

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE, FORT PITT :
LODGE No. 1 :
 :
v. : Case No. PF-C-22-37-W
 :
CITY OF PITTSBURGH :

PROPOSED DECISION AND ORDER

On July 1, 2022, the Fraternal Order of Police, Fort Pitt Lodge No. 1 (Union or FOP) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (PLRB or Board) against the City of Pittsburgh (City, Employer, or Pittsburgh Bureau of Police (PBP)) alleging that the City violated Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA), as read *in pari materia* with Act 111, when the City failed to follow bargained-for language in General Order 12-10 "Critical Incidents Involving Police" after a critical incident involving police officers on May 27, 2022.

On July 20, 2022, the Secretary issued a Complaint and Notice of Hearing designating October 21, 2022, in Pittsburgh, as the time and place of hearing.

The hearing was held on October 21, 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. A second day of hearing was held on January 20, 2023, in Pittsburgh. The Union submitted a post-hearing brief on May 12, 2023. The City submitted a post-hearing brief on July 3, 2023.

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. 7).

2. The Union is a labor organization under Act 111 as read *in pari materia* with the PLRA. The Union is the exclusive bargaining unit representative of City of Pittsburgh police officers. (N.T. 7).

3. On May 8, 2020, Hearing Examiner Pozniak issued a Proposed Decision and Order (PDO) in Case No. PF-C-18-26-W which dealt with a dispute between the parties where the Union charged the that the City repudiated a negotiated agreement for General Order 12-10. As part of this PDO, Hearing Examiner Pozniak made the following relevant findings of fact:

6. In 2015 or 2016, the FOP and the City negotiated to agreement terms for Order Number 12-10, which resulted in a March 8, 2016, policy entitled "Critical Incidents involving Police." . . .

7. On October 3, 2017, the City held a meeting with a number of Allegheny County officials, as well as the

FOP President and counsel, during which the City presented the FOP with a draft Memorandum of Understanding (MOU) between the City and County regarding critical incidents. FOP President Robert Swartzwelder testified that the essence of the MOU between the City and County was that police officers involved in critical incidents would now be taken immediately to County headquarters for a compelled interview with County police and without Union representation, in contravention of their bargained-for agreement with the City.

8. The [Union] did not agree to these proposed changes and instead voiced a number of objections to the same, which were memorialized in a subsequent email to the City's lawyer on November 1, 2017. The FOP did not receive any response from the City.

Fop Lodge 1 Fort Pitt v. City of Pittsburgh, 52 PPER ¶ 13 (Proposed Decision and Order, 2020) (internal citations omitted).

4. Hearing Examiner Pozniak held that “[i]t must be concluded that the March 2016 policy resulting in Order 12-10 was a bargained-for agreement between the parties.” He further held “the City is still bound by the agreement it reached with the FOP contained in Order 12-10.” Hearing Examiner Pozniak ordered the City to reinstate General Order 12-10 from 2016 and rescind any MOU between the City and the County which was inconsistent with the 2016 version of General Order 12-10. While the City did file exceptions to this Proposed Decision and Order, the exceptions were dismissed by letter of the Secretary of the Board on June 8, 2022. This letter made Hearing Examiner Pozniak’s PDO final and absolute unless the City filed new exceptions within twenty days. The City did not do so. Fop Lodge 1 Fort Pitt v. City of Pittsburgh, 52 PPER 13 (Proposed Decision and Order, 2020); Board Secretary’s Letter to Wendy Kobee, Esquire, June 8, 2022 (PF-C-18-26-W).

5. While litigation over General Order 12-10 was proceeding before the Board, the parties were engaged in interest arbitration over a successor contract. On January 9, 2020, Arbitrator Robert Creo issued an interest arbitration award binding the parties (the Creo Award). The Creo Award amended the Working Agreement between the parties to have the effective dates of January 1, 2019, through December 31, 2022. The Creo Award included a new Section 25 which was contingent on the outcome litigation over General 12-10 before the Board and would incorporate the outcome of the litigation before the Board. The Creo Award amended the Working Agreement between the parties to add the following relevant section:

SECTION 25 - CRITICAL INCIDENTS

The City will be required to maintain a Critical Incident Policy, which shall be consistent with the bargainable terms set forth in the current version of Order Number 12-10 subject to the resolution of any Unfair Labor Practices charges currently pending. The Critical Incident Policy shall continue to not diminish the Constitutional rights of any Officer, and which shall include the following terms: definition of

Critical Incident, definitions of Involved Officer and Witness Officer, the interview process applicable to an Involved Officer, and provisions relating to Officer Wellness. The polic[y] includes information on who will conduct the criminal investigation, process of the involved and uninvolved officers, administrative investigation, and post-shooting procedures.

(N.T. 117-118; Joint Exhibit 1, pages 27-28, Joint Exhibit 2, page 120).

6. Though the PDO from Hearing Examiner Pozniak ordered the City to rescind the MOU with the County and restore the *status quo ante* of the 2016 version of General Order 12-10, the Union instead decided to engage in bargaining with the City to draft a new and updated version of General Order 12-10 which incorporated the MOU. (N.T. 112-113, 123-124).

7. To that end, on March 4, 2021, Attorney Kelly Mistick, counsel for the City, emailed Attorney Christopher Cimballa, counsel for the Union, a revised version of the General Order 12-10. On May 12, 2021, Mistick emailed Cimballa with an updated draft to General Order 12-10 and stated "Please let me know if you want to talk through any of the changes; however, I am hopeful that to [the] extent your last comments were incorporated we might be able to finalize this version . . ." On May 20, 2021, Mistick responded to an email from Cimballa and stated "Chris, I added the language to address your last comment at 5.3 [of General Order 12-10]. If this is agreeable, I will get a clean copy over to you for final sign off." Finally, on June 8, 2021, Mistick emailed Cimballa attaching a revised version of General Order 12.10 and stated in relevant part:

Chris,

Please see the attached revision. I highlighted my change to the [Union] representation section. I believe this accurately reflects the clarification you requested during our last meetings.

If this change is acceptable, please confirm and we can finalize this draft in advance of the walk-through. [Police] Command staff and the [Allegheny] County Police want an opportunity to review a final version prior to the meeting.

(Union Exhibit 5).

8. On June 8, 2021, the Union and the City came to a final agreement on General Order 12-10. On June 10, 2021, the Pittsburgh Bureau of Police reissued General Order 12-10 "Critical Incidents Involving Police". This version of the General Order resolved the issues the parties had over the General Order 12-10 and the MOU which led to the litigation before the Board at PF-C-18-26-W. (N.T. 90-91, 118-119, 124; Union Exhibit 2).

9. The June 10, 2021, version of General Order 12-10 states in relevant part:

2.5 Involved Officer - PBP member who deployed deadly or physical force resulting in critical bodily injury or death to any person, or a member who was engaged in

a primary or secondary pursuit where the pursuit was the cause of the critical injury or death, or a member who intentionally discharges a firearm at a subject.

. . .

2.7 Witness Officer - PBP member who was present but did not deploy deadly force or participate as primary or secondary pursuit vehicle where the pursuit was the cause of the critical injury or death.

. . .

3.3.8 Witness officers shall be separated at the scene and given an administrative order not to discuss the critical incident with other witness officers.

. . .

3.3.10 All witnesses shall be identified and separated pending the arrival of investigators. All biographical information shall be included in either the PBP Form #3.0 "Investigative Report," or a supplemental report.

. . .

4.3 The Major Crimes Commander shall notify the Pittsburgh Members Assistance Program (PMAP) Coordinator about the critical incident.

4.3.1 Inform personnel at the scene that the PMAP personnel will be reporting to Headquarters, Allegheny County Headquarters or other investigative location.

4.3.2 Provide any necessary information to PMAP personnel about the critical incident which will allow them to accurately compile a list of all personnel affected by such incident.

4.3.3 PMAP personnel shall not offer legal advice to any of the involved officer(s) nor direct any part of the criminal investigation.

4.3.4 PMAP shall designate different personnel for involved and witness officers.

4.3.5 Officers will be afforded the opportunity to meet individually with PMAP personnel upon arrival at Allegheny County Headquarters or other investigative location.

. . .

4.5 The Major Crimes Commander will notify a[n] FOP Executive Board Member of the Critical Incident after making notice to the Investigative Agencies as set forth in Section 4.1.

. . .

5.2 Officers who were present at the scene at the time of the critical incident, whether the involved officer(s) or the witness officer(s), shall be relieved of their duties at the scene as promptly as possible. The involved officer(s) shall be relieved first and should be sequestered somewhere in the immediate area of the scene. The witness officer(s) should also be sequestered at the scene. The involved officer(s) and witness officer(s) will remain on scene until the arrival of Investigators unless in need of medical attention or otherwise directed to proceed to Headquarters or testing as per Section 8.0.

. . .

5.5.6 All interviews will be conducted at the Investigators' recorded interview rooms or other facilities as it may designate.

. . .

5.5.7 All involved and witness officers will be transported to the Investigators' facilities for a preliminary interview and evidence collection. FOP Counsel may be present for the preliminary interview and any subsequent criminal interviews. However, in order to maintain the integrity of each involved officer's statement, involved officers shall not consult or meet with a FOP Representative or FOP Counsel collectively or in groups prior to being interviewed.

. . .

5.5.9 Involved officers will be afforded the opportunity to review any available BWC, MVR, or other audio or video in the presence of legal counsel and Investigators prior to giving a statement.

5.5.10 All other PBP officers and supervisors who witnessed the critical incident will be required to be interviewed by the Investigators, including a statement at the scene and at their facility. Garrity rights will not be given, nor will there be any waiting period prior to providing a statement. Witness officers may have counsel present during their interview; however, witness officers may not be represented by the same legal counsel as involved officers.

. . .

5.5.12 The ACPD will make arrangements to receive members of the PMAP in order to provide timely support to members.

. . .

6.1 Prior to being released from Duty, the Chief or his/her designee may require the involved officer(s) to provide a Garrity Statement and/ or complete required reports at Pittsburgh Police Headquarters.

. . .

6.3 The involved officer(s) must be seen by the City-contracted psychologist as soon after the incident as possible. The PMAP Peer Coordinator will assist the involved officer(s) with scheduling the appointment.

. . .

7.0 CRITICAL INCIDENT REVIEW BOARD

7.1 Following the occurrence of a critical incident, the Chief of Police shall convene a Critical Incident Review Board as set forth in General Order #12-11, "Critical Incident Review Board" of the Pittsburgh Bureau of Police Manual of Procedural Orders.

7.1.1 The Major Crimes Commander will advise the CIRB Chair accordingly and provide a case file.

7.1.2 Neither investigative personnel nor representatives from the DA's office will be present during any interview conducted as part of the administrative review.

7.1.3 The "Garrity Rule" will be provided to the involved officer(s) by sworn personnel.

7.1.4 The involved officer(s) statement provided under "Garrity" will not be shared with VCU personnel, the DA's office personnel, or any other agency involved in the criminal investigation.

7.1.5 All paperwork by the involved officer (s) will be completed following the Garrity interview.

. . .

10. UNION REPRESENTATION

10.1 The FOP representatives shall not be involved in any aspect of the criminal investigation in order to avoid any claim of a conflict of interest (for instance, taking possession of the officer's weapon).

10.2 FOP Representatives may be present at the staging area of the incident scene but may not access the crime scene.

10.3 In addition to FOP counsel, two FOP Representatives may be present at the Investigators Facility. FOP representatives shall not meet with involved or witness officers in groups; however, any

individual request for union representation will be accommodated.

10.4 If a Garrity Interview is conducted as part of an administrative investigation by the PBP, either a FOP Representative and/ or FOP Counsel may be present.

(Union Exhibit 2).

10. Late on the night of May 27, 2022, Sergeants Loscar and Gray, and Officers Livesay, Noonan and Suaro encountered a man firing gun shots near North Homewood. When encountered by the police officers, the suspect started firing gun shots at the officers. The suspect fired directly at Loscar and Gray who were in their police car. Loscar steered his car out of the situation and the suspect ran off. The suspect also fired at Noonan and Livesey. Livesey returned fire. The suspect was eventually taken into custody. (N.T. 26-29, 50-52, 64).

11. After the suspect had been taken into custody, Loscar, Gray, Livesay, Noonan and Suaro were instructed by Lieutenant Abraham to sit in their vehicles and wait for further instructions. These were the five officers who were initially involved in the incident. Livesey was read a public safety statement by Lieutenant Abraham which recorded on Livesey's body camera. Abraham asked Livesey to walk through what happened. (N.T. 29, 39, 52, 64-65).

12. Livesay had joined Loscar and Gray in Loscar's police vehicle. All five of the involved police officers remained on scene for approximately two hours. Livesay had fired his weapon in the incident. Loscar did not fire his weapon. (N.T. 29, 53).

13. Loscar and Noonan were not given an opportunity to talk to a Union representative or Union counsel while at the scene. While sitting at the scene, Livesey asked if the Union had been contacted. Livesey reached out to another Sergeant in a different zone and asked that Sergeant if he was supposed to call the Union. That Sergeant ended up contacting the Union. Union President Bob Swartzwelder contacted Livesey by cellphone. Livesey talked to Swartzwelder on the phone and also talked to him in-person at the scene. (N.T. 30, 53, 66-67).

14. At some point, Livesey was taken for drug testing and was returned to the scene. At this point, his body camera was taken. Livesey was able to speak with PMAP at the drug testing location. (N.T. 62-69).

15. Loscar was not contacted by PMAP until the afternoon of May 28, 2022, when PMAP called him and left a message. PMAP did not call Loscar back and Loscar had to reach out to PMAP a week later. Noonan was not given an opportunity to speak to PMAP the night of the incident or the next day in the early morning. (N.T. 47, 54-55).

16. Eventually, Lieutenant Abraham radioed Loscar and told Loscar that Loscar, Gray, Noonan, Livesey and Suaro were to proceed to Allegheny County Police Headquarters. Abraham was at the scene. Loscar walked over to Abraham and asked him how he would like the five officers to get to the Allegheny County Police Headquarters. Abraham told Loscar to turn on his in-car camera and body camera and go with Gray and Livesey in one car without talking about the incident. Abraham told Loscar that Noonan and Suaro would also turn their cameras on and drive in their vehicle. (N.T. 30-31).

17. The five involved officers traveled to Allegheny County Police Headquarters and were placed in a conference room together. Loscar and Noonan were eventually interviewed by County Police. The interviews were recorded. They were not given an opportunity to speak with a Union representative or counsel. They were not provided Garrity or Miranda rights. After his interview, Lieutenant Wilson, of the Pittsburgh Police, took the body-worn cameras from Loscar, Gray and Noonan. (N.T. 31-33, 53-54).

18. On the night of the incident, President Swartzwelder received many calls from police officers about the officer-involved shooting soon after it happened. He was not notified by PBP Management until an hour or so after the incident occurred. Swartzwelder waited outside of the crime scene for permission to enter the scene to speak to the involved officers and check their well-being. Deputy Chief Strangrecki denied him access initially. Eventually, Swartzwelder was allowed to speak to Livesey. Swartzwelder was not told when the involved officers were told to transport themselves to County Police headquarters. Swartzwelder eventually made it to County Police Headquarters around 6 a.m. on May 28, 2022, and met Suaro and Noonan as they were coming out of the door with Lieutenant Wilson. Wilson informed Swartzwelder that Loscar and Grey had already been interviewed and Suaro and Noonan had just been interviewed. Swartzwelder confirmed with Lieutenant Wilson and the involved police officers that officers did not have Union representation when they were interviewed. (N.T. 125-139).

DISCUSSION

In its charge, the Union alleges that on the night of May 27, 2022, and the early morning of May 28, 2022, the City repudiated the bargained-for provisions of General Order 12-10 by: failing to promptly separate the involved member and the witness officers at the scene; 2) failing to notify the FOP Executive Board for several hours following the incident; 3) failing to provide representation to the witness officers before conducting interviews. In its Brief at pages 16-17, the Union further argues:

The City failed to follow several provisions regarding representation, sequestering of officers, and providing psychological services. Despite this clear language, officers were held up at the scene for two to four hours. Officers were packed into a room with each other and not provided their Garrity or Miranda rights. They were interviewed in criminal interrogation rooms with video and audio recorders. Officers were not provided the right to counsel, psychological services, or immediate FOP support. Many of the officers had never been involved in a critical incident previously. During this critical and traumatic time, officers were deprived of FOP representation and legal guidance.

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. Cmwlth. 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).

Turning to this matter, the Union alleges that the City repudiated General Order 12-10 by failing to promptly separate the involved member and the witness officers at the scene. Section 3.3.8 states: "Witness officers shall be separated at the scene and given an administrative order not to discuss the critical incident with other witness officers." Section 5.2 states:

Officers who were present at the scene at the time of the critical incident, whether the involved officer(s) or the witness officer(s), shall be relieved of their duties at the scene as promptly as possible. The involved officer(s) shall be relieved first and should be sequestered somewhere in the immediate area of the scene. The witness officer(s) should also be sequestered at the scene.

The record in this matter shows throughout that the involved officers were not completely separated or sequestered. The City clearly repudiated these sections of General Order 12-10.

The Union alleges that the City repudiated General Order 12-10 by failing to notify the FOP Executive Board for several hours following the incident. Section 4.5 states: "The Major Crimes Commander will notify a[n] FOP Executive Board Member of the Critical Incident after making notice to the Investigative Agencies as set forth in Section 4.1." Swartzwelder testified that he was notified by PBP Management an hour or so after the incident occurred. I find that here the City did not clearly repudiate General Order 12-10 since there is no time limitation in Section 4.5. The language merely says the PBP "will" notify the Union "after making notice" to other agencies. There are no timeliness words such as "immediately" or "soon after". Swartzwelder was in fact eventually notified and the fact that the notification happened one hour after the critical incident is **not** a clear repudiation.

The Union alleges that the City repudiated General Order 12-10 by failing to provide representation to the witness officers before conducting interviews. The relevant section of General Order 12-10 states:

5.5.9 Involved officers **will be** afforded the opportunity to review any available BWC, MVR, or other audio or video in the presence of legal counsel and Investigators prior to giving a statement.

(emphasis added). The record is clear that the involved police officers gave statements to the Allegheny County Police without the opportunity to review any available video in the presence of legal counsel and Investigators prior to giving a statement. Swartzwelder credibly testified that he confirmed with Lieutenant Wilson and the involved police officers that officers did not have Union representation when they were interviewed by Allegheny County

Police. I find that this is a clear repudiation of Section 5.5.9 of General Order 12-10 which explicitly states that involved officers **will be** afforded the opportunity to review any available video of the incident in the presence of legal counsel and Investigators prior to giving a statement.

The Union alleges that the City repudiated General Order 12-10 by holding the involved officers at the scene for two to four hours. My review of General Order 12-10 shows no particular section which this would violate.

The Union alleges that the City repudiated General Order 12-10 by "packing" officers into a room with each other and not provided their Garrity or Miranda rights. The separation or sequestration of officers is discussed above. General Order 12-10 does not say that the City must observe an officer's Garrity rights in the investigation done immediately after a Critical Incident. Section 7.0 of General Order 12-10 does indicate that as part of the later investigation by the Critical Incident Review Board that the "Garrity Rule will be provided". However, the incident in this matter was not before the Critical Incident Review Board. General Order 12-10 makes no mention of Miranda rights.

The Union alleges that the City repudiated General Order 12-10 by interviewing them in criminal interrogation rooms with video and audio recorders. Section 5.5.6 plainly states that "All interviews will be conducted at the Investigators' recorded interview rooms or other facilities as it may designate." Therefore, the City did not violate this section.

The Union alleges that the City repudiated General Order 12-10 by not providing the right to counsel, psychological services, or immediate FOP support. The right to counsel is discussed above. With respect to psychological services, General Order 12-10 states:

4.3.5 Officers will be afforded the opportunity to meet individually with PMAP personnel upon arrival at Allegheny County Headquarters or other investigative location.

. . .

5.5.12 The ACPD will make arrangements to receive members of the PMAP in order to provide timely support to members.

. . .

6.3 The involved officer(s) must be seen by the City-contracted psychologist as soon after the incident as possible. The PMAP Peer Coordinator will assist the involved officer(s) with scheduling the appointment.

The record shows that Livesey was able to speak with PMAP immediately after the incident. Loscar was not contacted by PMAP until the afternoon of May 28, 2022, when PMAP called him and left a message. PMAP did not call Loscar back and Loscar had to reach out to PMAP a week later. Noonan was not given an opportunity to speak to PMAP the night of the incident or the next day in the early morning. Section 4.3.5 plainly states that "Officers **will be** afforded the opportunity to meet individually with PMAP personnel upon arrival at Allegheny County Headquarters" (emphasis added). This did not

happen for Loscar and Noonan. Additionally, 5.5.12 states that PMAP support will be provided in a "timely" manner and 6.3 states that PMAP will assist an involved officer in seeing a "City-contracted psychologist **as soon** after the incident **as possible**" (emphasis added). Again, 6.3 plainly states that an involved officer **must** be seen by a psychologist **as soon as possible**. Based on this record, I find that the City's efforts with respect to Noonan and Loscar were not timely and as soon as possible. The record shows for example that Noonan has not been contacted at all by PMAP nor has he seen a psychologist. For the above reasons, the City clearly repudiated General Order 12-10 with respect to PMAP services.

In its defense, the City raises many arguments. In its Brief at page 9, the City argues that it could not have violated Section 6(1)(a) and (e) because "General Order 12-10 is not an enforceable contract". Generally, the City's arguments in this vein are an attempt to reargue an issue that has already been decided. Hearing Examiner Pozniak explicitly found that "[i]t must be concluded that the March 2016 policy resulting in Order 12-10 was a bargained-for agreement between the parties" and the "[Union] and the City negotiated to agreement terms for Order Number 12-10" and that "the City is . . . bound by the agreement it reached with the FOP contained in Order 12-10." Therefore, it has already been decided that General Order 12-10 is an agreement by which parties are legally bound.

In its Brief at page 15, the Union asserts that the City cannot now argue that General Order 12-10 is not a bargained-for agreement because the issue was decided by Hearing Examiner Pozniak. This argument is a claim of collateral estoppel. In Pennsylvania Board of Probation and Parole v. Pennsylvania Human Relations Commission, 66 A.3d 390 (Pa. Cmwlth. 2013), the Court stated that "[t]he doctrine of collateral estoppel is based on the policy that a losing litigant does not deserve a rematch after fairly suffering a loss in adversarial proceedings on an issue identical in substance to the one he subsequently seeks to raise." Id. at 395. The Court recited the elements of collateral estoppel as follows:

Generally, collateral estoppel forecloses relitigation of issues of fact or law in subsequent actions where the following criteria are met: (1) the issue in the prior adjudication was identical to the one presented in the later action; (2) there was a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication; (4) the party against whom it is asserted has had a full and fair opportunity to litigate the issue in a prior action; and (5) the determination in the prior proceeding was essential to the judgment.

Id. In this matter, the issue in this matter and PF-C-18-26-W are the same (whether the City was bound by General Order 12-10), there was a final judgment on the merits, the City was a party to the previous case, the City fully litigated the issue, and Hearing Examiner Pozniak's determination that the City is bound by the agreement it reached with the FOP contained in Order 12-10 was essential to the judgment. Therefore, the City is estopped from arguing it is not bound by the agreement it made with the Union in General Order 12-10.

Further developments between the parties firmly cement General Order 12-10's status as a binding agreement between the parties. The Creo Award

added a new Section 25 to the Working Agreement between the parties which explicitly states that "the City will be required to maintain a Critical Incident Policy, which shall be consistent with the bargainable terms set forth in the current version of Order Number 12-10." (This section was contingent upon the outcome of PF-C-18-26-W, which, discussed above, found that the City is bound by the agreement it reached with the FOP contained in Order 12-10.) To state in another way, the fact that General Order 12-10 is bargainable is provided for directly in the parties' Working Agreement.

The parties did update General Order 12-10 after the Creo Award and after Hearing Examiner Pozniak's decision. The update was done, in part, because Hearing Examiner Pozniak ordered the City to completely rescind the agreement with Allegheny County which modified General Order 12-10 and restore the *status quo ante*. This would have removed the policies which allow, in part, the Allegheny County Police Department to serve as an independent agency investigating critical incidents. The record shows the Union decided, instead of rescinding the agreement with the County, to bargain with the City over an update to General Order 12-10. The record then shows that the City and Union did in fact bargain over the terms of the updated General Order 12-10 which was issued on June 10, 2021, and in effect on May 27 and May 28, 2022.¹ This updated version solved the issues outstanding between the Union and the City over General Order 12-10 and the changes the City wanted to make to it through its agreement with Allegheny County. This is an example of a union and employer bargaining over an issue to reach a mutually agreeable solution.²

Therefore, in summary, there was a determination that the City is bound by the agreement it reached with the FOP contained in Order 12-10 which the City cannot now challenge, the bargainability of General Order 12-10 was included in the parties' Working Agreement, and the parties further bargained an update to General Order 12-10 to resolve their outstanding issues. The City cannot now argue that General Order 12-10 is not a contract between the parties.

Moving on, the City on page 11 of its Brief argues General Order 12-10 does not meet the legal requirements for a contract. As stated above, the City is estopped from making this argument. Furthermore, General Order 12-10

¹As an aside, the Union put on evidence of a further update to General Order 12-10 which was issued on May 31, 2022. Since this update was not in effect on the days of the critical incident in question, I do not cover it in the Findings of Fact above as it is not relevant to determining what contractual language was in effect. The Union also put on evidence of the back-and-forth between the Union and the City over the May 31, 2022, version of General Order 12-10. This evidence may be relevant to show that the City bargained over the terms of General Order 12-10, however, I find that evidence to be cumulative and distracting from the core issues of this matter and did not include it.

² Even if the City had unilaterally changed General Order 12-10, without input from the Union or bargaining with the Union, General Order 12-10 would still nevertheless be an issue the City is bound to bargain over on this record. A waiver of bargaining rights will not be lightly inferred and a waiver of bargaining rights may only be found when words show a clear and unmistakable waiver. Crawford County, 659 A.2d 1078 (Pa. Cmwlth., 1995). No express waiver by the Union over the bargainability of General Order 12-10 can be found on this record.

is incorporated by reference in the parties Working Agreement at Section 25. Additionally, the record shows the parties negotiated over an update to General Order 12-10 through a give-and-take of proposed terms. Finally, General Order 12-10, as seen at Union Exhibit 2, is a written document. General Order 12-10 is a contract between the parties.

The City next argues at pages 12-13 of its Brief that the City did not repudiate an agreement with the FOP because General Oder 12-10 is a managerial prerogative with the FOP having mere meet and discuss opportunities. The City states on page 13 of its Brief that "the proceedings before Pozniak are irrelevant to the present case." The PDO issued by Hearing Examiner Pozniak is directly relevant to this matter and precludes the argument by the City that the City is not bound by the agreement it made with the Union for General Order 12-10 because General Order 12-10 is an issue of managerial prerogative. Hearing Examiner Pozniak directly addressed this argument in his PDO and held:

[T]he question of whether such an issue on these facts represents a mandatory subject of bargaining or a managerial prerogative is of no consequence. Indeed, it is well settled that where a public employer voluntarily negotiates a matter of managerial prerogative, and includes that agreement in the parties' collective bargaining agreement, it shall be bound for the duration of the contract even though the matter was only a permissive subject of bargaining, not subject to a bargaining duty at the time of the agreement. Scranton School Board v. Scranton Federation of Teachers, 365 A.2d 1339 (Pa. Cmwlth. 1976); FOP Delaware Lodge 27 v. Springfield Township, 42 PPER 20 (Final Order, 2011). **Therefore, even assuming the City is correct that the delegation of a criminal investigation to an outside law enforcement agency is a managerial prerogative, the City is still bound by the agreement it reached with the FOP contained in Order 12-10.**

Fop Lodge 1 Fort Pitt v. City of Pittsburgh, 52 PPER 13 (Proposed Decision and Order, 2020) (emphasis added). As discussed above, the City is precluded from arguing this same argument again. The issue of whether the FOP only has "meet and discuss" or "review and discuss" rights with respect to General Order 12-10 are not relevant because it has already been decided that City is bound by the agreement it made over General Order 12-10 and must bargain any changes to it with the Union. As discussed above in footnote 2, the Union has not waived the bargainability of General Order 12-10.

Board policy strongly supports the conclusion that the City must be held to the agreements it made with the Union with respect to General Order 12-10. The Board, quoting the Pennsylvania Supreme Court, has 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 ¶ 25101 (Final Order, 1994), quoting Pittsburgh Joint Collective Bargaining Committee v. City of Pittsburgh, 81 Pa. 66 (1978).

Finally, the City argues on page 20-21 of its Brief:

The FOP further alleges that in the matter before Pozniak, the City "conceded that General Order 12-10 was a bargained-for policy in the previous litigation." But, this alleged concession cannot be afforded the force that the FOP accords to it. The Board is not bound by a hearing examiner's determination where before final Board resolution, the parties settled their dispute thus mooting the then pending exceptions. Capitol Police Lodge 85, FOP, v. Commonwealth of Pennsylvania, 2003 PA PED LEXIS 29, *8 n.4, 34 PPER P 150 (Nov. 18, 2003). Here, it is undisputed that the City filed exceptions to Pozniak's May 8, 2020 Order. See Letter from Secretary Bortner to Wendy Kobee, dated May 5, 2022, supra. It is undisputed that before the Board resolved the exceptions, the parties voluntarily resolved the matters underlying Pozniak's Proposed Decision and Order.

In reviewing Capitol Police Lodge 85, Fraternal Order of Police v. Commonwealth of Pennsylvania, 34 PPER ¶ 150 (Final Order, 2003), I agree that it does stand for the proposition that the Board is not bound by a decision of a Hearing Examiner in a different case which was resolved before the Board could issue a Final Order. However, the City is not the Board, and is bound by Hearing Examiner Pozniak's PDO which is final and absolute.

Therefore, the City violated Section 6(1)(a) and (e) of the PLRA by clearly repudiating specific sections of General Order 12-10. The City will be ordered to cease and desist from its bargaining violations and make the affected police officers whole.

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 Union 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 unfair labor practices in violation of Section 6(1)(a) and (e) of the PLRA and Act 111.

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE, FORT PITT :
LODGE No. 1 :
v. : Case No. PF-C-22-37-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 immediately made whole any bargaining unit employees who have been adversely affected due to the City's 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