

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE, LODGE 1 :  
 :  
 v. : Case No. PF-C-18-27-W  
 :  
 CITY OF PITTSBURGH :

**PROPOSED DECISION AND ORDER**

On February 21, 2018, the Fraternal Order of Police, Lodge 1 (FOP) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) against the City of Pittsburgh (City or Employer) alleging that the City violated Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA) as read with Act 111.

On May 18, 2018, 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 October 12, 2018, in Pittsburgh, as the time and place of hearing, if necessary.

The hearing was held on October 12, 2018, 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 FOP submitted a post-hearing brief on June 18, 2019. The City submitted a post-hearing brief on August 20, 2019.

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

**FINDINGS OF FACT**

1. The City is a public employer and political subdivision under Act 111 as read *in pari materia* with the PLRA. (N.T. 6).

2. The FOP is a labor organization under Act 111 as read *in pari materia* with the PLRA. (N.T. 5).

3. On January 19, 2018, the City implemented Order 69-03 "Body Worn Camera Recording and Digital Evidence Stored System". The Order mandates the use of body worn cameras (BWC). Additionally, it establishes guidelines and procedures for utilization of body worn cameras by police officers. (N.T. 30; FOP Exhibit 5, 9).

4. The BWC policy states in relevant part:

9.0 LIEUTENANT AND SERGEANT DUTIES AND RESPONSIBILITIES

9.1 Lieutenants and sergeants shall have access to view all BWC recordings from their respective zone. . . .

9.2 Each Sergeant must review at least (5) BWC recordings per month from their respective shift based on the group they review for PARS/OMS. . . .

. . .

11.0 USE OF MEDIA COLLECTED BY THE BODY WORN CAMERA

. . .

11.7 To the extent possible, the PBP shall limit the viewing of Mobile Video Recordings (MVRs) and Body Worn Cameras (BWC) recordings by any officer at the scene of an officer involved shooting or in custody death unless there is a public safety need to identify or search for suspect(s) and/or involved vehicles that may have left the scene.

(FOP Exhibit 9).

5. On January 21, 2018, the President of the FOP, Robert Swartzwelder, sent an email to the Chief of Police which states in relevant part:

Chief,

The issues surrounding the expansion of the BWC policy continue to concern the FOP. Specifically, the sections where the officer is NOT permitted to view the footage surrounding a Critical Incident or more specifically an Officer Involved Shooting.

Criminal Defendants are permitted to view footage and all evidence against them prior to determining whether they want to make a statement in court. The process is known as discovery. The FOP's attorneys advise that if video evidence is available the officer should review it to assist in the recollection of the events so that a thorough report can be written. Yet the BWC policy prohibits this. Why an officer cannot do this is unexplainable. . . .

The policy specifically fails to prohibit against trolling for discipline cases and the FOP was not permitted or consulted regarding the equipment selected . . . . This [equipment's] impact on officer safety could be significantly mitigated with modern BWC technology of today.

In my meetings with yourself and others on December 21, 2017, I raised those issues and did so again in early January 2018. On January 19, 2018, the BWC policy was issued to the Bureau without those issues being bargained or addressed. I further requested that a specific notation is made in the policy regarding when an officer could turn the camera off. This provision remains elusive. Thus, the discretion to discipline that an officer turned the camera off too soon or not soon enough remains within the department's discretion to discipline. As a suggestion consider the Fraternal Order of Police Best Practices on the issue.

. . .

The FOP remains ready to bargain the impact of this issue at your earliest convenience.

(N.T. 31, 63; FOP Exhibit 6).

6. Swartzwelder did not receive an immediate response to his email. (N.T. 31).

7. On February 4, 2018, Swartzwelder wrote Deputy Chief Strangrecki an email regarding the BWC policy which states in relevant part:

[Deputy] Chief Strangrecki,

The BWC system has now been implemented into Zone 3 on an ad hoc basis. The FOP has vehemently objected to mandatory wear due to several issues previously discussed regarding this significant change in Working Conditions unilaterally occurring without significant impact bargaining.

The policy is ambiguous regarding "every citizen contact" that an officer comes into contact with during a shift. This places bargaining unit members at a disadvantage in some instances while other bargaining unit members do not have the same potential for a penalty in regards to discipline. The Policy does not MANDATE every bargaining unit member wear a body worn camera, only certain units must wear a body worn camera.

As for when an officer must download the footage the policy continues its ambiguity. Should the officers download immediately following each contact? Middle of shift? End of the shift? If at the end of the shift, I have been informed that it takes at least 20 minutes to download the footage of a 30-minute nature. If the footage is for the entire shift, with substantial footage, the officer could potentially be downloading 8 hours of footage for nearly 6 hours at the conclusion of the shift. Is the City going to pay overtime? If not, what should the officers do about downloads? What about hospitals? Nothing in the policy addresses recording in areas that are sensitive to potential Hipaa violations. Either through a memorandum or Chief directive, the officers are still not clear on when the camera may be turned off. . . . This issue has not been addressed. Please provide convenient dates where impact bargaining may take place over these and other issues previously raised by the FOP regarding BWC.

((N.T. 31; FOP Exhibit 7).

8. Swartzwelder did not receive an immediate response to his February 4, 2018, email. (N.T. 32-33).

9. On February 21, 2018, the FOP filed an unfair labor practice charge with the Board alleging that the City violated Act 111 and the PLRA by "Failing to bargain over the impact of the BWC Order on employee discipline and privacy, as well as other terms and conditions." (FOP Exhibit 8).

10. On February 27, 2018, the Chief of Police Scott Schubert responded to Swartzwelder by letter which states in relevant part:

Re: Requests for Impact Bargaining  
Mr. Swartzwelder:

The Bureau is in receipt of the following requests for impact bargaining. The City is willing to meet and discuss the specific terms over which the FOP seeks to impact bargain.

1.) January 21, email re: Impact Bargaining - BWC policy  
The following discussions have occurred to date:

November 16, 2017: Letter and Policy received at FOP office  
November 30, 2017: FOP requested a formal discussion on the policy

December 21, 2017: Deputy Chief Strangrecki met with you

December 23, 2017: Deputy Chief emailed notes from the December 21<sup>st</sup> meeting to Accreditation, which then updating the policy [sic]

January 12, 2018: Deputy Chief Strangrecki provided an updated copy of the policy to you to review and discuss

January 19, 2018: The policy was finalized.

Throughout this time, FOP counsel and the City Law Department also engaged in an ongoing discussions regarding both this policy as well as the Critical Incident Policy and MOU.

. . .

In the interest of concluding both of these matters expeditiously, we can offer the following dates and times:

March 6, 2018 from 8:00 to 10:30 AM

March 8, 2018 from 2:00 to 5:00 PM

March 14, 2018 from 8:00 AM to 1:00 PM

Please advise as to your availability.

(N. T. 64; City Exhibit 2).

11. Since the implementation of the BWC policy on January 19, 2018, there have been at least three officer-involved shootings, where the officers involved were compelled to give statements to Allegheny County Police by the City Chief without the opportunity to review anything from their BWC per the BWV policy. These statements are compelled by a direct order from the Chief and if the officer refuses to give a statement before reviewing BWC footage per the BWC policy, they are subject to discipline. If the officer is the accused, he or she may invoke their Miranda rights. (N.T. 34-42, 56, 98-99).

12. The BWC mandates that the BWC must be used in any interaction with the public. The FOP is unclear as to when a police officer may use discretion to decide which interactions with the public required use of the BWC. (N.T. 44-45).

13. The FOP is concerned about the City "trolling" for discipline because there are no limits on the City's ability to continue to review BWC footage. Supervisors are required by the BWC policy to review certain amounts of BWC footage for each police officer

every month. The FOP believes that discipline has been expanded because without the BWC footage, that City would not have seen or been able to make distinctions of officer conduct. (N.T. 46-48, 69).

14. There have been a few incidents where a police officer has been disciplined beyond what they normally would have been disciplined due to footage captured by the BWC and reviewed by the City per the BWC policy. (N.T. 36-38).

#### DISCUSSION

In its charge, the FOP alleges that the City failed to impact bargain over the implementation of the BWC policy on January 19, 2018. In Lackawanna County Detectives Ass'n v. PLRB, 762 A.2d 792 (Pa. Cmwlth. 2000), the Commonwealth Court held that a union must establish the following four elements in an impact bargaining case: (1) The employer must lawfully exercise its managerial prerogative; (2) there must be a demonstrable impact on wages, hours, or working conditions, which are severable from the managerial decision; (3) the union must demand to negotiate these matters following management's implementation of its prerogative; and (4) the public employer must refuse the union's demand. Id. (citing Borough of Ambridge, 30 PPER ¶ 30218 (Final Order, 1999)).

In this matter, it is not contested that the City exercised its managerial prerogative when it implemented the BWC policy on January 19, 2018. It is also clear the FOP demanded to impact bargain on January 21, 2018 and February 4, 2018. The record also shows that the City refused to impact bargain: the City did not immediately respond to the FOP's demands to impact bargain and its later February 27, 2018, letter to the FOP says that it would be willing to "meet and discuss" over the FOP's demands to impact bargain. "Meet and discuss" is, in the context of labor negotiations, a term of art which signals that the City was not willing to bargain.

Thus, the record in this matter supports three of the four elements of Lackawanna County. The question in this case is whether, for the issues raised by the FOP, there are demonstrable impacts on wages, hours, or working conditions, which are severable from the managerial decision.

First, the FOP raised the issue of reviewing BWC camera footage surrounding a Critical Incident or Officer Involved Shooting. In its brief, the FOP argues:

[T]he City's mandate that officers provide a statement in critical incidents without review of the body worn camera footage creates an area of discipline. Section 11 of the [BWC] Policy provides that an officer may not review the footage in [the] situation of officer involved shootings. In all other situations, however, the officer is permitted to review footage. Prior to this policy there was no such mandate. To that end, this creates an area of concern for the affected member as it is a deviation from the status quo. Officers are ordered to provide a statement or will be subject to discipline and in preparing their statement they not permitted to review footage from what is often a very stressful situation.

(FOP Brief at 10). Since the implementation of the BWC policy on January 19, 2018, there have been at least three officer-involved shootings, where the officers involved were compelled to give statements to Allegheny County Police by the City Chief without the opportunity to review anything from their BWC footage. It is clear then that the BWC policy has a demonstrable impact on discipline, as officers, in the position as a witness or an accused, have been forced to give a statement without reviewing BWC footage per the BWC policy.

Generally, where an employer exercises its managerial prerogative to install new technology to monitor employe behavior for purposes of discipline under existing rules, the disciplinary aspects of employe working conditions remain unchanged, and thus there is no impact on the employee that is severable from introduction of the new technology. FOP, Lodge No. 5 v. City of Philadelphia, 29 PPER ¶ 29000 (Final Order, 1997); FOP, Lodge No. 9 v. City of Reading, 27 PPER ¶ 27259 (Final Order, 1996). However, the Board has held that where the employer exercises a managerial prerogative to install monitoring devices, but uses the enhanced monitoring of the new technology to create new rules or more stringent guidelines, or to alter the procedures for review of employe conduct, those new rules, guidelines, or procedures constitute a severable impact on working conditions that is mandatorily negotiable. Bureau of Liquor Control Enforcement, 45 PPER 99 (Final Order, 2014); 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). Here it is clear, as the FOP argues, that the City has implemented new procedures for review of employe conduct by forbidding officers from reviewing relevant BWC footage in critical incident cases where the officer is an accused suspect in manifest jeopardy or a witness who is required to give a statement subject to discipline upon refusal. Therefore, following Bureau of Liquor Control Enforcement, the effect on discipline is severable and the City committed an unfair practice when it refused to impact bargain this issue.

Second, the FOP raised the issue of "trolling" for discipline and demanded to impact bargain the use of BWC camera footage to "troll" for discipline. The FOP argues in its Brief:

[T]he information gathered under the [BWC policy] is more [than] a new technology for employee supervision. It gathers information the City would never have been able to gather through normal supervisory channels. . . . Moreover, not only does it make it more likely that an employe will be disciplined, it makes the employees' ability to defend such discipline more difficult as the employee can be confronted days, weeks or months after the incident whereas before [the BWC policy] the employee could immediately explain an event to a Supervisor. This aspect is particularly problematic because of the requirements of the [BWC policy] that directs Supervisors to do periodic random checks on employees. . . . As noted by [FOP President Swartzwelder], the mandatory use of the body worn camera and the policy mandate of periodic review allow for "trolling".

(FOP Brief at page 7). The record in this matter supports a finding that the City violated its duty to impact bargain. The record shows that the troling for discipline that the FOP complains of has happened. Swartzwelder credibly testified that there were a few incidents where a police officer had been disciplined beyond what they normally would have been disciplined due to footage captured by the BWC and reviewed by the City. This is a demonstrable impact. The record shows that the BWC policy in this respect alters the procedures for review of employe conduct by making BWC footage generally available for review by superiors and has led to discipline beyond what would have occurred but for the review of BWC footage pursuant to the policy. This is a severable impact. Bureau of Liquor Control Enforcement, supra. The City thus committed an unfair labor practice by refusing to impact bargain this issue.

Third, the FOP raised with the City the issue of the time it takes for an officer to download BWC footage in compliance with the policy and demanded impact bargaining over the issue. The FOP in particular was concerned about the status for overtime if an officer took longer than their shift to comply with the BWC policy. It is not contested that hours of work and overtime are mandatory subject of bargaining. However, the record in this matter does not show any demonstrable impact on overtime issues: they remain merely theoretical. Therefore, at this time, the City has not committed an unfair labor practice by refusing to impact bargain this issue.

Finally, the FOP raises issues relating to privacy, ambiguity with respect to when the BWC may be turned off or must be turned on, and differences in the application of the mandate upon police officers. I find that the record in this matter is clearly insufficient to show that these issues had a demonstrable impact on wages, hours, or working conditions, which are severable from the managerial decision. Therefore, the City did not commit unfair practices by refusing to impact bargain over these issues.

I note that the FOP may in the future file unfair labor practice charges if demonstrable impacts on wages, hours, or working conditions arise from the City's continuing implementation and enforcement of the BWC policy and the City refuses to impact bargain over those issues.

#### 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 is a public employer and political subdivision under Act 111 as read *in pari materia* with the PLRA.
2. The FOP 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 City has committed an unfair labor practice in violation of Section 6(1)(a) and (e) of the PLRA and Act 111.

**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 City of Pittsburgh shall:

1. Cease and desist from interfering with, restraining or coercing employes 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 employes.

3. Take the following affirmative action which the Hearing Examiner finds necessary to effectuate the policies of the PLRA and Act 111:

(a) Immediately bargain the impact of its January 19, 2018, Order 69-03 "Body Worn Camera Recording and Digital Evidence Stored System".

(b) 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 employes and have the same remain so posted for a period of ten (10) consecutive days;

(c) 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

(d) 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 twenty-second day of October, 2019.

PENNSYLVANIA LABOR RELATIONS BOARD

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Stephen A. Helmerich, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE, LODGE 1 :  
v. : Case No. PF-C-18-27-W  
CITY OF PITTSBURGH :

AFFIDAVIT OF COMPLIANCE

The City of Pittsburgh hereby certifies that it has ceased and desisted from its 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; that it has immediately bargained the impact of its January 19, 2018, Order 69-03 "Body Worn Camera Recording and Digital Evidence Stored System"; 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.

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Signature/Date

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Title

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

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Signature of Notary Public