

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

ALLEGHENY COUNTY POLICE ASSOCIATION :
v. : Case No. PF-C-22-10-W
ALLEGHENY COUNTY :

PROPOSED DECISION AND ORDER

On February 9, 2022, the Allegheny County Police Association (Association) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (PLRB or Board) against Allegheny County (County or Employer) alleging that the County violated Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA), as read *in pari materia* with Act 111, when, on January 1, 2022, the County established an Independent Police Review Board without bargaining with the Association.

On May 12, 2022, the Secretary of the Board issued a Complaint and Notice of Hearing designating August 3, 2022, in Pittsburgh, as the time and place of hearing.

The hearing was continued and held on August 5, 2022, in Pittsburgh, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. At the hearing, the parties agreed to fully adopt the transcript and exhibits of case no. PF-C-21-48-W into the record of this case. The Association submitted a post-hearing brief on October 12, 2022. The County submitted a post-hearing brief on December 2, 2022.

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

FINDINGS OF FACT

1. The County is a public employer and political subdivision under Act 111 as read *in pari materia* with the PLRA. (N.T. 5)¹.

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

3. The Association is the exclusive collective bargaining representative of all full-time and regularly scheduled part-time Allegheny County police officers (Police Officers) employed by the County of Allegheny. The bargaining unit includes Police Officers up through and including the rank of Lieutenant. There are 212 members of the bargaining unit. (N.T. 44).

4. The Association and County are parties to a collective bargaining agreement setting forth wages, hours and other terms and conditions of employment. The CBA has been amended by an Act 111 interest arbitration award covering the term January 1, 2019, through December 31, 2022. (N.T. 53-54; Police Exhibit 3).

¹ All references to the transcript are to the transcript of the hearing on September 3, 2021, in case PF-C-21-48-W between the same parties.

5. The Allegheny County Police Department maintains personnel records or files for each Police Officer. In addition to personnel files, the Department also maintains background check files, medical files, disciplinary files, and supervisory files. The personnel files are maintained in the Department headquarters. Contained within the personnel files are basic biographical information, emergency contact information, a record of where they have been assigned to work, a record of transfer orders, annual performance reviews, a section for discipline and commendations, and a section to list issued equipment. Background check files include the information collected and reviewed by the Department prior to hiring a Police Officer. Medical files are continuously updated and include information including what medicines a Police Officer may be taking, medical conditions, and other medical information. The discipline file contains any reports from the Supervisory Inquiry Board, the internal investigation report, any recorded interviews, any video or body worn camera video, surveillance video, and any other relevant information. (N.T. 19-33).

6. General Order No. 37 is the Department's disciplinary policy with respect to Police Officers. General Order No. 37 was incorporated by reference by the most recent Interest Arbitration Award. General Order No. 37 refers to, among other topics, how citizen complaints and other disciplinary matters will be handled by the Department. Pursuant to General Order No. 37, the Department conducts internal investigations of Police Officers. These internal investigations could be prompted by a citizen's complaint, a supervisor's referral, or a criminal investigation by another law enforcement agency that is brought to the attention of the Department. Paragraph 4 of General Order No. 37 states in relevant part:

4. Confidentiality and Record Retention

a. All internal investigations shall be kept confidential except as required for continuation of the investigation.

b. Only those allegations that are adjudicated as Sustained shall be included in an Officer or employee's personnel file.

c. All complaints received by the department, regardless of disposition, will be maintained in a separate confidential file by the Superintendent of Police.

(N.T. 33-40; Association Exhibit 3).

7. Allegheny County Council passed Ordinance No. 06-21-OR on April 27, 2021 (the Ordinance), providing for the establishment of an Independent Police Review Board. Allegheny County Chief Executive Rich Fitzgerald signed the ordinance on April 29, 2021. (Association Exhibit 1).

8. The Ordinance became effective on January 1, 2022. (Association Exhibit 1).

9. The Ordinance amends the Allegheny County Code of Ordinances to establish an Independent Police Review Board to receive and review allegations of misconduct filed by members of the public against police officers within Allegheny County including the Police Officers in this matter. (Association Exhibit 1).

10. The stated purpose of the Ordinance is "to create a mechanism for external independent fact-finding and dispute resolution concerning allegations of misconduct filed by an individual against . . . Police Officers employed by Allegheny County." (Association Exhibit 1).

11. Section 905.09 of the Ordinance provides that the Board shall have the authority to, inter alia, "[p]repare reports... on the results of any investigations conducted by the Board regarding a complaint of misconduct filed against a Police Officer, including recommendations relating to the complaint, including facts relied on in making such recommendations, and recommendations relating to any patterns of conduct regarding a Police Officer against whom a complaint of alleged misconduct has been filed." (Association Exhibit 1).

12. Section 905.14. is entitled "Final Disposition: Recommendations" and states in relevant part:

b. The Board shall have the power to recommend that the County Chief Executive ... take remedial action(s) only when a finding of 'Sustained' is made

d. Notwithstanding any recommendation(s) made by the Board pursuant to this Section, the relevant County officials and the officials of the Municipality and their Police Departments shall retain full and final authority to set disciplinary policies or take other lawful actions they deem appropriate relative to Police Officers within their supervision.

(Association Exhibit 1).

13. Section 905.07 is entitled "Member Responsibilities" and states in relevant part:

Board Members shall:

A. Maintain absolute confidentiality with respect to confidential or privileged information they receive and maintain a thorough knowledge of the legal protection accorded to police records, including penalties imposed for violations. . . .

(Association Exhibit 1).

14. Section 905.17 is entitled "Records" and states in relevant part:

Any personnel records, complaints alleging misconduct against County or municipal police officer, and information obtained from these records, which are in the possession of the Board or its staff, shall be confidential and shall not be disclosed to any member of the public, except in accordance with applicable law.

(Association Exhibit 1).

15. Section 905.18 is entitled "Cooperation with the Board; Power to Seek Court Intervention" and states in relevant part:

(a) Subject to applicable laws, the County and Municipal Police Departments shall cooperate fully with Preliminary Inquiries undertaken by the Board pursuant to Section 905.11, Formal Investigations undertaken by the Board pursuant to Section 905.12 and Formal Fact-Finding Hearing conducted by the Board pursuant to Section 905.13.

(b) Subject to applicable laws, the County and Municipal Police Departments shall provide to the Board upon reasonable request such records, personnel, witnesses and other materials that the Board determines are necessary to conduct a Preliminary Inquiry, a Formal Investigation or a Formal Fact-Finding Hearing. Upon a finding by the Board that such necessary records, personnel, witnesses and other materials have not been provided, the Board may petition the Court of Common Pleas for an order compelling the production of such records, personnel, witnesses and other materials.

(Association Exhibit 1).

16. The County did not bargain the Ordinance with the Association. (N.T. 52-53).

DISCUSSION

The Association in this case argues that the County's policy in the form of the Independent Police Review Board constitutes a mandatory subject of bargaining and, therefore, the County committed an unfair practice when it unilaterally implemented the Independent Police Review Board in January, 2022.

The Board and the Commonwealth Court have already held that a police oversight board similar to the Independent Police Review Board in this case is a managerial prerogative and not a mandatory subject of collective bargaining. FOP, Lodge No. 5 v. City of Philadelphia, 29 PPER ¶ 29000 (Final Order 1997); FOP, Lodge No. 5 v. PLRB, 727 A.2d 1187 (Pa. Commw. Ct. 1999). In FOP, Lodge No. 5, 727 A.2d 1187, the police union in that case contested the City of Philadelphia's unilateral implementation of a Police Advisory Commission (PAC). The reasons Philadelphia established the PAC included: to enhance public safety; to provide proper support of the government to those responsible for public safety; to increase the confidence of the citizenry in their capacity to redress grievances against the government and its employees; to lower legal settlements in misconduct or abuse cases; to establish a citizen advisory commission to help the City prevent future incidents of police misconduct and abuses of civil rights; to lessen the probability that future incidents of urban unrest will occur; and, to promote the public confidence in law enforcement. Id. The PAC was given full discretion to investigate specific complaints or incidents of misconduct against police officers, hold public hearings and to study broader issues which may be of interest to the community and the Philadelphia Police Department. Id. The PAC could only make recommendations to the Philadelphia Police Commissioner concerning discipline of officers. Id. Philadelphia did not bargain with the police union in that case regarding the creation of the PAC. Id.

The Pennsylvania Labor Relations Board upheld a Hearing Examiner Proposed Decision and Order which found that the implementation of the PAC was a managerial prerogative. On appeal of the Pennsylvania Labor Relations Board's decision, the Commonwealth Court held:

In this case, we agree with the Board's conclusion that the City's interest in creating the PAC outweighs the interests of the police officers. The City's interest in providing public safety and providing a forum in which citizens can redress grievances against the government and its employees, as well as attempting to prevent future incidents of police misconduct and abuses of civil rights, outweighs the interests expressed by the police officers in this situation . .

. .

Id.

It is well settled that the Board properly relies on precedent to determine whether a matter constitutes a mandatory subject of bargaining or a managerial prerogative rather than reinventing the wheel to arrive at the same result as the established precedent. PSCOA v. Commonwealth of Pennsylvania Dept. of Corrections, Waynesburg SCI, 33 PPER ¶ 33178 (Final Order, 2002); Pennsylvania State Corrections Officers Ass ' n v. Commonwealth of Pennsylvania, Dept. of Corrections, Fayette SCI, 35 PPER 58 (Proposed Decision and Order, 2004) citing Teamsters Local 77 & 250 v. PLRB, 786 A.2d 299 (Pa. Cmwlth. 2001). Although the decision regarding the negotiability of a particular subject is in part fact driven, once the Board has conducted this analysis the result is precedential for future cases on the same or similar facts. Fayette SCI, *supra*. Where a party introduces new or different facts that may alter the weight the matter at issue bears on the interests of the parties, additional analysis may be warranted. The burden is on the party requesting departure from established precedent to demonstrate on the record facts warranting such a departure. Id.

In this case, there is not only Board precedent, but the precedent of a decision by the Commonwealth Court. The record does not support a deviation from decision of the Commonwealth Court in FOP, Lodge No. 5, 727 A.2d 1187, upholding the Board's determination that the PAC was not a bargainable issue. On this record, the Independent Police Review Board in this matter is substantially similar to the PAC. I find that the dispositive issue in this determination is that, similar to the PAC, the Independent Police Review Board has no independent power to discipline Police Officers and only makes recommendations.

The Association in this case points to the Independent Police Review Board's potential access to confidential Police Officer information as a reason the Independent Police Review Board policy should be a mandatory subject of bargaining. However, I do not find that is a sufficient reason to deviate from precedent and distinguish FOP, Lodge No. 5, 727 A.2d 1187. The PAC had similar access to sensitive documents including "Internal Affairs Division files; citizen complaints and determinations made pursuant thereto; the files of other internal investigative agencies charged with investigating police misconduct incidents; police paper work; information relating to past assignments and disciplinary action; police directives, training manuals, and other police documents that the Police Commissioner deems relevant." City of Philadelphia, 28 PPER 28109 (Proposed Decision and Order, 1997). On this

record, the PAC and the Independent Police Review Board have the authority to request similar records. Thus, the Association in this case has not introduced "new or different facts that may alter the weight the matter at issue bears on the interests of the parties" as the Independent Police Review Board appears to be substantially similar to the PAC.

More recently, in Fraternal Order of Police Lodge 5 v. City of Philadelphia, 52 PPER ¶ 67 (Final Order, 2019), the Board opined that police officer concerns over confidentiality of their records may lead to a topic being a mandatory subject of bargaining. However, in that case the policy was substantially different as the City of Philadelphia mandated publicly releasing the names of police officers involved in shootings. Here, in this case, there is no such policy, and the Ordinance behind the Independent Police Review Board focuses, on its face at least, on maintaining confidentiality of any personnel records, complaints alleging misconduct against Police Officers, and information obtained from these records.

Moving on, the Association also argues that the policy establishing the Independent Police Review Board is vague and overbroad and therefore a mandatory subject of bargaining. The Association cites Pennsylvania State Troopers Association v. Pennsylvania State Police, 41 PPER 101 (Final Order 2010). I have reviewed the ordinance establishing the Independent Police Review Board and I do not find it to be an example of a work rule with respect to the Police Officers in this matter. The Ordinance does not tell Police Officers to do or not do anything. There is no formation of an expectation of behavior for Police Officers which they must follow subject to discipline. The Ordinance is an expression of County policy which establishes a new agency and not explicitly concerned with directing the manner of their work. I therefore find that the case cited by the Association to not be relevant. Even if the 'vague work rule' analysis were relevant in this case, the Commonwealth Court has already previously found a substantially similar policy to be a proper exercise of non-bargainable managerial prerogative and the Association in this matter has not shown on this record any reason to deviate from that precedent.

Finally, the Association argues that the Ordinance is a repudiation of the collective bargaining agreement between the parties. The PLRB exists to remedy violations of statute, i.e., unfair labor practices, and not violations of contract. Pennsylvania State Troopers Ass ' n v. PLRB, 761 A.2d 645, 649 (Pa. Commw. Ct. 2000); Parents Union for Public Schools in Philadelphia v. Board of Education of the School District of Philadelphia, 480 Pa. 194 (1978). Where breach of contract is alleged, interpretation of collective bargaining agreements typically is for the arbitrator under the grievance procedure set forth in the parties' collective bargaining agreement. Ellwood City Police Wage and Policy Unit v. Ellwood City Borough, 29 PPER 29213 (Final Order, 1998), aff'd, 736 A.2d 707 (Pa. Cmwlth., 1999). However, the PLRB will review an agreement to determine whether the employer clearly has repudiated its provisions because such a repudiation may constitute both an unfair labor practice and a grievance. Millcreek Education Association v. Millcreek Township School District, 22 PPER 22185 (Final Order, 1991), aff'd, 631 A.2d 734 (1993), appeal denied, 537 Pa. 626 (1994); Port Authority of Allegheny County v. Amalgamated Transit Union Local # 85, 27 PPER 27184 (Final Order, 1996). In this matter, the Association argues:

The County has actually ignored the confidentiality provisions in the contractual General Order No. 37 by

failing to honor those provisions within the Ordinance or otherwise exempt the investigative and disciplinary materials from disclosure to the review board. Its Ordinance broadly and blindly requires the Police Department to disclose these records and materials at the review board's request. The enactment of the ordinance in violation of this contractual limitation constitutes the unlawful repudiation of contract . . ."

(Association's Brief at 10-11). Initially, on this record, it is clear that a contract exists between the parties and no effort must be made to divine one. However, I find that to resolve the issue of whether the County clearly repudiated the contract between the parties I would have to interpret the meaning of "confidential" in General Order No. 37, which was incorporated into the Interest Arbitration Award that serves as the parties' collective bargaining agreement. Specifically, I would have to interpret whether it is a clear repudiation of the contracted terms for the Police Department to share confidential records with another County agency such as the Independent Police Review Board, which, on the face of the Ordinance at least, has its own rules to ensure confidentiality of records. I find that a review of the collective bargaining documents in the record does not allow for a conclusion that sharing documents with the Independent Police Review Board is a clear repudiation of the collective bargaining documents.

It is unclear from the documents in the record whether the parties ever intended for another County agency, such as the Independent Police Review Board which was created after the issuance of the Interest Arbitration Award, to review confidential Police Officer records. The term "confidential" in the General Order No. 37 thus suffers from latent ambiguity brought about by the post-hoc formation of the Independent Police Review Board. To dispel this latent ambiguity, I would have to consider parol evidence, among other tools of contract interpretation, to understand the true intention of the parties. The weighing of parol evidence in this context is clearly in the realm of arbitration and not the Board.

I note that at the time of the hearing on August 5, 2022, the Independent Police Review Board had not requested any records at all from the Police Department. If the Independent Police Review Board meets, begins business, and requests documents from the Police Department, there may or may not be some demonstrable impact of the terms and conditions of employment for Police Officers. Public unions under Board policy and Commonwealth Court precedent may demand impact bargaining in cases where there is a demonstrable impact on wages, hours, or working conditions that is severable from the managerial decision. Lackawanna County Detectives' Association v. PLRB, 762 A.2d 792 (Pa. Cmwlth. 2000).

In conclusion, the County's action establishing the Independent Police Review Board is a managerial prerogative covered by Commonwealth Court precedent and does not clearly repudiate any collective bargaining agreement between the parties. The County has not violated Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act and Act 111.

CONCLUSIONS

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

1. The County is a public employer and political subdivision under Act 111 as read *in pari materia* with the PLRA.

2. The Association 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 County has not 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 charge is dismissed and the complaint rescinded.

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 eleventh day of January, 2023.

PENNSYLVANIA LABOR RELATIONS BOARD

/s/ Stephen A. Helmerich
Stephen A. Helmerich, Hearing Examiner