department of involvement in any civil action (whether a plaintiff, defendant or witness) arising from police duty within 5 calendar days.

This is a new rule. However, this rule constitutes a proper exercise of managerial prerogative. This rule protects the integrity of the police department's financial and human resources. The Department has a substantial interest in knowing the potential civil liability that stem from officers' duties. This rule advances that interest. The rule will stand but the City must rescind and bargain the penalty provision and the reckoning period, which is two years.

6-§005-10 Soliciting without proper authorization.

This is a new rule, derived from Section 5.01 of the Old Code, which prohibited "soliciting money or any other valuable thing without proper authorization." The FOP contends that the deletion of "money or any valuable thing" makes the new rule vague and overbroad. The FOP contends that the rule could lead to the disciplining of an officer for selling Girl Scout cookies or requesting a glass of water from a vendor on a hot day. However, the plain language of the rule allows an officer to engage in such sales or requests upon obtaining the "proper authorization." The rule constitutes a proper exercise of managerial prerogative. **IAFF, Local 1803 v. City of Reading**, 31 PPER 31151, (Final Order, 2000). The rule will stand but the City must rescind and bargain the penalty provisions and the reckoning period, which is two years.

6-§006-10 Failure to follow Departmental procedures for the handling of evidence, personal effects, and all other property taken into custody except narcotics, money, explosives, firearms, hazardous materials or forensic evidence.

This is similar to the rule found in Section 5.15 of the Old Code. Because there is no change, the rule will stand.

6-§007-10 Failure to follow Departmental procedures for the handling of narcotics, money, explosives, firearms, hazardous materials or forensic evidence.

This is similar to the rule found in Section 5.15 of the Old Code. Because there is no change, the rule will stand. The City increased the penalties and reckoning period. The City should rescind and bargain the penalty provisions and reckoning period.

6-§008-10 Discharging, using, displaying or improper handling of a firearm while not in accordance to Department Policy.

This rule is a more specific restatement of Section 5.18 of the Old Code. The rule will stand. The City increased the reckoning period. The City should rescind and bargain the reckoning period.

6-§009-10 Improper or unauthorized use of Departmentally owned or leased equipment.

This is a new rule. However, the rule is a proper exercise of the city's managerial prerogative. The rule will stand but the City must rescind and bargain the penalty provisions and the reckoning period, which is five years.

6-§010-10 Communicating or imparting local, state, or federal law enforcement information without authority or to unauthorized persons.

This is similar to the rule found in Section 5.60 of the Old Code. Because there is no change, the rule will stand. The City increased the reckoning period. The City should rescind and bargain the reckoning period.

6-§011-10 Having or operating private vehicle on beat or driving to or from a post without authorization.

This is similar to the rule found in Section 5.24 of the Old Code. Because there is no change, the rule will stand. The City increased the penalties and reckoning period. The City should rescind and bargain the penalty provisions and reckoning period.

6-§012-10 Failure to report on or off assignment as prescribed.

This is similar to the rule found in Section 5.24 of the Old Code. Because there is no change, the rule will stand. The City increased the reckoning period. The City should rescind and bargain the reckoning period.

6-§013-10 Tardiness

This is similar to the rule found in Section 5.33 of the Old Code. Because there is no change, the rule will stand. The City increased the reckoning period. The City should rescind and bargain the reckoning period.

6-§014-10 Unauthorized persons in a police vehicle.

This is similar to the rule found in Section 5.39 of the Old Code. Because there is no change, the rule will stand. The City increased the reckoning period. The City should rescind and bargain the reckoning period.

6-§015-10 Carrying or possessing unauthorized equipment while on duty.

This is a new rule. However, this rule is a valid exercise of managerial prerogative. The rule is a means to promote the integrity of Department and the efficient operation of the Department. The rule will stand but the City must rescind and bargain the penalties and the reckoning period, which is two years.

6-§016-10 Wearing awards or citations on the uniform that have not been awarded.

This is a new rule. However, this rule is a valid exercise of managerial prerogative because it promotes the integrity of the Department by ensuring that employees only wear awards that they have been awarded. The rule will stand but the City must rescind and bargain the penalty provisions and the reckoning period, which is five years.

6-§017-10 When in uniform, failure to properly salute the Police Commissioner or a uniformed superior officer.

This is similar to the rule found in Section 5.57 of the Old Code. Because there is no change, the rule will stand. The City increased the reckoning period. The City should rescind and bargain the reckoning period.

6-§018-10 Failure to give prescribed identification when answering the telephone.

This is similar to one of the rules found in Section 5.63 of the Old Code. Because there is no change, the rule will stand. The City increased the reckoning period. The City should rescind and bargain the reckoning period.

6-§019-10 Refusal to give name and badge number when requested.

This is similar to one of the rules found in Section 5.63 of the Old Code. Because there is no change, the rule will stand. The City increased the reckoning period. The City should rescind and bargain the reckoning period.

6-§020-10 Failure to provide a member of the public with the procedure, information or form concerning a complaint against the police.

This is a new rule. However, it is a valid exercise of managerial prerogative because it promotes the efficient operation of the Department, the integrity of the Department and public confidence in the Department by ensuring that employees know the complaint procedures for the public to follow. The rule will stand but the City must rescind and bargain the penalty provisions and the reckoning period, which is two years.

6-§021-10 Instituting a private criminal complaint as a result of dissatisfaction with the outcome of an official police action prior to notifying the Department about the action being taken.

This is a new rule that amends Section 5.02 of the Old Code by requiring that the officer must first notify the Department of filing the criminal complaint. The addition does not unduly burden the employee and it also furthers the efficiency of the Department by alerting the Department of the filing of charges, which could disrupt operations. The rule will stand. There is no duty to bargain the penalties and the reckoning period because they are same as were found in Section 5.02 of the Old Code.

6-§022-10 No one shall, without previously being subpoenaed and previously notifying the Chief Inspector of the Office of Professional Responsibility, appear or give testimony as a character witness for any defendant in a criminal trial or inquiry.

This is a restatement of the rule found in Section 5.75 of the Old Code, with the replacement of Chief Inspector of the Office of Professional Responsibility for Police Commissioner. Because the rule is essentially the same, the rule will stand.

6-§023-10 Unapproved outside employment.

This is a rule derived from one found in Section 5.78 of the Old Code. Because the rule is essentially the same, the rule will stand. The City increased the reckoning period. The City should rescind and bargain the reckoning period.

6-§024-10 Prohibited outside employment.

This is a rule derived from one found in Section 5.78 of the Old Code. Because the rule is essentially the same, the rule will stand. The City increased the penalties and reckoning period. The City should rescind and bargain the penalties and reckoning period.

6-§025-10 Willfully damaging Police Department owned or leased property and/or equipment.

This is a restatement of the rule found in Section 5.80 of the Old Code. Because the rule is essentially the same, the rule will stand.

6-§026-10 Interference with Police Radio broadcasting.

This is a restatement of the rule found in Section 5.81 of the Old Code. Because the rule is essentially the same, the rule will stand.

6-§027-10 Intentionally providing inaccurate, misleading, or deceptive information to Police Radio regardless of how communicated, on or off duty.

This is a new rule, but it is a proper exercise of managerial prerogative because it promotes the efficient operation of the Department. The rule will stand but the City must rescind and bargain the penalty provisions and the reckoning period, which is five years.

Article VII: Motor Vehicle Violations

7-§001-10 Unspecified

This is a new rule. This rule constitutes a proper exercise of managerial prerogative for the reasons stated in the discussion of Rule 1-§001-10 *supra*. The rule will stand but the City must rescind and bargain the penalty provisions and the reckoning period, which the City has set at two years.

7-§002-10 Involved in a preventable motor vehicle accident.

This is a new rule. However, this rule constitutes a proper exercise of managerial prerogative. The City has a substantial management interest in ensuring that officers take reasonable care in the operation of motor vehicles. The rule will stand but the City must rescind and bargain the penalty provisions and the reckoning period, which is one year.

7-§003-10 Failure to follow Departmental procedures involving safe operation of a police vehicle [excluding pursuits and/or emergency driving].

This is a new rule, but it is a valid exercise of managerial prerogative because it promotes the efficient operation of the Department and furthers the integrity of the Department. The rule will stand but the City must rescind and bargain the penalty provisions and the reckoning period, which is one year.

7-§004-10 Failure to follow Departmental procedures involving pursuit and/or emergency driving.

This is a new rule, but it is a valid exercise of managerial prerogative because it promotes the efficient operation of the Department and furthers the integrity of the Department. The rule will stand, but the City must rescind and bargain the penalty provisions and the reckoning period, which is one year.

7-§005-10 Failure to notify Commanding Officer in writing whenever PA Operator's License has lapsed, or expired.

This is similar to the rule found in Section 5.84 of the Old Code. Because there is no change, the rule will stand.

Article VIII: Failure to Supervise

8-§001-10 Unspecified

This is a new rule. This rule constitutes a proper exercise of managerial prerogative for the reasons stated in the discussion of Rule 1-§001-10 *supra*. The City must rescind and bargain the penalty provisions and the reckoning period, which the City has set at five years.

8-§002-10 Failure to review, approve, input, submit or distribute all required reports, forms, documents or notifications in any medium.

This is a new rule. The FOP argues that the rule is problematic because the City's internal document delivery system leaves much to be desired. However, the rule is a valid exercise of managerial prerogative because it sets a standard of supervisory conduct, thereby promoting the efficient operation of the Department. The rule will stand but the City must rescind and bargain the penalty provisions and the reckoning period, which is two years.

8-§003-10 Failure to properly supervise subordinates.

This is similar to one of the rules found in Section 4.15 of the Old Code. Because there is no change, the rule will stand. The City increased the penalties. The City should rescind and bargain the penalty provisions.

8-§004-10 Failure to take supervisory action.

This is a new rule, but it is a valid exercise of managerial prerogative because it promotes the efficient operation of the Department. The rule will stand. The rule will stand but the City must rescind and bargain the penalty provisions and the reckoning period, which is five years.

8-§005-10 Supervisors shall not personally solicit subordinates in any manner for any item unless authorized by the Police Commissioner or their official designee.

This is a new rule, but it is a valid exercise of managerial prerogative because it promotes the efficient operation of the Department and integrity in the workplace. The Department has an important interest in ensuring that supervisors do not pressure subordinates or that subordinates do not feel obligated to buy any particular item from a supervisor. The rule will stand but the City must rescind and bargain the penalty provisions and reckoning period, which is five years.

CONCLUSIONS

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

1. The City of Philadelphia is an employer under section 3(c) of the PLRA as read *in pari materia* with Act 111.
2. The Fraternal Order of Police, Lodge 5 is a labor organization under section 3(f) of the PLRA as read *in pari materia* with Act 111.
3. The Board has jurisdiction over the parties.
4. The City has committed unfair labor practices under sections 6(1) (a) and (e) of the PLRA as read *in pari materia* with Act 111.

ORDER

In view of the foregoing and in order to effectuate the policies of the PLRA as read *in pari materia* with Act 111, the hearing examiner

HEREBY ORDERS AND DIRECTS

that the City shall:

1. Cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed in the PLRA as read *in pari materia* with Act 111.
2. Cease and desist from refusing to bargain with the exclusive representative of the police employees of the City of Philadelphia.
3. Take the following affirmative action which the examiner finds necessary to effectuate the policies of the PLRA and Act 111:
 - (a) Rescind and offer to bargain the penalty provisions in the rules found at 1-§001-10; 1-§005-10; 1-§006-10; 1-§009-10; 1-§011-10; 1-§012-10; 1-§015-10; 1-§016-10 1-§017-10; 1-§018-10; 1-§019-10; 1-§022-10; 1-§023-10; 1-§024-10; 1-§025-10; 1-§026-10; 2-§001-10; 2-§002-10; 2-§003-10; 2-§006-10; 2-§007-10; 2-§008-10; 2-§009-10; 2-§011-10; 2-§012-10; 2-§013-10; 3-§001-

10; 3-\$002-10; 3-\$003-10; 4-\$001-10; 4-\$002-10; 4-\$003-10; 4-\$004-10; 4-\$006-10; 5-\$001-10; 5-\$002-10; 5-\$003-10; 5-\$004-10; 5-\$006-10; 5-\$009-10; 5-\$010-10; 5-\$015-10; 5-\$020-10; 6-\$001-10; 6-\$002-10; 6-\$003-10; 6-\$004-10; 6-\$005-10; 6-\$007-10; 6-\$009-10; 6-\$011-10; 6-\$015-10; 6-\$016-10; 6-\$020-10; 6-\$024-10; 6-\$027-10; 7-\$001-10; 7-\$002-10; 7-\$003-10 7-\$004-10; 8-\$001-10 8-\$002-10; 8-\$003-10; 8-\$004-10 and 8-\$005-10;

- (b) Rescind and offer to bargain the reckoning periods in the rules found at 1-\$001-10; 1-\$003-10; 1-\$005-10; 1-\$0010-10; 1-\$011-10; 1-\$012-10; 1-\$014-10; 1-\$015-10; 1-\$016-10; 1-\$017-10; 1-\$018-10; 1-\$019-10; 1-\$020-10; 1-\$021-10; 1-\$022-10; 1-\$023-10; 1-\$024-10; 1-\$025-10; 2-\$001-10; 2-\$002-10; 2-\$003-10; 2-\$004-10; 2-\$005-10; 2-\$006-10; 2-\$008-10; 2-\$009-10; 2-\$010-10; 2-\$012-10; 3-\$001-10; 4-\$001-10; 4-\$002-10; 4-\$003-10; 4-\$004-10; 4-\$006-10; 5-\$001-10; 5-\$003-10; 5-\$004-10; 5-\$006-10; 5-\$008-10; 5-\$009-10; 5-\$010-10; 5-\$011-10; 5-\$013-10; 5-\$015-10; 5-\$020-10; 6-\$001-10; 6-\$004-10; 6-\$005-10; 6-\$007-10; 6-\$008-10; 6-\$009-10; 6-\$010-10; 6-\$011-10; 6-\$012-10; 6-\$013-10; 6-\$014-10; 6-\$015-10; 6-\$016-10; 6-\$017-10; 6-\$018-10; 6-\$019-10; 6-\$020-10; 6-\$023-10; 6-\$024-10; 6-\$027-10; 7-\$001-10; 7-\$002-10; 7-\$003-10; 7-\$004-10; 8-\$001-10; 8-\$002-10; 8-\$003-10; 8-\$004-10 and 8-\$005-10;
- (c) Rescind the following rules because they are mandatory subjects of bargaining: 1-\$010-10 and 5-\$014-10;
- (d) Rescind the following rule because it is vague and overbroad: 1-\$013-10;
- (e) Post a copy of this decision and order within five (5) days from the effective date hereof in a conspicuous place readily accessible to its employees and have the same remain so posted for a period of ten (10) consecutive days; and
- (f) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this decision and order by completion and filing of the attached affidavit of compliance.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty (20) days of the date hereof, this decision and order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this twenty-first day of May, 2014.

PENNSYLVANIA LABOR RELATIONS BOARD

Thomas P. Leonard, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE,
LODGE NO. 5

v.

CITY OF PHILADELPHIA

:
:
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:
:
:

Case No. PF-C-10-84-E

AFFIDAVIT OF COMPLIANCE

The City of Philadelphia hereby certifies that it has ceased and desisted from its violation of Sections 6(1)(a) and (e) of the Pennsylvania Labor Relations Act as read *in pari materia* with Act 111; that it has complied with the proposed decision and order; that it has posted a copy of the proposed decision and order as directed and that it has served a copy of this affidavit on the Fraternal Order of Police Lodge 5.

Signature/Date

Title

SWORN AND SUBSCRIBED TO before me
the day and year first aforesaid.

Signature of Notary Public