

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE, FORT PITT :
LODGE No. 1 :
v. : Case No. PF-C-22-65-W
CITY OF PITTSBURGH :

PROPOSED DECISION AND ORDER

On December 27, 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, by failing to provide requested information.

On February 23, 2023, the Secretary 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 May 12, 2023, in Pittsburgh, as the time and place of hearing.

The hearing was held on May 12, 2023, 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 August 2, 2023, in Pittsburgh. The Union submitted a post-hearing brief on September 21, 2023. The City submitted a post-hearing brief on October 30, 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. 5)¹.

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. 5, 15; Union Exhibit 1).

3. The parties were subject to a collective bargaining agreement (CBA) with the effective dates of January 1, 2019, through December 31, 2022. (N.T. 15; Union Exhibit 1).

4. The CBA covers topics including discipline, internal investigation procedures, and grievance procedures. Pursuant to the CBA, there are three steps involved in grieving discipline assigned to a bargaining-unit police officer. Step One is before the Chief of Police. Step Two is before the

¹ All citations to the transcript refer to the May 12, 2023, hearing unless otherwise noted.

Public Safety Director. If there is no agreement at Step Two, the parties then proceed to binding discipline arbitration at Step Three. (N.T. 16-17).

5. Discipline of a bargaining-unit police officer may begin with an Office of Municipal Investigations (OMI) investigation which leads to an OMI report. OMI is responsible for coordinating the receipt, analysis and investigation of citizen complaints against employees of the City including police officers. An OMI report is a foundational investigative document which may drive the issuance of a disciplinary action report (DAR). An OMI investigator will conduct an investigation, including interviewing witnesses, obtaining documents, reviewing body armor camera video, motor vehicle camera video, and reviewing any other evidence that's available such as civilian cameras and social media posts. The OMI investigator will gather all available information and formulate a report and determine whether or not the employee has violated City rules and regulations. (N.T. 17-19, 64-65).

6. Once initiated, a DAR goes through the chain of command and then the document is served on the police officer. If the police officer challenges the DAR, the document is reviewed as part of the grievance process. (8/3/23 N.T. 21-22).

7. Typically, after discipline has been issued based on an OMI report, a bargaining-unit police officer wants to review the OMI file. The police officer will first review the OMI file him or herself at the OMI office and then request that a Union official come to the OMI office to review the file. After this review, the Union and the police officer make the decision to proceed with a grievance. If at this point the Union wants a copy of the OMI report, the Union typically requests it through its legal counsel. (N.T. 17-22).

8. Erin Bruni, Manager of OMI, testified that traditionally, it has been OMI's practice that, if there was a request to review an OMI report from a police officer, the requestor would make an appointment to come to the OMI office to review it. Often a Union representative and Union Counsel would also review the document with the police officer. Bruni testified that traditionally the police officer or the Union has not been allowed to take a copy of the OMI report from the OMI office. (N.T. 67).

9. Bruni has field investigators that work under her. She is in charge of coordinating investigations of complaints that come into the Police Bureau. She directs investigators to gather evidence and draft a final report. She reviews the final report and decides if it needs more evidence. When she is satisfied with a final report, she files it. (N.T. 63-68).

10. The Union believes the OMI report is important for discipline arbitrations because, in discipline cases based on an OMI investigation, it is the foundational document that forms the basis for the DAR. The Union believes that having access to the information ensures due process for bargaining-unit police officers who have been disciplined. The Union believes that the OMI report will contain witness information and other information of evidence that the Union wants to review before a hearing in front of an arbitrator. The Union wants the ability, before an arbitrator, to undermine the credibility of DAR reports, if necessary. (N.T. 23-24).

11. On June 2, 2022, the City served Police Officer Mosesso with DAR No. 22-049 for violation of General Order 45-02, Warrantless Searches and Seizures. After an initial meeting, Police Chief Thomas Strangrecki recommended a written reprimand and retraining. The Union and Mosesso

pursued a grievance challenging the proposed written reprimand. At Step Three of the grievance procedure, Public Safety Director Lee Schmidt sustained the recommended action. The Union processed the grievance through Step Three. The Union requested Arbitrator Jane Desimone to be the neutral member of the arbitration panel for Mosesso. The hearing before Arbitrator Desimone was scheduled for December 2, 2022. (City Exhibit 3).

12. On November 29 and 30, 2022, Attorney Christopher Cimballa, Counsel for the Union, and Attorney Irene Thomas, Counsel for the City, engaged in settlement discussions over the issue of Mosesso's pending grievance arbitration via email. At this time Thomas also provided information including body-worn camera footage and other documents regarding Mosesso to Cimballa pursuant to Cimballa's subpoena *duces tecum* served on the City. (City Exhibit 2, 3).

13. On December 2, 2022, the parties settled Mosesso's grievance before the hearing. (City Exhibit 3).

14. On December 1, 2022, Cimballa and Bruni engaged in an email chain regarding Mosesso's discipline arbitration scheduled for the next day. In this email chain, Cimballa asked Bruni "Also, can you provide me with [Mosesso's] OMI report?". The time of the request was approximately 2:20 p.m. At approximately 3:40 p.m., Bruni responded to the request for the OMI report by writing: "Not to be uncooperative but since we haven't traditionally (intentionally, except for the one mishap) distributed the final report I'd be happy to make it available to you tomorrow prior to the meeting." (N.T. 24-32, 65-66; Union Exhibit 2, 3).

15. Sometime before December, 2022, Police Officer Patrick Desaro called OMI and wanted to file a complaint about a Critical Incident Review Board (CIRB) Executive Summary of the James Rogers In-Custody Death Investigation being leaked to the media. Bruni told Desaro at that time that OMI had already initiated an investigation on the issue. Several times before December, 2022, Desaro called Bruni and asked for a status update on the findings of the OMI report related to Desaro's complaint about the leak of the CIRB Executive Summary of the James Rogers In-Custody Death Investigation. On December 1, 2022, Bruni sent Police Officer Patrick Desaro an email. The email attached a document entitled "Closing letter for OMI 21-194.PDF". The email states in relevant part:

Mr. Desaro,

I got your message that you left a voicemail. My apologies. I know that I prepared this letter previously but then had to speak to the Law Department about what I could send out given that this initially was a Bureau-referred complaint and remaining consistent with our past practice in other similar cases. That letter is attached. . . .

Respectfully,

Erin Bruni

(N.T. 33, 69-76; 8/3/23 N.T. 34; Union Exhibit 5).

16. On December 5, 2022, Bruni wrote Desaro an email which states in relevant part:

Case # OMI-21-194

Dear Mr. Desaro,

Please be advised that I consulted with the Solicitor this morning regarding your request to review the final report for OMI-21-194. In a memo from PBP Chief Scott Schubert to OMI Manager Erin Bruni dated December 21, 2021, Chief Schubert requested an investigation into the release of the CIRB Executive Summary of the James Rogers In-Custody Death Investigation to the local news media. As this was a Bureau-referenced complaint, your request to review the final report is denied.

Respectfully,

Erin Bruni

(City Exhibit 6).

17. At some point in January 2022, Desaro again asked Bruni for a copy of the OMI report in the leak of the CIRB Executive Summary of the James Rogers In-Custody Death Investigation. Bruni denied the request. (8/3/23 N.T. 36-38).

18. The City did not provide copies of the requested OMI report for Mosesso to the Union. The City did not provide any OMI report to Desaro. (N.T. 31, 67-71).

DISCUSSION

In its charge, the Union alleges that the City did not provide upon the request of the Union a copy of an OMI investigation regarding bargaining-unit member Mosesso (Mosesso OMI report) on December 1, 2022, one day before a hearing in a discipline arbitration for Mosesso. The Union also alleges that the City did not provide upon the request of Desaro a copy of an OMI report regarding the leak of the CIRB Executive Summary of the James Rogers In-Custody Death Investigation to the local news media.

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). In order to facilitate effective policing of the collective bargaining agreement by the employe bargaining representative, the employer must promptly respond to its requests for relevant information. North Hills Educ. Ass'n v. North Hills School Dist., 29 PPER ¶ 29063 (Final Order, 1998).

The Board has also held that there is an exception to the general rule of disclosure of relevant information in the case of the employer's investigation of workplace misconduct, where statements the employer receives from witnesses to the employe' s misconduct do not need to be turned over to the union, but the employer must provide the name of the witness who provided the statement. Gas Works Employees Union, Local 686 v. Philadelphia Gas Works, 45 PPER 68 (Final Order 2013); Allegheny County Prison Employees Independent Union v. Allegheny County, 54 PPER ¶ 50 (Final Order 2023).

Addressing first the request for Mosesso's OMI report, the Union has shown that the Mosesso OMI report is relevant to the Union's duty of prosecuting disciplinary grievances on behalf of bargaining-unit members. Mosesso was in fact disciplined by the City and the discipline was grieved to a hearing before a neutral arbitrator. The record shows that the Mosesso OMI report will contain information the City relied upon in determining to discipline Mosesso. The Union showed on the record that it required the Mosesso OMI report to more fully understand the DAR report based on it, to ensure due process and, before the Arbitrator, to undermine the credibility of the DAR report, if necessary. 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 and defending Union members against discipline issued by the City. The record shows the City had a clear obligation to provide the Mosesso OMI report once requested.

The City first argues in its Brief at pages 10-11 that the Union was not entitled to the Mosesso OMI report because the parties were negotiating a settlement to the grievance and settled the grievance on December 2, 2022. The City argues the request was moot. I do not agree with the City since the Union had to prepare for the grievance hearing even if settlement negotiations are occurring and settlement is even likely. In its Brief at page 11 the City asserts that the settlement was reached on December 1, 2022, but the record shows the settlement occurred on December 2, 2022, which is the day after the City denied Cimballa's request for the Mosesso OMI report.

The Union reasonably still had to prepare for the grievance arbitration hearing on December 1, even if the parties were discussing a settlement. Therefore, while I agree that the settlement ultimately mooted any continuing obligation to provide the Mosesso OMI report, the issue was not settled on December 1, 2022, which is the day the City denied Cimballa's request for the Mosesso OMI report. Therefore, the City cannot rely on mootness as a defense to an unfair labor practice in this context.

The City next argues in its Brief at pages 11-12 that the City did not commit an unfair labor practice because the "City faces a legitimate confidentiality concern with respect to OMI investigative reports." The City has not shown that it had any confidentiality interest in the Mosesso OMI report. Therefore, it cannot justify withholding it from the Union. The record shows that, in fact, the City would routinely disclose OMI reports to the Union and to police officers. The record shows that the City was willing to disclose the Mosesso OMI report to Cimballa on December 2, 2022, before the arbitration hearing. I do not see how the City could have a confidentiality interest in this context if it was readily willing to disclose the Mosesso OMI report. The record shows that the City has a policy of not distributing copies of the final OMI reports to the Union, but has provided no justification for such a restriction that is sufficient under Board law to suspend its obligation to provide relevant information to the Union. I infer from the record that there was no logistical issue with providing the report when it was requested by Cimballa. On this record, there is no justification for the City's refusal to provide a copy of the Mosesso OMI report while only offering access to the report in OMI's office. Since the City has not shown any confidentiality interest in the Mosesso OMI report, it cannot dictate access terms to the Union which has shown an interest in the strongly relevant Mosesso OMI report. Therefore, the City cannot rely on confidentiality as a defense to an unfair labor practice in this context.

The City next argues in its Brief at pages 12-15 that Cimballa's request was void because it was a violation of Rule 4.2 of the Rules of Professional Conduct which provides that "[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." The City cites no cases or authority to support its theory that requests for information are void if they allegedly violate the Rules of Professional Conduct. I decline to create such precedent in this case. As a Hearing Examiner of the Board, my role in this case is to enforce the PLRA, Act 111, and the related policies of the Board. I do not believe it is proper for me to consider allegations under the Rules of Professional Conduct which is in the exclusive jurisdiction of the Supreme Court of Pennsylvania. See Chester Township, 21 PPER ¶ 21005 (Final Order, 1989) (Holding that the question of whether communications violate the Pennsylvania Rules of Professional Conduct is not a question for the Board.) Therefore, the City cannot rely on Cimballa's alleged ethics violation as a defense to an unfair labor practice in this context.

The City next argues in its Brief at pages 15-16 that the City is entitled to a complete defense under Section 10.1 of the PLRA where the Union's counsel engaged in an unfair practice in connection with requesting the Mosesso OMI report. Section 10.1 of the PLRA states

Whenever the board shall find, as part of its findings of fact in any proceeding before it, that the party or parties filing charges of unfair labor practices upon which the complaint was based have engaged in an unfair labor practice (as defined in section six) in connection with or as part of the actions forming the basis of the complaint, such findings shall constitute a complete defense to the complaint, and no order shall issue thereon against the person charged.

43 P.S. § 211.10.1. The City cites no Board authority or caselaw to support its argument in this vein. I refuse here to extend an affirmative defense to a charge based on a refusal to provide relevant information based on an allegation that the requesting party committed an unfair practice. Not only is there, as mentioned, no Board authority or caselaw cited by the City to support such a legal conclusion, I further believe that such a conclusion would have a deleterious effect on labor relations as it would tend to promote disharmony between employees and employers and would increase the complexity and length of litigation before the Board. The policy of the Board is that employers shall provide all relevant information to a Union on request. Allowing employers the colorable argument to withhold information because, in the employer's opinion, the union somehow committed an unfair labor practice would ultimately delay disclosure of information that unions require to intelligently carry out grievance handling and collective bargaining functions. I am therefore hesitant to create precedent which would likely lead to further delays on the disclosure of relevant information and, ultimately, additional litigation before the Board over issues which should not be controversial. Therefore, the City cannot rely on Section 10.1 of the PLRA as a defense to an unfair labor practice in this context.

The City next argues in its Brief at pages 16-18 that the City did not commit an unfair labor practice because the Union demanded a response to an information request within twenty-four to forty-eight hours which is contrary to Board precedent. The City cites City of Philadelphia, 37 PPER 126 (Proposed Decision and Order, 2006), and City of Philadelphia, 37 PPER 128 (Proposed Decision and Order, 2006). Those cases in turn cite Capital Area Steel & Door Company v. NLRB, 89 F.3d 692 (10th Cir. 1996), for the proposition that a delay of as little of two weeks in responding to a request has been ruled an unfair labor practice. However, the City cannot assert that it did not have enough time to comply in this matter. Bruni flatly denied Cimballa's request to provide the Mosesso OMI report to him and stated that he can review it the next day. She did not ask for more time to provide the report or that it was not ready. I infer that she needed no time to provide it and could have emailed it to Cimballa the moment he asked for it. It was finished and available to her. Therefore, this is not an issue of the City not having enough time to reasonably comply with the request for information. The City cannot rely on unreasonable time to comply as a defense to an unfair labor practice in this context.

For the above reasons the City clearly committed an unfair labor practice when it refused to provide the Union the Mosesso OMI report when requested. As noted by the City, the grievance was settled so the relevance for the Mosesso OMI report now no longer exists. Therefore, I will not order the City to provide it now as part of the remedy for its unfair labor practices.

Moving to Desaro's request for information relating to the leak of the CIRB Executive Summary of the James Rogers In-Custody Death Investigation to the local news media, the record is weakened by the fact that Desaro did not testify. As a result, I have begrudgingly included some of his out-of-court statements, which are hearsay, into the record in Finding of Facts 15 and 17 above in order to provide some narrative sense to this Proposed Decision and Order. My conclusions in this matter do not rely on any hearsay from Desaro.

As noted by the City in its Brief at page 18, there is nothing in the record to establish that Desaro is a representative of the Union. Therefore he does not have the same rights as the exclusive bargaining representative to request information from the employer. David Thomas v. PHRC, 21 PPER 21089 (Final Order, 1990). Therefore, even if the information were relevant to the Union, the City did not commit an unfair labor practice when it refused to provide it to Desaro. Therefore, the City has not committed an unfair labor practice with respect to denying Desaro's requests.

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 employes 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 employes 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) 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;

(b) 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

(c) Serve a copy of the attached Affidavit of Compliance upon the Union.

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 thirteenth day of December, 2023.

PENNSYLVANIA LABOR RELATIONS BOARD

 /s/ Stephen A. Helmerich
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-22-65-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 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