

Commonwealth of Pennsylvania
Pennsylvania Labor Relations Board

MIDDLETOWN BOROUGH POLICE OFFICERS
ASSOCIATION

v.

MIDDLETOWN BOROUGH

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Case No. PF-C-13-109-E

PROPOSED DECISION AND ORDER

On November 18, 2013, the Middletown Borough Police Officers' Association (Association or Complainant) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) against Middletown Borough (Borough or Respondent), alleging that the Borough violated section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA) as read *in pari materia* with Act 111.

On December 18, 2013, the Board issued a Complaint and Notice of Hearing, in which March 20, 2014, in Harrisburg was assigned as the time and place of hearing. The hearing was held as scheduled.

A second day of hearing was held on May 16, 2014. At the hearings, all parties were afforded an opportunity to present testimony, cross examine witnesses and introduce documentary evidence.

The examiner, on the basis of the testimony presented at the hearing and from all other matters and documents of record, makes the following:

FINDINGS OF FACT

1. Middletown Borough is a public employer within the meaning of Act 111.
2. The Middletown Borough Police Officers' Association is a labor organization within the meaning of Act 111.
3. The Association is the exclusive representative of a unit of full-time and part-time police officers, exclusive of the Chief of Police, employed by the Borough. (N.T. 53, Association Exhibit 11, p. 2)
4. The Borough and the Association have been parties to several collective bargaining agreements (CBAs). The CBA currently in place is for the period January 1, 2013 through December 31, 2016, (N.T. 53, Association Exhibit 11).
5. On February 11, 2013, Steven Wheeler became the Chief of Police. He soon began the process of writing a new departmental policy manual. (N.T. 244, 252)
6. The Department was operating under a manual with some policies that had been in place since 1984 and other policies added over time. (N.T. 253)
7. Wheeler reviewed the existing manual with a view to whether the policies conformed to legal mandates, to the standards for law enforcement accreditation in Pennsylvania and to the best practices in law enforcement. (N.T. 253, Borough Exhibit 9)
8. Wheeler then developed a draft of a proposed policy. On April 25, 2013, he sent the draft of the policy to Officer Mark Laudenslager, the Association president. He also attached a "companion set of 'Special Orders' which are designed to deal with specific issues that affect the Middletown Police Department, such as policies promulgated county-wide by the District Attorney and so on." Wheeler sought Laudenslager's review and input for those policies which conflict with the CBA. Wheeler requested a response by May 6, 2013. (N.T. 254-255, Borough Exhibit 8)

9. After he received no response to this request, Chief Wheeler again requested comment from Laudenslager by June 21, 2013. (N.T. 259, Borough Exhibit 11)
10. Laudenslager and Wheeler met in June, 2013 to discuss the revised police policy manual but Laudenslager had issues with the policy manual that remained unresolved. (N.T. 149-150)
11. On September 25, 2013 Chief Wheeler notified the police department that he had given the sergeants the revised police policy manual to distribute to the officers and to asking the officers to acknowledge receipt. (N.T. 261, Borough Exhibit 12)
12. On October 1, 2013, the Police Policy Manual went into effect. (N.T. 261-262)
13. On November 15, 2013, The Association filed a grievance over the new policies. (N.T. 153, Association Exhibit 17)
14. The Police Policy Manual includes the following provisions that the Association contends have been improperly issued in violation of the Borough's duty to bargain:
 - a. General Order 1.8 – Conduct and Disciplinary Procedures (N.T. 17, Association Exhibit 2)
 - b. Special Order 3 – Patrol Operations-Deployment Plan (N.T. 20, Association Exhibit 4)
 - c. General Order 1.4 – Direction (N.T. 35, Association Exhibit 6)
 - d. General Order 1.7 – Conditions of Work – Extra-Duty Employment (N.T. 43, Association Exhibit 10)
 - e. General Order 2.6 – Criminal Investigations (N.T. 52, Association Exhibit 16)
 - f. General Order 1.3 – Use of Force (N.T. 62, Association Exhibit 8)
 - g. General Order 2.3 – Internal Affairs (N.T.65, Association Exhibit 15)
 - h. General Order 3.4 – Records (N.T. 59, Association Exhibit 13)(N.T. 17, 20, 35, 43, 52, 62, 65, 59)
15. The new General Order 1.8 includes Section 1.8.4, Standards of Conduct and Disciplinary Procedures. (N.T. 17, Association Exhibit 2)
16. Subsection 1.8.4 (C)- Conduct, Disciplinary Procedures, states, in part:

(C) Disciplinary Procedures

 1. Violations of the Department's policies, procedures, and standards of conduct may lead to disciplinary action.
 2. Disciplinary action may take the form of the following: oral reprimand, written reprimand, suspension (with or without pay), reduction in rank, or termination.
 3. In most instances, the Department will adhere to a system of progressive discipline in response to violations of the Department's policies, procedures, and standards of conduct. *The Department, however, reserves the right to administer any level of discipline it determines, in its sole discretion, to be appropriate given the circumstances and the severity of the infraction.*
 4. This policy will be implemented in a manner consistent with the provisions of the Agreement between the Borough and Police Officers Association.

(N.T. 17, Association Exhibit 2, italics by Hearing Examiner)

17. The old policy, "Disciplinary Action Sanctions and Penalties Guideline" covered 43 separate offenses. The policy divided offenses into three broad classes. (N.T. 16, Association Exhibit 1)
18. The old policy described the three classes of offenses as follows:

Class I OFFENSES

Breaches of policy and procedure in this category may lead to disciplinary action up to and including dismissal. A Class I Offense does not automatically mean dismissal, however. The actual disciplinary action will reflect the circumstances of the violation. A Second or subsequent offense of a Class II type of offense that occurs within one year of the last offense will become a Class I Offense.

Class II OFFENSES

Breaches of policy and procedure in this category may lead to action other than dismissal. A Second or subsequent offense of a Class III type of offense that occurs within one year of the last offense will become a Class II Offense.

Class III OFFENSES

Breaches of policy and procedure in this category will generally result in verbal warning or in written reprimand.

(N.T. 16, Association Exhibit 1)

19. The policy provided a recommended maximum penalty for the first, second and third breaches for Class I and Class II Offenses. (N.T. 16, Association Exhibit 1)
20. In both the current and prior CBA, Article 27 provided for a three (3) step grievance procedure ending in binding arbitration. Also, Article 37 provides that "disciplinary action" may be the subject of a grievance. (N.T. 53, 72, Borough Exhibit 1, p. 22 and Association Exhibit 11, p. 19)
21. Officer Dennis Morris is a thirteen year veteran of the police department. (N.T. 189)
22. In 2013, Morris was the Association's vice-president. (N.T. 191)
23. On October 29, 2013, at the beginning of the 3 pm to 11 pm shift, Sergeant James Bennett informed Morris that Chief Steven Wheeler wanted to see him in his office. (N.T. 1890)
24. In this unfair labor practice hearing, Bennett admitted that it was Bennett who requested the meeting. (N.T. 233)
25. Bennett's purpose for asking for the meeting was because he believed that Morris had been driving an unmarked police vehicle and had been told repeatedly not to drive the vehicle. (N.T. 233)
26. Bennett testified that his goal with the meeting was to give Morris a verbal warning about driving an unmarked police car. (N.T. 238)
27. Only the Chief can impose discipline. His discipline is subject to Borough Council. (N.T. 307, 326)
28. A few days before October 29, Bennett asked the Chief of Police Steven Wheeler to be involved in the meeting. Wheeler testified that he also wanted to have the meeting with Morris in order to address Morris' alleged failure to follow the department's uniform policy as to wearing the proper hat. He also wanted to address the chain of command policy in that Morris allegedly would seek supervisory authority from someone who was not his direct supervisor. (N.T. 234, 245-248)

29. Morris asked Officer Mark Laudenslager, his patrol partner and the Association president, to come to the meeting with him as his representative. He asked for a representative because it was the first time that a sergeant had ever told Morris that the chief wanted to see him in his office before he was on duty and because of the sergeant's tone. (N.T. 190)
30. Morris and Laudenslager entered the chief's office. When they walked in, Chief Wheeler was sitting at his desk with his hands clasped behind his head and Sergeant Bennett was standing next to him. (N.T. 191-192)
31. Chief Wheeler pointed to Laudenslager and asked Morris why he was there. Morris answered that he was there as his representative. (N.T. 192)
32. Chief Wheeler ordered Laudenslager to leave because Wheeler did not deem the meeting a disciplinary meeting. (N.T. 193)
33. Laudenslager left the room. Wheeler then closed the door for a meeting with Morris. Sergeant Bennett remained in the room. (N.T. 193)
34. Chief Wheeler directed Morris to sit at a conference table across from Sergeant Bennett, with Wheeler sitting at the head of the table. (N.T. 195-196)
35. Chief Wheeler then asked Morris if he had been given the police department policy manual. Morris answered that he had been given it earlier by Bennett and that he had signed a paper acknowledging receipt of the policy book. (N.T. 194-196)
36. Wheeler then placed three different policies in front of Morris, asked him if he understood what they meant and asked him several questions about each policy. The policies were Special Order 1, Uniform and Appearance Standards; Special Order 3, Patrol Operations-Deployment Plan and General Order 1.4, Direction. (N.T. 196-201, 241, Association Exhibits 19, 20 and 21).
37. Wheeler then questioned Morris about the three policies and if he agreed with him that Sergeant Bennett was his supervisor and he had to take orders from him. (N.T. 198-199)
38. Bennett asked Morris whether he was driving an unmarked vehicle. (N.T. 234)
39. Wheeler took notes during the meeting. (N.T. 196-201)
40. Bennett testified that the meeting lasted ten (10) minutes. (N.T. 237)
41. Chief Wheeler testified that a verbal warning is a step in the Department's disciplinary policy. (N.T. 291)
42. That disciplinary action was not approved by Chief Wheeler for Morris in October, November or December of 2013. (N.T. 326.)
43. That Morris did not receive any discipline as a result of the October 29, 2013 meeting. (N.T. 207-208, 251, 326)

DISCUSSION

The Association's charge has two parts. They will be discussed separately.

Department Policy Changes

The first part of the charge alleges that on October 1, 2013, the police department, through Chief Steven Wheeler, unilaterally enacted eight (8) new department policies in violation of its duty to bargain as set forth in section 6(1)(e) of the PLRA.

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 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).

The Borough contends that the new policies were permitted by its management rights clause in the CBA, specifically, the clause that says "the Borough shall retain the right to adopt and enforce such reasonable rules and regulations as it deems necessary and proper with regard to the management of the operations of the Department." However, the Borough remains bound to its duty to bargain mandatory subjects of bargaining. **City of Philadelphia, supra**.

The policies will be judged separately, as was done in **Fraternal Order of Police, Lodge 9 v. City of Reading**, 34 PPER ¶ 34 (Proposed Decision and Order, 2003) and **Fraternal Order of Police, Lodge 5 v. City of Philadelphia**, 45 PPER 105 (Proposed Decision and Order, 2014).

General Order 1.8 – Conduct and Disciplinary Procedures

The Association complains that this is a new policy that gives an unprecedented level of discretion to the Borough as to the level of discipline to administer with regard to all offenses. The old policy recommended maximum levels of discipline for a list of 43 specific offenses, with progressively more severe discipline for the second and third offenses.

The Board has long held that changes in an employer's policy that substantially increase the severity of discipline are mandatory subjects of bargaining. **Pennsylvania Department of Transportation**, 18 PPER ¶ 18009 (Final Order, 1986). The Board has applied this principle in the Act 111 setting as well. In **City of Reading**, 31 PPER ¶ 31151 (Final Order, 2000), the Board held that the city had a managerial prerogative to enact a Code of Ethics, but violated its duty to bargain when the Code of Ethics permitted the Board of Ethics to impose almost any penalty well beyond the city's disciplinary code.

The Borough defends the enactment of this policy on two grounds.

The Borough's first argument is that the new policy is an appropriate exercise of its management rights under the CBA. Article 3 of the CBA, "Management Rights," provides that the Borough retains the right to "the suspension, demotion, or discharge of policemen according to the Borough Code." However, the first sentence of Article 3 also states that the Borough holds such rights "[t]o the extent that the laws of this Commonwealth do not otherwise limit, restrict or abridge the rights of the Borough." Two of these laws are Act 111 and the Pennsylvania Labor Relations Act, specifically section 6(1)(e) of the PLRA, 43 P.S. 211.6(e), which imposes a duty to bargain certain policies. **See, Fairview Township Police Ass'n v. Fairview Township**, 31 PPER ¶ 31019 (Final Order, 1999) and **IAFF, Local 1803 v. City of Reading**, 31 PPER ¶ 31151 (Final Order, 2000). In other words, although the Borough Code gives the broad authority for a police department to have rules, policies and discipline for violating those rules, once the disciplinary guidelines are in place, the public employer must first bargain changes to those penalties for such rule violations.

The Borough's second argument is that there has been no change in the level of discretion that management may use. The Borough argues that the old policy stated that the penalties were merely recommendations. While this is true, the old policy also assigned offenses to certain classes and provided a maximum level of discipline for each offense. The new policy removes the maximum discipline. This is a change that should have first been bargained with the Association.

To remedy this refusal to bargain, the Borough should rescind that part of the General Order 1.8 that grants such discretion, i.e. section 1.8.4(C)(3), which states "The Department, however, reserves the right to administer any level of discipline it determines, in its sole discretion, to be appropriate given the

circumstances and the severity of the infraction." Also, the Borough should rescind any disciplinary penalties applied under the new policy that exceed the recommended maximum penalty for the same offenses in the old policy. Finally, the Borough should offer to bargain the penalty guidelines with the Association.

Special Order 3 – Patrol Operations-Deployment Plan

On September 24, 2013, the Borough announced that effective January 13, 2014, the police would be geographically divided into two zones for patrol operations. Main Street (PA 230) was the dividing line; Zone 1 would be north of Main Street and Zone 2 would be south of Main Street.

The Association contends that the new division of patrols into two geographic zones combined with new restrictions on responding outside of the assigned zone impacts the safety of the officers. In the past, the officers could back each other up on traffic stops or other events wherever they took place, and could move independently throughout the Borough. The Association contends that the Borough failed to establish that its interest in efficient operations is greater than the safety of the officers. Also, the Association complains that one of the zones is devoid of public bathrooms, food and drink.

The Borough argues that the deployment plan is an example of the Borough's exercise of the direction of personnel, which the Board has held is a managerial prerogative. **City of Wilkes-Barre**, 29 PPER ¶ 29240 (Final Order, 1998). The Borough argues that the deployment plan furthers its interest in the efficient delivery of police patrol services. The Borough also disputes the Association's statement of the impact on the officers. The new policy specifically provides for backup in a variety of scenarios, including traffic stops and emergencies.

Applying the balancing test stated in **Borough of Ellwood City v. Pennsylvania Labor Relations Board**, *supra* and **City of Philadelphia v. International Association of Firefighters, Local 22**, *supra* to the present case, the Borough has made a convincing case that its managerial policy interests substantially outweighs the interests of the officers. Accordingly, the patrol deployment plan is a managerial prerogative.

However, the Association did convincingly argue that the Borough should bargain one impact that is not recognized in the new plan. The new deployment plan does not take into account the past practice of the officers taking food, drink and restroom breaks. Accordingly, the Chief should notify the officers that the Patrol Operations-Deployment Plan found at Special Order 3 does not apply to the past practice of food, drink and restroom breaks that had existed prior to the new plan and offer to bargain the issue of breaks with the Association.

General Order 1.4 – Direction

The Association takes issue with section 1.4.2 of the General Order, which states,

"All department personnel shall obey any lawful order of a superior officer, including any order relayed from a superior officer through an employee of the same or lesser rank. Failure to obey a lawful order shall be deemed insubordination."

The Association contends that the new order impacts the officers more than it promotes the efficient operation of the department. On behalf of the Association, Sergeant Richard Heister, a 24 year veteran of the department, testified that the General Order 1.4.2 could lead to inconsistent orders coming from two separate officers. Heister testified that a problem could exist when someone of a lesser rank is conveying an order from a superior.

The Borough responds that such orders have been communicated this way in the past. The Association admits to this assertion. Also, the Borough points out that the General Order must be read in conjunction with General Order 5.03, Chain of Command, and that to be valid, all orders must originate with a superior officer. The Borough has presented convincing evidence that the new order does not constitute a change in the way that the department's management directed the police officers in the past. The order is a valid exercise in managerial prerogative. Accordingly, the order will stand.

General Order 1.7 – Conditions of Work – Extra-Duty Employment

The Association complains that this order unilaterally restricts outside employment opportunities that were previously assured under the old policy. The Association complains that the new policy gives the chief greater discretion as to whether or not to approve an officer's request to take off duty work and the manner of compensation, and grants to the chief the new power to revoke approval even after it is granted.

The Borough argues that the language of General Order 1.7 recognizes that the CBA has already addressed the Association's concerns. The General Order states, "[t]his general order shall not be construed to supersede or conflict with ... the existing collective bargaining agreement between the Borough of Middletown and the Middletown Borough Police Officers Association." The Borough contends that it does not go beyond the CBA's provisions on Outside Employment but only addresses extra-duty employment.

The language that the Borough points to in the CBA actually does address the issue in this case. In Article 34 of the CBA, the parties came to a meeting of the minds on this topic that the General Order later attempts to change. The General Order goes beyond the CBA in certain ways by giving the chief greater discretion as to whether to approve outside employment.

The Borough cites to **City of Reading**, 27 PPER ¶ 27259 (Final Order, 1996) to claim Pennsylvania law allows an employer to make a unilateral decision on outside employment because its interests for integrity in government outweigh the employees' interests in added wages from extra duty employment. However, **City of Reading**, also noted, "An employer may voluntarily engage in collective bargaining over a subject it is not statutorily obligated to bargain, and where an employer does so, it will be bound by what it negotiated into the collective bargaining agreement." *Id.* at 586, citing **Scranton School District v. Scranton Federation of Teachers**, 365 A.2d 1339 (Pa. Cmwlth. 1976).

In the present case, the parties' CBA already has a provision on outside employment, which prevents the Borough from now acting unilaterally. The Borough should rescind General Order 1.7 and offer to bargain the matter with the Association.

General Order 2.6 – Criminal Investigations

The Association contends that this new policy in General Order 2.3 changed the flow of investigation work, removing it from officers and giving the work to detectives. The Association contends that this unilateral change takes away the officers' ability to earn overtime previously paid the officers and, therefore, changes a longstanding past practice that directly affects wages. It claims the order fundamentally changes job duties and opportunity for career growth.

The Borough points out, correctly, that this is a matter that falls within the "direction of personnel," an issue that is a managerial prerogative and not a mandatory subject of bargaining. **City of Reading**, 34 PPER 34 (Proposed Decision and Order, 2003). Furthermore, as for the impact of the lost overtime, in **City of Wilkes-Barre**, 29 PPER ¶ 29240 (Final Order, 1998), the Board held that the "direction of personnel is managerial prerogative, even though it may affect overtime opportunity." *Id.* at 579. Accordingly, this order does not require bargaining.

General Order 1.3 – Use of Force

The Association contends that this new use of force policy includes three significant changes to the policy. In **FOP Lodge 5 v. City of Philadelphia**, *supra*, at 490-91, I found that a public employer's rules pertaining to the use of force and the use of weapons are proper exercises of managerial prerogative.

However, the Association contends that even if the subject is a proper exercise of managerial prerogative, the new policy impacts wages, hours and the terms and conditions of employment so that the impacts should be bargained.

The first impact is that the new policy removed the benefit of administrative leave for officers involved in a use of force incident. The old policy, at Article XVI (E) provided that any officer involved in a

deadly force incident "shall be placed on 'Administrative Leave' immediately upon completion of the preliminary report of the incident." This automatic administrative leave has been eliminated and the new policy, at Section 1.3.7 (B), states that following a use of deadly or serious bodily force incident, "the Chief of Police may, at his option, reassign the employee involved to office related or other duties."

Sergeant Heister testified that this would remove the benefit of administrative leave under the old policy, whereby an officer was able to stay home with his family and de-stress after a deadly force incident. Heister was able to use such leave in 1993. This part of the new policy gives the chief the discretion whether to grant such leave; it is no longer a right of employees. This part of the new policy certainly impacts a benefit for employees and should have first been bargained. The right to administrative leave in the old policy should be restored.

The second alleged impact is that the Association contends the new policy reduced the training requirements, from twice a year to once a year. However, on review of the evidence, there does not appear to have been a change. Although the new policy says that officers "shall receive training, at least annually" Chief Wheeler testified that the Department is still providing training twice a year and referred to this as the department policy. Sergeant Heister agreed that Chief Wheeler's current practice is to train twice a year. Chief Wheeler also testified, without contradiction, to the state mandate of an annual qualifying training of at least five (5) hours. Despite the Association's concern for the potential for reducing the training to once a year, the Borough has the right within its managerial prerogative of deciding the amount of training officers receive because training is an exercise of the direction of personnel. Accordingly, this is not an impact that must be bargained.

Third, the Association contends that the new policy changed the use of force continuum, from six (6) to eight (8) steps in the decision to use or refrain from the use of force. This change, it argues, makes it difficult for officers to decide when to use force. The Association also contends that its officers have not been trained in the new continuum, thereby opening up the potential for confusion and possible discipline.

The Borough responds to this argument by pointing out that the use of force is governed by law in both state and federal courts and that the Borough's policy attempts to be consistent with what's statutorily required and what the case law says. In light of this legal mandate, it appears that the Borough is exercising proper managerial prerogative in directing personnel. It has taken action to adjust the continuum according to the changing legal environment and guidelines. Therefore, the change in the use of force continuum is not an impact that must be bargained.

General Order 2.3 – Internal Affairs

The Association complains that the Borough's change in its internal affairs procedures appears to provide for greater discretion as to the penalties the Borough may impose for violations, including "job termination." This issue has been addressed above, in the discussion concerning General Order 1.8 – Conduct and Disciplinary Procedures.

The Association also complains that the new rules provide for investigating every citizen complaint, even if they may be frivolous. The new standard, in the purpose section, states, "[i]t is therefore essential to provide for a process by which complaints that allege inappropriate, wrongful, or illegal conduct from both within and outside the department be received and properly investigated." The manner in which the department decides to review complaints is a managerial prerogative.

General Order 2.3 will stand.

General Order 3.4 – Records

The Association contends that the new policy replaced the old arrest report procedures with procedures requiring a combination of computer entries and paper entries. The Association contends that this combination of methods could potentially lead to discipline because it is not clear which method to use, thereby exposing the officer to discipline. The old system of only paper entries did not have a similar uncertainty.

From 1984 until 2005, the Department was only a paper form based department for the recording of arrests and the Department policy on procedures reflected that. In 2005, the Department changed to an electronic In-Synch Records Management System (RMS). Despite the change to electronic based system in 2005, the Department did not issue a revision to the policy for the procedures for recording arrests until 2013.

Sergeant Heister testified that the new procedures for field reports, found at section 3.4.1 (F)(4) and (5) of General Order 3.4 is the cause for concern in that it requires "all reports will be complete, accurate and detailed" and requires that officers "shall verify spelling of all names and addresses, and spell check all report narratives, prior to a RMS entry." The Association contends that this policy could be read as requiring the officer to make a written report as well an electronic report in some instances, leading to confusion as to when to make what kind of order.

Having reviewed the policy and the Association's concerns, it does not seem that the Association is giving the proper reading of the policy. Its concerns will not rise to the level of finding that the policy is confusing, unclear or vague. The General Order 3.4 will stand.

Alleged Weingarten Violations

The second part of the charge alleges that the Borough violated Officer Dennis Morris' rights to have a union representative present in an investigatory interview that could lead to discipline. In **Township of Shaler**, 11 PPER ¶ 11347 (Nisi Decision and Order, 1980), the Board adopted the rule that stated in **NLRB v. J. Weingarten, Inc.**, 420 U.S. 251, 95 S. Ct. 959 (1975) that an employee has a right to union representation during a meeting where he reasonably believes may result in discipline. The Board stated the test that the employee must meet to prove an unfair labor practice:

"First, the Complainant must demonstrate that he reasonably believed that the interview might result in disciplinary action. Second, the Complainant must request that a union representative be present and that such request must be denied. Finally, that subsequent to the employer's denial of representation, the employer must compel the employee to continue with the interview."

Id at 11 PPER at 559.

In the present case, the Association proved all three elements of the test for showing a **Weingarten** violation. The Association met its burden of proof with credible testimony from Morris and Association president Laudenslager and admissions from Chief Wheeler and Sergeant Bennett.

The Borough argues that the Association did not prove any of the three elements of the test. First, the Borough disputes that Morris had reason to believe the interview might result in discipline. The Borough argues that the Chief's statement to Morris that he did not need Laudenslager since the meeting was not disciplinary should convince an objective observer that the meeting was not disciplinary. However, there are facts of record which lead to a different conclusion.

Sergeant Bennett admitted that he called the meeting with the Chief because of Morris driving an unmarked police car contrary to an order and that he wanted to give a verbal warning to Morris. Bennett's admission bolsters Morris' testimony that the circumstances around the meeting convinced him that the meeting was one that could have led to discipline. Furthermore, Chief Wheeler testified that he wanted to address Morris' understanding of the policies on department uniforms and chain of command because he believed Morris was not following those policies. Bennett also admitted that he asked Morris whether he was driving an unmarked vehicle. It is clear from these facts that the meeting was investigatory and could lead to finding that Morris violated an order, thereby being subjected to possible discipline.

The Borough argues that there could not have been an objective reason to believe that discipline might have resulted from the meeting because Morris himself sent two emails to the chief (Borough Exhibits 6 and 7) repeating back to the Chief his words to Morris that the meeting was not disciplinary. These emails are simply repeating what the chief said to Morris on that day and do not reflect the entire

set of circumstances around the meeting. They can reasonably be read as the statements of a worried employee trying to make a record to prevent any future discipline against him.

Second, the Borough disputes that Morris requested a Union representative because there is no evidence that he did so once the meeting began. However, this ignores Morris' request at the beginning of the meeting to have Laudenslager with him and Wheeler's denial of the request. The law does not require the employee to make repeated requests after the initial refusal.

Finally, the Borough contends that Morris was not compelled to continue with the interview. This assertion is contradicted by several facts. Morris was asked to sit at a table with two supervisors on either side of the table. The Chief closed the door on the meeting. The meeting lasted ten minutes. Wheeler asked Morris several questions and took notes during the meeting. The inescapable conclusion is that the meeting was compulsory.

As for the remedy of the **Weingarten** violation, the Association requests that in addition to a cease and desist order, the Board should enter a "make whole remedy to include an expunging of any and all discipline imposed on the basis of the new policies and the Weingarten violation." In **Pennsylvania Emergency Management Agency v. PLRB**, 768 A. 2d 1201 (Pa. Cmwlth. 2001), the Board adopted the National Labor Relations Board approach to remedies of **Weingarten** violations as stated in **Kraft Foods, Inc.** 251 NLRB 598 (1980). "Under **Kraft Foods**, once a Weingarten violation has been established, the burden shifts to the employer to establish that it did not impose the discipline based upon information that it obtained in the unlawful interview. If the employer fails to carry that burden, then a conventional make-whole order will be issued." 768 A.2d at 1206.

There is a dispute about what, if any, discipline the Borough issued "on the basis of the Weingarten violation." Chief Wheeler testified that he did not discipline Morris on the basis of anything from the October 29 meeting. The Association did not rebut this assertion. Some time after October 29, 2013, the Borough did terminate Morris' employment, but on what basis it took such action is unclear because the Association objected to the Borough's introduction of evidence about Morris' termination.

Bennett testified that he gave Morris a verbal warning about driving an unmarked police car. However, Chief Wheeler testified credibly, without contradiction, that that a verbal warning is a step in the Department's disciplinary policy and that only he, as the Chief, has the ability to issue discipline.

Based on these facts, under the **Kraft Foods** standard, the Borough met its burden of proving that it did not impose discipline on the basis of the **Weingarten** violation. Accordingly, the appropriate remedy is a cease and desist order.

CONCLUSIONS

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

1. Middletown Borough is a public employer within the meaning of Act 111.
2. The Middletown Borough Police Officers' Association is a labor organization within the meaning of Act 111.
3. The Board has jurisdiction over the parties.
4. The Borough has committed unfair labor practices under Sections 6(1)(a) and (e) of the PLRA.

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

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 Middletown Borough.
3. Take the following affirmative action which the examiner finds necessary to effectuate the policies of the PLRA and Act 111:
 - (a) The Borough should rescind section 1.8.4(C)(3), which states "The Department, however, reserves the right to administer any level of discipline it determines, in its sole discretion, to be appropriate given the circumstances and the severity of the infraction.";
 - (b) Rescind any disciplinary penalty applied under General Order 1.8 that exceeds the recommended maximum penalty for the same offenses in the old policy;
 - (c) Notify the officers of the department that the Patrol Operations-Deployment Plan found at Special Order 3 does not apply to the past practice of food, drink and restroom breaks that had existed prior to the new plan and offer to bargain the issue of breaks with the Association;
 - (d) Rescind and offer to bargain the provisions found at General Order 1.7 – Conditions of Work – Extra-Duty Employment;
 - (e) Restore Article XVI (E) of the old policy, which states, "[a]ny officer directly involved in a deadly force incident shall be placed on 'Administrative Leave' immediately upon completion of the preliminary report of the incident";
 - (f) 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
 - (g) 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 tenth day of March, 2015.

PENNSYLVANIA LABOR RELATIONS BOARD

Thomas P. Leonard, Hearing Examiner