

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

ELLWOOD CITY POLICE DEPARTMENT :
WAGE & POLICY UNIT :
 :
v. : Case No. PF-C-13-89-W
 : PF-C-16-8-W
BOROUGH OF ELLWOOD CITY :

PROPOSED DECISION AND ORDER

On September 23, 2013, the Ellwood City Police Department Wage Policy Unit (Union) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board), docketed at PF-C-13-89-W, against the Borough of Ellwood City (Borough or Employer) alleging that the Borough violated Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA) as read with Act 111.

On October 25, 2013, the Secretary of the Board issued a Complaint and Notice of Hearing, assigning the charge to conciliation for the purpose of resolving the matters in dispute through mutual agreement of the parties, and designating January 29, 2014, in Pittsburgh, as the time and place of hearing, if necessary, before Hearing Examiner John Pozniak.

The parties requested a continuance of the hearing in order to pursue settlement discussions. On August 25, 2015, the matter was transferred to the undersigned Hearing Examiner and a hearing was scheduled for October 22, 2015, in Pittsburgh. The hearing was continued at the request of the complainant and without objection from the respondent, and the hearing was scheduled for February 12, 2016, in Pittsburgh.

On January 26, 2016, the Union filed a charge of unfair labor practices with the Board against the Borough alleging that the Borough violated Section 6(1)(a) and (e) of the PLRA as read with Act 111. This charge, which was numbered PF-C-16-8-W, was related to PF-C-13-89-W and the parties agreed to consolidate the matters and hear them together. Therefore, on February 4, 2016, the Secretary of the Board issued a Complaint and Notice of Hearing designating February 12, 2016, in Pittsburgh as the time and place of hearing.

A hearing was held on February 12, 2016, in Pittsburgh, before the undersigned Hearing Examiner, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The Union submitted a post-hearing brief in support of its charge on March 21, 2016. The Borough submitted a post-hearing brief in support of its position on April 20, 2016.

The Hearing Examiner, based on all matters of record, makes the following:

FINDINGS OF FACT

1. Ellwood City Borough is a public employer and political subdivision under Act 111 as read *in pari materia* with the PLRA. (N.T. 4).
2. The Ellwood City Police Wage and Policy Unit is a labor organization under Act 111 as read *in pari materia* with the PLRA. (N.T. 3).
3. The parties were subject to a collective bargaining agreement (CBA) which expired on December 31, 2005. (N.T. 13; Union Exhibit 1).
4. Following the CBA, the parties were subject to an Act 111 interest arbitration award from January 1, 2006 to December 31, 2008. (N.T. 13; Union Exhibit 1).
5. The parties were subject to a subsequent Act 111 interest arbitration award (the Peterson Award) from January 1, 2009 to December 31, 2012. (N.T. 13; Union Exhibit 1).

6. Subsequent to the Peterson Award, the parties agreed to a settlement from January 1, 2013, to December 31, 2016. (N.T. 14; Union Exhibit 1).

7. Article X of the 2003 CBA contains the following provision regarding bulletproof vests:

C. BULLETPROOF VESTS

1. The Borough shall issue a bulletproof vest to all members of the Police Department at no charge to the members' clothing allowance.

2. The bulletproof vest shall be replaced in accordance with the manufacturer's recommendation at the cost of the Borough.

(N.T. 15; Union Exhibit 1).

8. In 2005, the Borough refused to buy new vests on the manufacturer's recommendation unless the Union agreed to new terms which made it mandatory to wear the vests. In response, the Union filed a grievance. At step two of the grievance procedure, the Borough agreed to buy new vests without any mandate to wear them. (N.T. 16).

9. In 2006, the Borough, through its Mayor, Don Clyde, issued an order directing the bargaining unit members to mandatorily wear bulletproof vests. In response, the Union filed a grievance. At step two of the grievance procedure, the parties agreed that bargaining unit members could choose not wear a bulletproof vest if they signed a Bulletproof Vest Waiver. As a result of this grievance settlement, the bargaining unit members could use their own judgement as to whether they want to wear a bulletproof vest and released the Borough from any liability that may arise from not wearing a vest. (N.T. 16-18; Union Exhibit 2).

10. The Bulletproof Vest Waiver contains the following relevant language:

The employee, _____, of the Ellwood City Police Department, acknowledges that he or she has been provided with a protective vest to wear while on duty. The employee, upon his or her own free choice, may decide not to wear such vest in the performance of his or her duties.

Note: This language has been agreed to by [the Union] and approved by the Mayor. If you wish not to wear your vest then you will have to sign a waiver prior to not wearing it!"

(Union Exhibit 2).

11. On or about August 20, 2013, the Borough instituted a policy "35.0 Body Armor" (the Body Armor Policy) which made the wearing of bulletproof vests mandatory and made no mention of the Bulletproof Vest Waiver. The policy was effective on November 18, 2013. (N.T. 22-24; Union Exhibit 4).

12. As of November 18, 2013, the Body Armor Policy stated in relevant part:

4.2 Use of Body Armor

4.2.1 Officers shall wear only agency-approved body armor.

4.2.2 Body armor shall be worn by probationary officers during both classroom and field training.

4.2.3 Officers that are assigned to a uniformed function and non-uniformed sworn officers are required to wear body armor while engaged in field activities both on duty and during secondary employment/paid details arranged through the police department unless exempt as follows:

4.2.3.1 When an agency-approved physician determines that an officer has a medical condition that would preclude wearing body armor.

4.2.3.2 When the officer is involved in undercover or plain clothes work that his/her supervisor determines could be compromised by wearing body armor; or

4.2.3.3 When the department determines that circumstances make it inappropriate to mandate wearing body armor.

4.2.4 All officers assigned to Detective or Administrative duty should wear a protective vest during their tour of duty. However, those officers performing Detective and Administrative duties who choose not to wear their protective vest must have it immediately available at all times during their tour of duty.

4.2.5 Regardless of routine daily assignment, all officers must wear protective vests during high risk and/or tactical situations. Examples of "high risk" or "tactical" situations include, but are not limited to, search warrant executions, drug raids, initial crime scene response, and serving felony warrants. Any officers not wearing a protective vest shall not participate directly in a high risk and/or tactical situation.

(Union Exhibit 4).

13. Subsequent to the passage of the Body Armor Policy, the Union sought a meeting. The Union and the Borough did not reach a settlement. (N.T. 24).

14. Ultimately, on September 23, 2013, the Union filed an unfair labor practice charge against the Borough, which was numbered PF-C-13-89-W. (N.T. 24).

15. On November 18, 2015, Mayor Anthony Court issued a memorandum to all personnel announcing that the Body Armor Policy would be enforced and violations would be subject to disciplinary action. This disciplinary policy was effective immediately. (N.T. 25; Union Exhibit 4).

16. Subsequent to the Mayor's memorandum, on December 21, 2015, the Borough Council approved revisions to the Body Armor Policy. The revisions deleted sections 4.2.3.2 and 4.2.3.3. It added a new section 4.2.3.2 which states "All Lieutenants, Sergeants, and Officers in Charge shall not be permit any officer to engage in any field activity as defined herein while on duty and during secondary employment details without his/her body armor." Additionally, the revisions added the following new section:

5.0 Violations

Violation of this policy will result in the following disciplinary action at any time during the course of an officer's employment with the Borough of Ellwood City Police Department as follows:

	Patrolman	Supervisor
First Violation	Written Warning	Written Warning
2 nd Violation (occurring within 1 year From the 1 st violation)	1 Day Suspension	3 Days suspension
3 rd Violation (occurring within 1 year from the 1 st violation)	5 Day Suspension	Termination

4th Violation (occurring Termination
within 1 year from the
1st violation)

(N.T. 27; Union Exhibit 4).

16. The discipline announced by the Mayor on November 18, 2015, was less severe than the discipline ultimately passed by the Borough Council on December 22, 2015. The discipline policy passed by the Borough Council is currently in effect. This revision to the policy prompted the Union to file an unfair labor practice charge against the Borough, which is docketed at PF-C-16-8-W. (N.T. 26, 29).

DISCUSSION

In its charge docketed at PF-C-13-89-W, the Union alleges that the Borough's 2013 Body Armor Policy, which was effective on November 18, 2013, violated Section 6(1)(a) and (e) of the PLRA on two grounds. First, the Union argues the Policy was a violation of 6(1)(a) and (e) because the Policy was a unilateral change in working conditions in violation of the Borough's statutory duty to bargain. Second, the Union argues the Policy was a violation of 6(1)(a) and (e) because it repudiated a grievance settlement agreement. In its related charge docketed at PF-C-16-8-W, the Union similarly alleges that the Borough's revision of the Body Armor Policy, on December 21, 2015, violated Section 6(1)(a) and (e) of the PLRA on two grounds. First, the Union argues the revised Policy was a violation of 6(1)(a) and (e) because the revised Policy was a unilateral change in working conditions in violation of the Borough's statutory duty to bargain. Second, the Union argues the revised Policy was a violation of 6(1)(a) and (e) because it repudiated a grievance settlement agreement.

Turning first the Union's allegation that the Borough repudiated a grievance settlement agreement, it is well settled that an employer's refusal to comply with a grievance settlement at a lower stage in the grievance procedure is an unfair practice. **Moshannon Valley School District v. PLRB**, 597 A.2d 229 (Pa. Cmwlth. 1991); **Zelienople Borough**, 27 PPER ¶ 27024 (Final Order, 1995); **New Eagle Borough**, 25 PPER ¶ 25026 (Proposed Decision and Order, 1994). An unfair practice may be found where 1) a settlement agreement exists, 2) the parties' intent is apparent from the settlement agreement, and 3) the party has failed to comply with the agreement's provisions. **City of Philadelphia**, 36 PPER 124 (Final Order, 2005).

In this matter, the record clearly shows that there was a settlement agreement between the parties. As background, in 2005, the Borough refused to buy new vests on the manufacturer's recommendation unless the Union agreed to new language which made it mandatory to wear the vests. In response, the Union filed a grievance. At step two of the grievance procedure, the Borough agreed to buy new vests without any mandate to wear them. Then, in 2006, the Borough, through its Mayor, Don Clyde, issued an order directing the bargaining unit members to mandatorily wear bulletproof vests. In response, the Union filed a grievance. At step two of the grievance procedure, the parties agreed that bargaining unit members could choose not wear a bulletproof vest if they signed a Bulletproof Vest Waiver. This is the settlement agreement in this matter.

Further, the record is clear as to the parties' apparent intent. The agreement was such that bargaining unit members could use their own judgement as to whether they want to wear a bulletproof vest and released the Borough from any liability that may arise from not wearing a vest. In other words, as long as they signed the waiver, the bargaining unit members could choose when or when not to wear a bulletproof vest. The choice to wear a bulletproof vest was within the bargaining unit members' discretion. Indeed, the Bulletproof Vest Waiver form clearly expresses the understanding of the parties. The form states, in relevant part:

The employee, _____, of the Ellwood City Police Department, acknowledges that he or she has been provided with a protective vest to wear while on duty. The employee, upon his or her own free

choice, may decide not to wear such vest in the performance of his or her duties.

Note: This language has been agreed to by [the Union] and approved by the Mayor. If you wish not to wear your vest then you will have to sign a waiver prior to not wearing it!"

This language, fully supported by testimony provided by the Union at the hearing, accurately describes the relevant terms of settlement agreement reached by the parties to settle the Union's grievance.

Lastly, the record is clear that, beginning in 2013, the Borough has on multiple occasions abrogated this agreement by instituting and revising a Body Armour Policy which directs the bargaining unit members to wear bulletproof vests and makes no mention of the Bulletproof Vest Waiver and the agreement that bargaining unit members can exercise their discretion in choosing to wear a bulletproof vest. Specifically, the Borough passed a Body Armor Policy effective on November 18, 2013, the Mayor modified the policy on November 18, 2015, to add discipline for noncompliance, and, finally, the Borough officially modified the Body Armor Policy on December 21, 2015.

The Employer argues in its Brief that its Body Armor Policy is an issue of managerial prerogative and that it has no duty to bargain the issue with the Union. Assuming for the purposes of this argument that the Body Armor Policy is in fact an issue of managerial prerogative, it is well established that even where a settlement agreement concerns a matter that is not a mandatory subject of bargaining, once the employer agrees to the terms of the settlement, the employer is bound by its agreement. **AFSCME, Council 13 v. State System of Higher Education** (Edinboro University), 32 PPER ¶ 32080 (Final Order, 2001); **Philadelphia School Police Association v. Philadelphia School District**, 9 PPER ¶ 29131 (Proposed Decision and Order, 1998); **Coatesville Area School District v. Coatesville Area Teachers' Association**, 978 A.2d 413 (Pa. Cmwlth. 2009). Indeed, in **New Castle Township**, quoting **Pittsburgh Joint Collective Bargaining Committee v. City of Pittsburgh**, 81 Pa. 66, 74 391 A.2d 1318, 1322 (1978), the Board held as follows:

To permit an employer to enter into agreements ... and to include terms which raise the expectations of those concerned, and then to subsequently refuse to abide by those provisions ... would invite discord and distrust and create an atmosphere wherein a harmonious relationship would be virtually impossible to maintain.

New Castle Township, 25 PPER at 258-259. Thus, in this matter, even if the settlement of the grievance involves matters that are managerial prerogative, this does not render that agreement nonbinding on the Borough. The Borough is still bound by the agreement it made with the Union, even though the Borough strongly believes the agreement concerns a topic it considers to be within its managerial prerogative.

Thus, the record is clear that the Borough, when it implemented the Body Armor Policy in 2013, violated Section (6)(1)(a) and (e) of the PLRA as read with Act 111 by repudiating a grievance settlement agreement. The same analysis also applies to the memorandum issued by the Mayor in 2015 regarding the Body Armor Policy and the revisions to the Body Armor Policy made by the Borough in 2015, and these actions are also a violation of Section (6)(1)(a) and (e) of the PLRA as read with Act 111, especially with regard to the imposed discipline. See **Amalgamated Transit Union, Division 1279 v. Cambria County Transit System**, 21 PPER 21007 (Final Order 1989) *aff'd* 22 PPER 22056 (Cambria County Court of Common Pleas 1999).

As the above analysis based on the Union's charges that the Borough repudiated a grievance settlement agreement disposes of this matter, I will not address the Union's charges that the Borough also committed unfair labor practices by unilaterally implementing a change in working conditions in violation of its statutory duty to bargain when it adopted its Body Armor Policy.

CONCLUSIONS

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

1. The Borough of Ellwood City is a public employer and political subdivision under Act 111 as read *in pari materia* with the PLRA.
2. The Ellwood City Police Wage and Policy Unit is a labor organization under Act 111 as read *in pari materia* with the PLRA.
3. The Board has jurisdiction over the parties hereto.
4. The Borough of Ellwood City has committed unfair labor practices in violation of Section 6(1)(a) and (e) of the PLRA in the matters docketed at PF-C-13-89-W and PF-C-16-8-W.

ORDER

In view of the foregoing and in order to effectuate the policies of the PLRA and Act 111, the Hearing Examiner

HEREBY ORDERS AND DIRECTS

that the Borough of Ellwood City shall:

1. Cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed in the PLRA and Act 111.
2. Cease and desist from refusing to bargain collectively with the representatives of its employees.
3. Take the following affirmative action:
 - (a) Revoke and rescind Borough Policy "35.0 Body Armor", effective date November 18, 2015, and revised December 12, 2015, and Mayor Court's November 18, 2015, memorandum regarding the Body Armor Policy;
 - (b) Return to the *status quo ante* that existed with regard to bulletproof vests prior to the adoption of Borough Policy "35.0 Body Armor", effective date November 18, 2013, and revised December 21, 2015, and Mayor Court's November 18, 2015, memorandum regarding the Body Armor Policy;
 - (c) Rescind any discipline imposed on bargaining unit members as a result of any Body Armor Policy violations and make bargaining unit members whole for any losses sustained as a result of the unfair labor practices;
 - (d) Post a copy of this Decision and Order within five (5) days from the effective date hereof in a conspicuous place readily accessible to the bargaining unit employees and have the same remain so posted for a period of ten (10) consecutive days;
 - (e) 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; and
 - (f) Serve a copy of the attached Affidavit of Compliance upon the Association.

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 days of the date hereof, this decision and order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this 10th day of May, 2016.

PENNSYLVANIA LABOR RELATIONS BOARD

Stephen A. Helmerich, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

ELLWOOD CITY POLICE DEPARTMENT
WAGE & POLICY UNIT

v.

BOROUGH OF ELLWOOD CITY

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Case No. PF-C-13-89-W
PF-C-16-8-W

AFFIDAVIT OF COMPLIANCE

The Borough of Ellwood City hereby certifies that it has ceased and desisted from their violations of Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act; that it has complied with the Proposed Decision and Order as directed therein; it has revoked and rescinded Borough Policy "35.0 Body Armor", effective date November 18, 2013, and revised December 21, 2015, and Mayor Court's November 18, 2015, memorandum regarding the Body Armor Policy; it has returned to the *status quo ante* that existed with regard to bulletproof vests prior to the adoption of Borough Policy "35.0 Body Armor", effective date November 18, 2013, and revised December 21, 2015, and Mayor Court's November 18, 2015, memorandum regarding the Body Armor Policy; it has rescinded any discipline imposed on bargaining unit members as a result of any Body Armor Policy violations and made bargaining unit members whole for any losses sustained as a result of the unfair labor practices; that it has posted a copy of the Proposed Decision and Order as directed therein; and that it has served an executed copy of this affidavit on the Union at its principal place of business.

Signature/Date

Title

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

Signature of Notary Public