

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE, FORT PITT :
LODGE No. 1 :
v. : Case No. PF-C-22-30-W
CITY OF PITTSBURGH :

PROPOSED DECISION AND ORDER

On May 13, 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 or Employer) 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 produce requested documents relating to the discipline of eight police officers.

On June 3, 2022, the Secretary issued a Complaint and Notice of Hearing designating August 31, 2022, via TEAMS, as the time and place of hearing.

The hearing was continued and held on October 28, 2022, via TEAMS, 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 in-person on January 19, 2023, in Pittsburgh. The Union submitted a post-hearing brief on February 17, 2023. The City submitted a post-hearing brief on March 17, 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. 9).

2. The Union is a labor organization under Act 111 as read *in pari materia* with the PLRA. (N.T. 9).

3. On October 13, 2021, in response to a call about a stolen bicycle, City police officers were dispatched to Harriet Street. The responding police officers encountered Jim Rogers. Rogers was tasered by police officers and taken into custody. While being transported by police officers, Rogers suffered a medical emergency and was taken by police officers to a hospital. Rogers died the following day. Immediately following this incident, the City's Police Bureau called the Allegheny County Police Department (an independent police agency) to investigate. The Pittsburgh Police Chief also started a Critical Incident Review Board (CIRB) to investigate. Eight police officers were subsequently disciplined for this incident. Some of the involved police officers were discharged as part of their discipline. The disciplined police officers and Union representatives were given access to the body-worn and in-car camera footage of the incident. The City accomplished this by making one of the conference rooms in the Police Bureau headquarters available with all of the camera footage available to play. The disciplined police officers and Union representatives viewed

the camera footage at both Step 1 and Step 2 of the grievance process which occurred in February, 2022. (N.T. 45, 86, 173-180).

4. The camera footage at issue in this matter is both body-worn camera and in-car camera footage. Body-worn camera footage comes from a camera mounted on the police officer's chest which records audio and video. It is activated by the police officer and is turned off pursuant to policy or when directed by a supervisor. The body-worn camera footage at issue in this matter shows the Harriet Street incident and communications between police officers and Rogers, supervisors, paramedics, and by-standing citizens. The in-car camera footage of this incident shows the back of the transport truck with Rogers and the attending police officers. (N.T. 61-66).

5. On April 8, 2022, Christopher Cimballa, Esq., attorney for the Union, sent Wendy Kobee, Esq., Associate Solicitor for the City, a letter which states in relevant part:

Dear Ms. Kobee:

As you know, the [Union] has appealed the disciplinary action taken by the City as it relates to the affected [eight police officers]. Each case was processed to arbitration and assigned an arbitrator. We are in the process of confirming dates for a hearing. In anticipation of that hearing please forward a copy of the entire file maintained by the City as it related to Harriet Street and Jim Rogers. This includes the Critical Incident Review Board investigation, all attachments and media (audio and video).

(N.T. 35; Union Exhibit 6).

6. With the above request for information, the Union was especially interested in obtaining all video and audio evidence from body-worn cameras and in-car recordings relating to the Harriet Street/Jim Rogers incident. The City had control over and retained all such video evidence. The Union believed the Critical Incident Review Board file for the incident would contain all the relevant audio and video evidence from body-worn and in-car cameras. (N.T. 35-36).

7. The Union President testified that the Union wants copies of the CIRB report and the body-worn and in-car camera footage (and not just access) because the Union asserts it has a need to make sure it has the entire and correct file to review before arbitration. The Union is not satisfied with mere access to the video footage because if the Union intends to have an use-of-force expert witness review the camera footage, it will need the footage for a lengthy amount of time and the Union does not believe it is proper for the City to have the ability to limit how long the camera footage can be used. The Union also believes it needs copies of the camera footage in order to allow the disciplined police officers opportunities to review the footage prior any arbitration proceeding and to assist Union counsel prior to any arbitration proceeding. (N.T. 37-66).

8. On May 17, 2022, Cimballa sent Kobee a letter enclosing the charge in this matter as well as reminding Kobee that the Union had not yet received the information requested in its April 8, 2022 letter. (Union Exhibit 7).

9. The City did not immediately provide the information requested in the Union's April 8, 2022 request because Kobee inadvertently overlooked the

email and did not read it until June, 2022. After considering the request at that time, Kobee did not release the requested information because she determined that there was a related grand jury investigation which, in Kobee's opinion, subjected the body-worn and in-car camera footage to legal confidentiality agreements with the County's District Attorney. (N.T. 113-116, 155-156, 183).

10. The City and the Allegheny County District Attorney's office entered into a Memorandum of Understanding (MOU) on November 27, 2017, regarding law enforcement video and audio recordings. Pursuant to the MOU, the City agreed to refer to the District Attorney all requests for audio and video recordings which may contain evidence of criminal matters pursuant to 42 Pa.C.S. Section 67A01 *et seq.* Pursuant to the MOU, the District Attorney will then determine if such recordings may be released. The District Attorney never communicated to the City that any of the information requested by the Union should be withheld pursuant to the MOU between the City and the District Attorney. (N.T. 137, 185; City Exhibit 19).

11. In lieu of handing over physical copies of the body-worn and in-car video evidence, the City on June 24, 2022, offered to the Union to schedule as much time as necessary to view the footage at the Police Bureau headquarters with any prospective expert witness. (N.T. 117-119).

12. On July 26, 2022, Cimballa sent Kobee another letter which states in relevant part:

Dear Ms. Kobee:

I am writing in follow-up to the conference held July 13, 2022 with [Board Administrative Officer] Dennis Bachy. This charge concerns the Harriet Street matter and, more specifically, the production of the Critical Incident Review Board investigation.

My Associate, Susan Pickup, attended the conference with you and Mr. Bachy. I understand from Ms. Pickup that you had represented to Mr. Bachy that a copy of the Critical Incident Review Board file was produced for me and the FOP in advance at the Loudermill Hearings. This is not true. The parties' Working Agreement provides that we will have access to the material in advance of the Step II with the Public Safety Director. We were provided access but we were never provided with copies.

If it is the City's position that the FOP may have a copy of the CIRB file minus the body cam and in car cameras, then I ask that you please forward this material to my attention.

(N.T. 37; Union Exhibit 8).

13. On August 22, 2022, Kobee sent Cimballa an email which attached a PDF copy of the Critical Incident Review Board Final Report. The email also states in relevant part:

Chris:

In partial response to the Union's Request for Information, please find attached a true and correct copy of the Critical Incident Review Board's Final Report about the October 13, 2021 incident on Harriet Street involving Jim Rogers.

Apart from a copy of the Body Worn Camera footage, do any items remain outstanding?

(N.T. 45-47, 122; City Exhibit 7).

14. On September 16, 2022, Kobee sent Cimballa an email which states in relevant part:

Chris,

This afternoon the DA's office responded with approval for the City to provide copies of the BWC footage to the FOP. The City will make arrangements to provide you with copies.

When we first started discussion of this, you had indicated that we could provide copies subject to a confidentiality agreement. Understanding that the Union may also want to provide copies to prospective experts, the City would like the confidentiality agreement to cover third parties with the Union agreeing to make the confidentiality terms known to the third parties. . . .

[U]nder these circumstances, will the Union withdraw its ULP. . . ?

(N.T. 54, 122-123, 139; Union Exhibit 12).

15. On September 19, 2022, Kobee sent an email to Ronald Retsch, Esq., attorney for the Union, indicating that the City would provide the Union the in-car camera footage for the transport vehicle, which was the important vehicle in the incident which led to the discipline of the police officers. This in-car camera evidence was provided to the Union. (N.T. 55; Union Exhibit 12).

16. In September and October 2022, Kobee and Cimballa engaged in discussions over a draft confidentiality agreement between the parties over the City giving physical copies of body-worn camera evidence to the Union. No agreement over the language in the confidentiality agreement was reached. (N.T. 71-76, 120-121, 142-143).

17. On October 17, 2022, Kobee sent Cimballa an email which states in relevant part:

Chris,

The Union is refusing to commit to confidentiality. That failure potentially interferes with the City's confidentiality interests. Therefore, we renew our offer of June 24, 2022 to provide access to the information for the Union's partisan arbitrators and prospective expert witnesses through scheduled viewings of these videos at [the Police Bureau headquarters].

(N.T. 118-119; City Exhibit 17).

DISCUSSION

The law is clear that an employer is obligated to provide relevant information requested by the union, which the union needs to intelligently carry out its grievance handling and collective bargaining functions. AFSCME Council 13, AFL-CIO v. Commonwealth of Pennsylvania, Dept. of Corrections, 17 PPER ¶ 17072 (Proposed Decision and Order, 1986), 18 PPER ¶ 18057 (Final Order, 1987). The standard for relevance is a liberal discovery type standard that allows the union to obtain a broad range of potentially useful information. Commonwealth of Pennsylvania v. PLRB, 527 A.2d 1097 (Pa. Cmwlth. 1987). Under federal cases which the Board has found persuasive, information that pertains to employees in the bargaining unit is presumptively relevant. North Hills School District, 29 PPER ¶ 29063 (Final Order, 1998); NLRB v. U.S. Postal Service, 888 F.2d 1568 (11th Cir. 1989); NLRB v. Pfizer, Inc., 763 F.2d 887 (7th Cir. 1985). If the record contains substantial and legally credible evidence that the union requested relevant information and the employer improperly denied the request, the employer must be found in violation of its bargaining obligation. AFSCME Council 13, supra.

The law is also well settled that the Union's right to such information is not absolute if the information is confidential in nature. Commonwealth of Pennsylvania, Department of Public Welfare, 17 PPER ¶ 17042 (Final Order, 1986); Commonwealth of Pennsylvania, Department of Agriculture, 18 PPER ¶ 18003 (Final Order, 1986) *citing* Detroit Edison Company v. NLRB, 440 U.S. 301, 100 LRRM 2728 (1979); Belle Vernon Area School District, 21 PPER ¶ 21134 (Proposed Decision and Order, 1990); *see also* New Jersey Bell Telephone Company v. NLRB, 720 F.2d 789 (3d Cir. 1983).

In cases where an employer claims that information is confidential, the employer has the burden of showing a legitimate claim of confidentiality which outweighs the union's interest in gaining access to the information. Pennsylvania Social Services Union, Local 668, SEIU v. Commonwealth of Pennsylvania, 16 PPER ¶ 16179 (Proposed Decision and Order, 1985), 17 PPER ¶ 17042 (Final Order, 1986); North Hills School District, 29 PPER ¶ 29063 (Final Order, 1998).

The Board has held that an unreasonable or inexcusable delay in providing relevant information is a violation of an employer's statutory obligation to bargain in good faith. United Steelworkers of America v. Ford City Borough, 37 PPER 11 (Final Order, 2006)

Moving to the analysis of this matter, the record shows no dispute that the information sought by the Union is relevant to the Union. Indeed, I find that the information requested by the Union here is strongly relevant to the core of the Union's mission of evaluating the merits of disciplinary grievances, defending Union members against discipline issued by the City, and the discipline imposed on the police officers.

With respect to the timeliness of production of the requested materials, on this record it is clear the production of the CIRB report to the Union was sufficiently tardy to be an unfair labor practice. The Union requested the CIRB report on April 8, 2022 and the City did not produce it until August 22, 2022. I do credit Attorney Kobee's testimony that she inadvertently overlooked the email from the Union requesting the material. However, the City was again on notice of the Union's request on May 17, 2022,

when Attorney Cimballa followed up on the information request and attached the charge in this matter. Using the May 17, 2022, date, the City took over three months to produce the CIRB report, which I find to not be reasonably timely. See Ford City Borough, supra. The City committed an unfair practice by not timely producing the CIRB report.

Moving to the in-car camera footage, the record shows that the City did produce a copy of the in-car camera footage on or about September 19, 2022. As discussed above regarding the CIRB report, this is also not timely as September 19, 2022, is approximately four months after the information was requested using the May 17, 2022, date. See Ford City Borough, supra. The City committed an unfair practice by not timely producing the in-car camera footage.

As of the date of the hearing, the City had still not produced a copy of the body-worn camera footage. The City argues it has a confidentiality interest in the body-worn camera footage based on 42 Pa.C.S. Section 67A01 *et seq.*, a related agreement with the County District Attorney, on-going criminal investigations, and its concerns about the Union's "cavalier" attitude towards the City's confidentiality interest. (City's Brief at 14). The City has the burden of showing its confidentiality interests outweigh the interests of the Union in gaining access to the information.

Turning first to the Union's interest in having a copy of the body-worn camera footage, the record in this matter shows that the Union has the following significant interests in obtaining a copy of the body-worn camera footage. The Union needs a copy of the body-worn camera footage for use-of-force expert witness review in preparation for arbitration hearings. Eight police officers were disciplined for their role in the Harriet Street incident and their discipline has been grieved by the Union and, at the time of the hearing, was advancing to arbitration. The Union has a strong interest in preparing for these arbitrations and preparing their expert witnesses. It is in the Union's interest that the expert witnesses review the body-worn camera footage to adequately prepare for the arbitrations. To the extent possible, the Union should have a copy of the body-worn camera footage to prepare their expert witnesses without having to schedule access with the City and have their expert witnesses travel to, and stay in, the Police Bureau headquarters to view the camera footage. Forcing the Union's experts to travel to the Police Bureau Headquarters to view the body-worn camera footage is a considerable inconvenience.

Additionally, the record shows that the Union needs a copy of the body-worn footage to allow the disciplined police officers opportunities to review the footage prior to arbitration proceedings and to assist Union counsel prior to the arbitration proceedings. Moreover, it is foreseeable that the expert witnesses and the disciplined police officers will have privileged conversations with Union counsel about the contents of the camera footage. I find that it is an interest of the Union to make sure, as much as possible, that these privileged conversations do not occur at the Police Bureau headquarters but rather at the Union counsel's offices or such other location that the Union chooses. Additionally, I find that it is the interest of the Union to prevent, as much as possible, the need for the disciplined police officers, some of them having been discharged, to travel to the Police Bureau headquarters and spend considerable amounts of time there with their counsel to view the camera footage.

Compared to the Union's interest in the requested materials, the City's confidentiality interest in the body-worn camera footage, on this record, is not as compelling. I note here again that the City had the burden of showing that its interests outweighed the Union's.

The City cannot have a concern with the Union seeing the information requested as it has already allowed the Union to review the requested camera footage and has maintained that the Union can view the camera footage whenever it wants at the Police Bureau headquarters. That is, the City cannot have a concern that any of the information in the body-worn camera footage is confidential in the sense that the Union should not be able to see it. The Union has seen it. This is an important distinction because the concern that the Union will view some highly personal and sensitive confidential information about employees in the requested material is the basis for the lead cases underlying the confidentiality exception to the general rule that the employer shall produce all relevant information to the Union. For example, the highly personal and sensitive information that was at issue in Detroit Edison, supra, was employees' scores on aptitude tests and in New Jersey Bell Telephone, supra, the information at issue included employee absence records containing highly personal information regarding the reasons that they were absent from work, including information about their medical conditions. The body-worn camera footage in question in this matter does not contain similar highly personal and sensitive confidential information about employees as in those lead cases. Therefore, the City's reliance on the confidentiality exemption carved out by these lead cases is not overly persuasive as the cases are distinguishable from this matter.

Outside of the context of 42 Pa.C.S. Section 67A01 *et seq.* and the agreement between the City and the District Attorney, both of which are discussed below, the record does not clearly show how the body-worn camera footage contains confidential information that the City needs to protect from the Union. The camera footage covers events which transpired in the public between police officers and citizens. The City has not shown that any of the information in the camera footage, if disclosed to the Union, would damage some interest of any party in the camera footage. Even if such confidential information existed, the City has already allowed the Union to view the camera footage and has repeatedly offered to allow the Union to view it at the Police Bureau headquarters.

The City argues that statutory law at 42 Pa.C.S. Section 67A01 *et seq.* controls, in part, this matter. The City argues that pursuant to Section 67A04, if a law enforcement agency determines that a video or audio recording contains potential evidence in a criminal matter, the law enforcement agency shall deny its dissemination. (City's Brief at 11). However, the text of the statute broadly exempts requests for information made as part of civil litigation. Section 67A08 states that "Nothing in this chapter shall be construed to alter the responsibilities of parties to any criminal or civil litigation in accordance with applicable rules of procedure." The Union argues (Union's Brief at 24), and I agree, that this broad exemption applies to requests made during a labor grievance over discipline. (Union's Brief at 24). Under Act 111, grievance arbitration is the form of civil litigation for labor disputes over discipline in Pennsylvania. Therefore, due to this language in the statute, the City cannot rely on 42 Pa.C.S. Section 67A01 *et seq.* to deny providing critical information to a Union regarding actions which lead to discipline and are the subject of grievances and arbitrations.

The City also argues that the City entered into an MOU with the Allegheny County District Attorney in which "the City agreed to refer to the DA all requests for audio and video recordings that contain evidence of criminal matters." (City's Brief at 12). I find that this MOU is not relevant to the City's responsibilities to produce relevant documents to the Union in this matter. The City has statutory obligations under Act 111, the PLRA and Board decisions to provide all relevant information to the Union upon request. The City cannot make an agreement with a third party (in this case the County District Attorney) to constrain this obligation. The City cannot give away Union rights in a third-party agreement without bargaining with the Union. Regardless, in this matter, the District Attorney told the City that it could give the body-worn camera footage to the Union. For these reasons, the City cannot rely on a confidentiality interest rooted in the MOU with the District Attorney to support its decision to not give the Union a copy of the body-worn camera footage.

The City also argues that one of its confidentiality concerns was "the FOP's cavalier attitude towards the City's confidentiality interest." (City's Brief at 14). In this matter, the Union has only discussed allowing Union leadership, expert witnesses, the disciplined employees, and Union counsel the opportunity to view the body-worn camera footage. The record does not support the City's concern that the Union would disclose the requested information irresponsibly. I am not persuaded by, nor will rely on, the testimony cited by the City in its Brief at page 14. The City's mistrust of the Union cannot by itself support the decision to not disclose information to the Union where the information requested has extreme relevance to the Union's core mission of investigating and defending disciplinary grievances.

On this record, the City has not met its burden of showing that its confidentiality interests in the body-worn camera footage outweigh the Union's interests in the material. Therefore, the City has committed unfair practices by refusing to produce a copy of the body-worn camera footage pursuant to the Union's request.

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.

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 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 in good faith with an employe representative which is the exclusive representative of employees in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative.

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

(a) Immediately produce to the Union a copy of the requested body-worn camera footage of the Harriet Street incident.

(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 employees 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 seventeenth day of April, 2023.

PENNSYLVANIA LABOR RELATIONS BOARD

Stephen A. Helmerich, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE, FORT PITT :
LODGE No. 1 :
v. : Case No. PF-C-22-30-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 produced to the Union a copy of the requested body-worn camera footage of the Harriet Street incident; 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