

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE :  
FORT PITT LODGE NO. 1 :  
 :  
v. : Case No. PF-C-22-59-W  
 :  
CITY OF PITTSBURGH :

**PROPOSED DECISION AND ORDER**

On November 18, 2022, the Fraternal Order of Police, Fort Pitt Lodge No. 1 (Union or FOP), filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair labor practices, under the Pennsylvania Labor Relations Act (PLRA), as read with Act 111 (collectively "the Acts"), alleging that the City of Pittsburgh (City or Employer) violated Section 6(1)(a), (c), and (e) of the PLRA. The Union essentially alleged that the City violated an agreement, reached during Step 2 grievance discussions, to hold enforcement of the City's COVID-19 (COVID) Vaccine Policy in abeyance when it posted a job announcement for Sergeant promotions which required proof of vaccination as a qualification for promotion. The Union further alleged that the vaccine requirement was motivated by anti-union animus for the protected activity of grieving the vaccine mandate.

On December 13, 2022, the Secretary of the Board issued a no-complaint letter. On December 30, 2022, the Union filed exceptions. On January 24, 2023, the Board issued an Order Directing Remand to the Secretary for Further Proceedings. On February 10, 2023, the Secretary of the Board issued a Complaint and Notice of Hearing for April 21, 2023, via TEAMS video. During the hearing on that date, both parties in interest were afforded a full and fair opportunity to present testimonial and documentary evidence and to cross-examine witnesses. On June 12, 2023, the Union filed its post-hearing brief. On July 11, 2023, the City filed its post-hearing brief.

The examiner, based upon witness testimony, admitted documents, and all matters of record, makes the following:

**FINDINGS OF FACT**

1. The City is a public employer and political subdivision pursuant to the Acts. (CX-1)<sup>1</sup>

2. The Union is a labor organization pursuant to the Acts. (CX-1)

3. Robert Swartzwelder is a Master Police Officer, and he is a Firearms and Tactics Instructor in the Training Unit of the City's Bureau of Police (Department or PBP). Officer Swartzwelder has also been the Union President since March 2016. (N.T. 64)

4. Section 18(D) of the parties' collective bargaining agreement (CBA) is titled "Promotional Examination" and provides as follows:

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<sup>1</sup> Complainant exhibits are herein designated "CX" and Employer exhibits are herein designated "EX."

Promotional examinations shall require both written and oral examinations of candidates for promotions. In general, the written and oral examination results shall be weighed on a 60% (oral)/ 40% (written) basis subject to adjustments to comply with federal, state or local discrimination laws. Oral examinations shall be conducted by external, appropriately trained individuals who have been appropriately vetted by the City and the FOP. The FOP may submit an objection to a specific examiner by providing written evidence demonstrating that the individual is not qualified to perform oral examinations.

Employees who take promotional examinations shall have ½ point added to their actual examination scores for each complete year served by them in the Bureau of Police to a maximum of 5 additional points at 10 or more complete years of service. Promotional candidates must have completed a minimum of six (6) years of service at the time of such examination in order to receive a length of service credit. Promotional candidates for the position of Lieutenant shall have at least ten (10) years of service as a City police officer as a prerequisite for promotion.

There shall be at least a twenty-four (24) hour separation between tests for Sergeant and Lieutenant.

The City shall retain the right to determine the manner in which candidates are tested to ensure that such testing does not violate federal, state or local discrimination laws.

(N.T. 65-70, 99-100; CX-1 at § 18(D), pg. 80-81)

5. The bargaining unit includes recruits-in-training, patrol officers, detectives, sergeants, and lieutenants. Non-bargaining unit ranks include the Chief of Police, Deputy Chief, Assistant Chief, and Commander. The non-unit position of Commander is immediately above the bargaining unit position of Lieutenant. (N.T. 68-69, 134)

6. In April 2020, a Sergeant list was generated, and a Lieutenant list was generated in November 2020. Promotional lists are valid for 3 years before they expire. The Sergeant list expired in April 2023, and the Lieutenant list will expire in November 2023. Both lists were generated before the existence of a COVID vaccine. Any Sergeants or Lieutenants placed on and promoted off those lists were not required to have received a vaccine. (N.T. 25, 70-71, 144-145)

7. On November 1, 2021, the Mayor's Office issued an executive order implementing a COVID Vaccine Policy for all employees. The Policy provides, in relevant part, as follows:

Vaccinations are required as a condition of employment for all new City Employees as of Monday, August 9, 2021.

City employees who cannot be vaccinated due to medical or religious reasons may seek a medical or religious accommodation to be exempt from the vaccine mandate. However, unvaccinated City Employees, who are not vaccinated because

of approved health or religious exemptions, must be tested weekly.

. . . . .

Unless they have an approved accommodation to be exempt from the vaccine mandate, beginning December 22, 2021, each City Employee will be required to be fully vaccinated. All City Employees will need to submit either proof of full vaccination to their designated department/bureau representative if they have not done so already or an approved accommodation exempting them from vaccination.

. . . . .

City Employees who fail to follow this policy will be subject to employment consequences including unpaid leave and/or discipline in accordance with the City's progressive discipline policy for the following acts of misconduct:

Failure to become vaccinated without an approved accommodation from HR

. . . . .

(N.T. 77-79, 110-111, 126-128, 182-183; CX-2) (emphasis original)

8. Progressive discipline is as follows: oral warning, written warning, 1-day suspension, 3-day suspension, 5-day suspension, termination. (N.T. 165; CX-1 at 16)

9. In the early stages of COVID, the City initially implemented a COVID Policy to ensure the safety of essential workers and to keep them healthy while working. During this time, non-essential employees worked from home. As the science evolved, the City modified the Policy to include masking. The City brought non-essential employees back to work in City facilities in June 2021, and the City applied the COVID Policies to the returning non-essential employees also to keep all employees safe and working. As the COVID Vaccine became available, the City followed federal guidelines and directed that all City employees obtain protection from the virus by receiving vaccinations by creating the Vaccine Policy under former Mayor Peduto. The City has designated police officers as essential employees. In January 2022, Edward Gainey became the City's new Mayor, and he continued the mandate. (N.T. 83, 158, 160-162, 182-183)

10. Thomas Stangrecki became the Acting Chief of Police in July 2022, and he was in that position at the time of the hearing. In May 2023, the City appointed Larry Sciroto as its new Chief of Police.<sup>2</sup> In November 2021, Chief Stangrecki was the Deputy Chief, and he implemented the November 1, 2021 Vaccine Policy in the Department on behalf of former Chief Schubert, the Public Safety Director, and the administration, on November 3, 2021. (N.T. 110-111, 124-126; CX-2)

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<sup>2</sup> The appointment of Chief Sciroto is not a fact of record, but I have taken administrative notice of this commonly known and undisputed fact.

11. President Swartzwelder received multiple complaints from officers objecting to receiving the vaccine. On November 5, 2021, the Union filed a class-action grievance challenging the COVID Vaccine Policy and requesting that the City "[w]ithdraw this policy immediately and negotiate over the terms and conditions of the policy as relates to the specific violations as outlined by the current working agreement." President Swartzwelder credibly testified that examples of substantive qualifications for promotion are the 10-year service requirement for a Lieutenant promotion and consideration of an applicant's disciplinary record. (N.T. 77-79, 84, 96; CX-4)

12. Chief Stangrecki denied the grievance at Step 1 of the grievance procedure. The Union leadership engaged in multiple meetings and discussions with the Public Safety Director and the Law Department at Step 2 of the grievance procedure. The matter was not resolved. (N.T. 77-79, 143-144)

13. Kinsey Casey was the City's Chief Operations Officer (COO) at this time, until her departure from City employment in January 2022. In that position, Ms. Casey oversaw the Department of Public Works; the Department of Mobility and Infrastructure; the Department of Parks and Recreation, the Department of Human Resources; and the Department of Information Technology. COO Casey implemented the COVID Vaccination Policy across the City. (N.T. 155-158)

14. On December 16, 2021, COO Casey wrote to the Union's attorney as follows:

As you may know, Arbitrator Gerald Kobell recognized the City's managerial right to impose a vaccine mandate on public employees working pursuant to an Act 111 labor contract.<sup>3</sup> Arbitrator Kobell also determined that the City must engage in impact or effects bargaining with the Union. . . .

Because this grievance is still being processed, the December 22<sup>nd</sup>, 2021 deadline articulated in the policy issued by the Mayor November 1<sup>st</sup> and shared by the PBP management November 3<sup>rd</sup>, 2021 will not be enforced for disciplinary purposes against any PBP employee covered by the FOP's CBA. Stated differently, while the grievance is pending, no one will receive discipline for being unvaccinated starting on December 23<sup>rd</sup>, 2021. However, PBP employees covered by the FOP's CBA who have not uploaded their proof of vaccination by December 22<sup>nd</sup>, 2021 will receive a notice of that fact. As discussed, the City hopes to resolve this grievance as quickly as possible and remains interested in continuing to confer with the Union's representatives about details regarding implementation of discipline for failure to comply with the mandate as well as other implementation details such as the effective date and other important effects. December 22<sup>nd</sup> will remain a deadline for filing requests for religious accommodations and medical exemptions from the vaccine requirement.

Please consider this communication as a request for an extension to provide a Step II response and a request for another meeting.

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<sup>3</sup> The arbitration award ruled on a grievance that was filed under a different collective bargaining agreement between the Firefighters and the City.

(N.T. 79-80, 164-165; CX-6)

15. With the grievance pending, the City agreed to hold only the progressive discipline (i.e. oral and written warnings, 1,3,5-day suspensions, and termination) for FOP bargaining unit employees in abeyance. The City did not agree to no longer require the vaccine as a requirement for employment or promotion. The vaccine mandate remained in effect, and the City still wanted every employe to be vaccinated to ensure that all City employes were protected against the worst effects of the virus. No officers in the bargaining unit or command staff have been disciplined for not receiving the vaccine after December 23, 2021. New hires are still required to receive the vaccine, and other non-unit employes were disciplined for not receiving the vaccine. (N.T. 80-83, 88, 112-113, 131, 137, 144-145, 166-169)

16. Paula Kellerman has been the Director of Human Resources and Civil Service since February 28, 2023. In the Summer of 2022, Director Kellerman was a Senior Manager in Human Resources and the Chief Examiner to the Civil Service Commission. She became the Acting Director of Human Resources on October 26, 2022. (N.T. 179-181)

17. Chief Stangrecki and Ms. Kellerman issued the job announcement for the position of Police Sergeant, on October 11, 2022, but Chief Stangrecki was not involved in requiring the COVID vaccine as a condition of promotion. (N.T. 128, 132, 185-186; CXs-8 & 9)

18. The Sergeant job posting provides, in relevant part, the following:

**REQUIREMENTS:**

**General Application Requirements:**

You must submit, show proof of or attest to all of the following at the time of filing your online application (unless otherwise indicated below) or your application may be disqualified.

Completed online City of Pittsburgh Application Form and Supplemental questions for this position.

Applicants must currently hold the permanent rank of Police Officer in the Bureau of Police, and must have completed at least four(4) years of regular full-time service in this rank by the exam date. Service must be continuous until date of appointment.

Applicants must present a current, valid Class C Pennsylvania Driver's License at time of filing application. A valid driver's license must be maintained throughout employment.

Applicants must comply with the City of Pittsburgh's COVID 19 vaccination mandate.

Applicants must have current MPOETC Act 120 Certification and CLEAN/NCIC Certification.<sup>4</sup>

**NOTE: The City of Pittsburgh, as a matter of policy, conducts pre-employment and promotional background investigations on all candidates being considered for positions. The background investigation includes but is not limited to criminal background, driver's license and City of Pittsburgh real estate tax payments. Candidates may be disqualified from consideration based on the results of their background investigation (as it relates to the job for which the applicant is being considered).**

(CX-9) (emphasis original)

19. The Sergeant job posting also requires that applicants pass the written exam, which was scheduled for January 17, 2023, and the oral exam, which is given by the Assessment Center, which was scheduled for February 27, 2023. The CBA permits the Union to object to a member of the Assessment Center panel. Attached to the job posting is a "Police Sergeant Supplemental Questionnaire" asking for yes or no answers to a series of questions which track the earlier-mentioned requirements. Those questions ask whether the applicant has been a police officer for at least 4 years, has a valid driver's license, MPOETC certification, CLEAN/NCIC certification, and proof of COVID vaccine compliance. (188-189; CXs-1 & 9)

20. All job announcements require proof of vaccination, not just the Sergeant job announcement. A July 25, 2022 job posting for the position of Fire Captain in the City's Bureau of Fire also required the applicant to be vaccinated against COVID, before the October 11, 2022 Sergeant job announcement. The City is still requiring that all new hires employed by the City receive the vaccine. The City is not requiring any employees to receive booster vaccines. (N.T. 182-184, 194-195, 197; EX-C)

21. A September 12, 2022 Department job posting for the non-bargaining unit position of Police Commander required applicants to meet all the same qualifications as outlined in the October 11, 2022 Sergeant position posting including proof of compliance with the City's vaccine mandate. This promotional announcement also pre-dated the October 11, 2022 Sergeant job announcement. Officers are not required to demonstrate vaccination status prior to taking oral or written exams.<sup>5</sup> (N.T. 133-134, 183-184, 190-191; EX-B)

22. The City is permitted to consider a promotional applicant's history of prior discipline that remains within the reckoning period. Generally, officers are ranked on the list according to their combined scores (i.e., oral and written exam scores and service credit). Chief Stangrecki considers officers' background checks and prior discipline which may result

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<sup>4</sup> A CLEAN/NCIC certification refers to a certification for an officer to use the law enforcement network, which provides access to large amounts of data about individuals, including but not limited to driver license records, criminal history, and PFAs. Officers are certified after passing an exam and swearing not to release the information obtained during investigations. (N.T. 68-69)

<sup>5</sup> The job announcements for Fire Captain and Police Commander were not for bargaining unit positions. Therefore, the timeliness of the charge is not an issue.

in a top candidate being skipped. He sends his recommendations to Human Resources and Civil Service, which certifies the short list of candidates to fill the vacant positions. The Public Safety Director makes final promotional determinations. (N.T. 73, 151-153, 186-187, 199; CX-1)

23. The number of candidates certified from the list is determined by a formula taking the number of position vacancies, multiplied by 2, plus 2. For example, if there are 3 vacancies, the Civil Service Commission will certify the top 8 candidates. (N.T. 187)

24. The physical examination is conducted after an officer passes the oral and written exams. Passing the physical is required before final appointment by the Public Safety Director. (N.T. 70-71, 188-189; CX-9)

25. Anthony Berber is a Sergeant in the Department. He was promoted from Detective, off an April 2020, list on March 30, 2023.<sup>6</sup> On the same day that Detective Berber was promoted to Sergeant, Sergeant Andrew Baker was promoted to Lieutenant from a list generated in November 2020. Sergeant Berber and Lieutenant Baker were not required to have a vaccine for their promotions because they qualified for the list prior to the existence of the vaccine and the City's vaccine mandate. These lists also existed prior to the October 11, 2022 Sergeant job announcement. By mid-December 2021, the City included the vaccine mandate in all job announcements including promotions. From that time until October 11, 2022, the City had not posted a job announcement for Sergeant. (N.T. 23-25, 27, 39-44, 54, 85, 197-198; CX-13)

26. Sergeant Berber was a patrol officer when he took the written exam for the rank of Sergeant in January 2020; he took the oral exam in February 2020; and he took a physical examination some weeks prior to his March 2023 promotion. Between the October 11, 2022 Sergeant job announcement and Detective Berber's March 2023 promotion to Sergeant, the City did not require Sergeant Berber to prove that he was vaccinated. Sergeant Berber is not vaccinated against COVID. (N.T. 26-29, 31-32)

## DISCUSSION

The Union argues that the City unilaterally changed the promotional criteria for the rank of Sergeant by requiring applicants to be vaccinated against COVID, in compliance with the City's COVID Vaccination Policy, the enforcement of which for police officers is presently in abeyance by way of the agreement between the City and the FOP. (Union Brief at 6). The Union contends that the October 11, 2022 Sergeant job announcement was the first time the vaccine requirement became an issue since the agreed upon disciplinary abeyance. (Union Brief at 11). The Union additionally argues that the promotional vaccine requirement is procedural in nature, constitutes a mandatory subject of bargaining, and was discriminatorily motivated. (Union Brief at 13-14, 21).

In Allegheny County Police Ass'n v. Allegheny County, 54 PPER 63 (Final Order, 2023), the Board held that the employer's unilateral implementation of

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<sup>6</sup> In the hearing transcript, Sergeant Berber's name is spelled "Berber." However, in CX-13, the Sergeant's name is spelled "Barber." I am assuming the court reporter heard his name correctly, and will refer to the Sergeant herein as Sergeant Berber.

a COVID vaccine mandate was a managerial prerogative and that the employer was obligated to bargain the severable impact of discipline to be imposed for not complying with the vaccine mandate. In this case, the City also unilaterally implemented a COVID vaccine mandate for all City employees including managers, new hires, and bargaining unit members employed by the PBP. The City's vaccine mandate, therefore, is a managerial prerogative within the meaning of Allegheny County, supra.

The managerial and employee interests, on this record, are the same as they were in Allegheny County. The City implemented the vaccine mandate to protect the health, safety, and welfare of employees and the public that they interact with against the extreme, and sometimes fatal, outcomes of infections from the COVID virus and its mutations. COO Casey credibly testified that the City needed essential employees to be safe so they can continue working and providing essential public services across City departments, but especially the Police and Fire Departments. The Allegheny County decision, therefore, is binding precedent in this case without re-applying the balancing test.

The Board has stated that there is no burden on a public employer to prove or justify the manner in which it chooses to exercise or implement a matter of managerial prerogative. Pennsylvania State Troopers Association v. Commonwealth of Pennsylvania, Pennsylvania State Police, 34 PPER 29 (Final Order, 2003). In this regard, the Board does not question the wisdom of a managerial decision. Id. Here, COO Casey credibly testified that the City was following the developing science and federal guidelines about the effects and spread of COVID infections which, in the fall of 2021, promoted the use of masks and vaccines to protect people from contracting or spreading the virus. The reasons for the City's vaccine mandate does not have to be 100% scientifically proven. The City's managerial prerogative in mandating vaccines for its employees is, therefore, unassailable even if the City's goal (i.e., to keep employees safe and continuously working) could not be entirely effectuated by its Vaccine Policy.

The Union's contention that the City's promotional vaccine requirement is procedural is also misplaced. First, the vaccine mandate is a managerial prerogative that has been applied to all employees in all positions. It would be incongruous to conclude that the vaccine mandate is a managerial prerogative but that it has to be bargained for promotions, when all managers, supervisors and employees are required to have it. The Union's position would undermine management's lawful prerogative. The City wants every employee to be vaccinated under the vaccine mandate, including supervisors, managers, and new hires. The vaccine mandate for promotion is not a new requirement for promotion because everyone is supposed to be vaccinated. In this regard, contrary to the Union's position, the City has not unilaterally changed the promotional criteria for the rank of Sergeant. The Union's charge challenging the vaccine mandate for Sergeant in October 2022 is a direct challenge to the original mandate for all employees, which was implemented in November 2021. The Union's charge in this case, therefore, is untimely.

The mandate is a qualification for continued employment for all City and FOP employees, and not just for promotions. The Union is attempting to characterize the promotional requirement as a new requirement for promotion when in fact it is merely a reminder by the City that every employee, unless exempt, is supposed to have the vaccine. The City is ensuring that promoted



officers have the vaccine they were supposed to already have in an environment where some officers are not getting the vaccine.

Even if the vaccine requirement in the Sergeant promotion announcement constituted a change, the Commonwealth Court, in FOP Rose of Sharon Lodge No. 3 v. PLRB, 729 A.2d 1278 (Pa. Cmwlth. 1999), held that a change in the minimum requirements for promotions constitutes a managerial prerogative. Id. Procedural requirements for promotion include activities such as posting job vacancies, disseminating testing notices and schedules, determining probationary time limits, etc. IAFF Local # 10 v. City of McKeesport, 34 PPER 4 (Proposed Decision and Order, 2002). The vaccine mandate is a substantive qualification for employment generally, which includes promotion, because the City exercised its discretion in determining that it was a minimum fitness for duty requirement for all City employees. Moreover, the requirement is even more necessary to keep essential police employees safe from spreading and contracting the virus and its worst effects when the virus and its variants were infecting people at exponential rates resulting in many fatalities.

The Union also relies on FOP Rose of Sharon Lodge No. 3 v. City of Sharon, 29 PPER 29147 (Final Order, 1998), and argues that requiring the vaccine for the Sergeant promotion is procedural because it limits, rather than expands, the pool of qualified applicants. (Union Brief at 22). The requirement that substantive criteria expand the pool of applicants is misplaced. An employer is certainly within its managerial prerogative to establish substantive promotional criteria designed to narrow the pool of qualified applicants for promotion. Otherwise, too many rank-and-file officers could qualify for the Sergeant promotion, and the City would have to consider thousands of officers for the promotion. Taking the Union's argument to the extreme, the City would be expected to have no promotional criteria to have the most expansive pool of applicants, when certainly there must be an assessment of ability and competency to be a supervising leader in the Department.

Moreover, City of Sharon did not hold that an employer has to establish or change a qualification for promotion that increases the pool of applicants to constitute a substantive qualification within management's prerogative. In City of Sharon, the employer lowered the time-of-service qualification for police officer promotions from 5 years of completed experience to being in the fifth year of service, which had the effect of increasing the candidate pool, because the city determined that it needed more applicants. The Board, however, did not hold that the promotional criteria must effectuate an increase in the candidate pool. Under City of Sharon, an employer is entitled to **increase or decrease** qualification standards to meet the changing needs of its enterprise. See also, Ridgway Area Teachers Association v. Ridgway Area School District, 48 PPER 17 (Proposed Decision and Order, 2016). Also, the lowering of the time-of-service qualification standard in City of Sharon still served to limit the pool of applicants, as does all promotional criteria, because there remained a time-of-service requirement excluding newer officers from qualification.

The vaccine requirement for the Sergeant promotion, posits the Union, is not akin to testing or the weight given to different tests. The Union asserts that the vaccine is not a job qualification germane to the level of education, required training, or to providing law enforcement service. (Union Brief at 20-22). Contrary to the Union's position, however, the vaccine requirement does in fact pertain to law enforcement duties. Officer safety

and physical fitness standards are related to law enforcement the same as other fitness for duty requirements.

In Lower Moreland Township Police Benevolent Association v. Lower Moreland Township, 54 PPER 61 (Final Order, 2023), the Board held, in relevant part, as follows:

[T]he Township's physical agility test is setting forth minimum qualifications and physical fitness standards for promotion. Indeed, as stated by the Court in City of Sharon, "[t]here is nothing more fundamental to the interests and safety of the public than the good health and physical fitness of those charged with the responsibility of enforcing the laws.". Therefore, the Township' s implementation of the physical agility test falls within its managerial prerogative to set forth standards to determine an officer's fitness to discharge his or her duties.

Id. (citations omitted). The inability of Sergeants to perform their duties as police officers because they are quarantined, hospitalized, or deceased, directly relates to the performance of their law enforcement duties. A fitness for duty requirement that Sergeants and all other officers receive a COVID vaccine, which reduces the risk that officers will be physically unable to perform their duties or interact with the public, is certainly a managerial prerogative and a substantive promotional criterion. Lower Moreland, supra.

The Union also contends that by promoting officers to Sergeant and Lieutenant off old lists after the October 11, 2022, vaccine requirement for promotion, there are Sergeants and Lieutenants who are not vaccinated while the ones from newer lists will be required to be vaccinated. This discrepancy, contends the Union, still exposes the public and other officers to risk, which undermines the City's position that the vaccine is required of all the officers to protect the public. The risk created by the disparity between vaccinated and unvaccinated officers, argues the Union, makes the vaccine requirement a procedural formality that can be overlooked and not a substantive requirement. (Union Brief at 15).

The vaccine mandate is not procedural because the City permits exemptions from the vaccine qualification for City employment. The City, consistent with established guidelines, exempts employes across the City from the requirement for qualifying religious or medical reasons. The City also exempted certain officers seeking promotion from the vaccine requirement because the mandate was not required when the officers qualified for the promotion and a ranking placement on the eligibility list. Certainly, there will be unvaccinated employes. There is no evidence that these exemptions were arbitrarily or capriciously applied.

Moreover, the disparity among vaccinated and unvaccinated employes would exist anyway by virtue of the fact that some officers voluntarily received the vaccine, like President Swartzwelder, and some refused, while discipline was held in abeyance. The vaccine mandate is not a nullity or a procedural formality simply because exempted employes are excused from the mandate and undisciplined officers have refused to comply with it. The City is still trying to get as many employes as possible vaccinated. Under the Union's logic, if some employes are medically or religiously exempt and the City cannot achieve 100% employe vaccination status, then the City does not have any prerogative to implement the vaccine mandate to the fullest possible

extent beyond those exemptions. By making these arguments, the Union is attempting to deny the City's Board-approved managerial authority and prerogative to mandate COVID vaccines for its employees simply because some employees will not receive the vaccine due to exemptions and a hiatus in enforcement within the PBP.

A substantive qualification does not convert to a procedural one simply because an employer decides to waive a criterion for good cause shown. In this case, employees with religious/medical exemptions have demonstrated good cause, as recognized by the City based on law and science, to be excused from the mandate. Also, the City exercised managerial discretion to waive the mandate requirement for officers who pre-qualified for promotion because the vaccine requirement for promotion did not exist when the officers on the unexpired Sergeants' list was generated prior to October 11, 2022. Those applicants already qualified for the promotion before the existence of the vaccine or the Citywide vaccine mandate as a qualification for employment.

The Union further contends that, even if deemed a managerial prerogative, City management bargained away its managerial right to implement substantive criteria for promotion because promotions are provided for in the CBA. (Union Brief at 7). However, the promotional section of the CBA leaves out many substantive criteria that the City requires for promotion. For example, the City requires that applicants for Sergeant to currently hold the permanent rank of Police Officer in the Bureau of Police; they must have completed at least four(4) years of regular full-time service in this rank by the exam date; their service must be continuous until the date of appointment; applicants must present a current, valid Class C Pennsylvania Driver's License at time of filing application; they must maintain a valid driver's license throughout employment; applicants must comply with the City of Pittsburgh's COVID vaccination mandate; applicants must also have current MPOETC Act 120 Certification and a CLEAN/NCIC Certification. Promotions are also subject to background checks and an examination of prior discipline within the reckoning period as well as passing a physical examination.

The CBA addresses the weight given to written and oral exams, the conduct of oral exams, service credit, and minimum years of service with the Police Department for Sergeant and Lieutenant promotions. The CBA does not address the substantive qualifications that the City requires for physical examinations for promotions, drivers' licenses, MPOETC and NCIC certifications, and passing background checks. Accordingly, the City did not bargain away its managerial right to impose additional substantive qualifications that are not expressly addressed in the CBA because the CBA does not provide an exhaustive list of the promotional qualifications that are in place and because the CBA does not contain an express, clear, unmistakable waiver of the City's managerial prerogative to add substantive promotional criteria at any time. City of Pittsburgh v. FOP, Fort Pitt Lodge No. 1, 52 PPER 28 (Pa. Cmwlth. 2020) (memorandum opinion); Faculty Federation of Community College of Philadelphia, Local 2026 v. Philadelphia Community College, 51 PPER 23 (PDO, 2019).

The Union further contends that the City effectively suspended the vaccine mandate for all police officers by agreement with the FOP thereby prohibiting the City from requiring the vaccine as a condition of promotion. The FOP filed a grievance challenging the vaccine mandate. At Step 2 of the grievance procedure, the City agreed to hold in abeyance the imposition of progressive discipline against FOP members for failure to comply with the vaccine mandate by December 22, 2021. The City further agreed to discuss the

disciplinary impact for non-compliance with the policy. The City applied a recent ruling in an arbitration award addressing the Firefighters' grievance challenging the same policy. That arbitration award concluded that the City had a managerial prerogative to implement the vaccine mandate, but the City had to bargain the impact on discipline, which is the same conclusion the Board reached in Allegheny County, supra.

The record shows that City officials never suspended the vaccine mandate. They only suspended the imposition of discipline on FOP members. Indeed, the City still requires new hires for the PBP to be fully vaccinated before being hired. The record also shows that the City has disciplined non-bargaining unit employees, demonstrating that the City-wide vaccine mandate for all employees remained in effect. COO Casey credibly testified that the City's goal has always been to get every City employee fully vaccinated, with the exclusion of employees who qualified for exemptions. Therefore, contrary to the Union's position, the suspension of discipline for FOP members did not constitute the effective suspension of the vaccine mandate simply because the City agreed not to enforce the mandate for bargaining unit members.

Also, the Union posits that bargaining unit members can no longer be disciplined because more than 120 days since the occurrence of non-compliance have passed and the CBA prohibits disciplining bargaining unit members beyond the 120 days. The Union contends that the alleged inability to discipline any police officer under the policy thereby nullifies the policy. (Union brief at 14). However, the Union's position does not account for the fact that the City could still maintain the mandate under Allegheny County, supra, and bargain the discipline, after which it could then impose the bargained-for discipline prospectively from a new compliance date and enforce the existing policy in the future pursuant to the agreed upon disciplinary procedures. Indeed, COO Casey contemplated future enforcement in her December 6, 2021 letter, agreeing to hold the discipline in abeyance, wherein she stated as follows:

As discussed, the City hopes to resolve this grievance as quickly as possible and remains interested in continuing to confer with the Union's representatives about details regarding implementation of discipline for failure to comply with the mandate as well as other implementation details such as the effective date and other important effects.

(F.F. 14) (emphasis added). COO Casey's agreement letter clearly informed the Union's attorney that the City was interested in negotiating a disciplinary process so the City could enforce the vaccine mandate in the future. Officers could certainly be disciplined under a bargained-for process for failing to comply with the vaccine mandate by a future date designated by the City, as new, discrete acts of non-compliance, which would restart the 120-day clock.

The Union argues that the settlement agreement expressly provided that "no one will receive discipline for being unvaccinated starting on December 23, 2021" and that requiring an officer to be vaccinated pursuant to the City's vaccine mandate is an "end-run" around the vaccine mandate abeyance agreement. (Union Brief at 13-14). The repudiation of the agreement, argues the Union, was motivated by the Union's protected activity of grieving the mandate, which is discriminatory and an unfair labor practice. (Union Brief at 13-14). The Union further contends that, by requiring officers seeking promotion to become vaccinated while other bargaining unit officers are not being disciplined and therefore remain unvaccinated, the City is

discriminating between bargaining unit members by placing unvaccinated officers at odds with voluntarily vaccinated officers. (Union Brief at 21).

To establish a violation of Section 6(1)(c) under the PLRA, the charging party must show that the employee was engaged in protected activity, the employer knew of that protected activity, and there was an adverse employment action motivated by anti-union animus. Pennsylvania State Troopers Ass'n v. Commonwealth of Pennsylvania, PA State Police, 33 PPER ¶ 33011 (Final Order, 2001). It is the motive for the adverse employment action that creates the offense under Section 6(1)(c). PLRB v. Ficon, 434 Pa. 383, 254 A.2d 3 (1969). An employer may rebut a claim of discrimination under Section 6(1)(c) of the PLRA by proving that the adverse employment action was based on valid nondiscriminatory reasons. Duryea Borough Police Dept. v. PLRB, 862 A.2d 122 (Pa. Cmwlth 2004).

First, the Union has mischaracterized the nature of the agreement, wherein the City agreed to hold only the discipline for non-compliance in abeyance. On this record, there is no evidence that the City ever agreed to hold the vaccine mandate itself in abeyance, and there is no evidence that the City disciplined PBP employees. Consequently, there is no violation or repudiation of the agreement, and the factual predicate for the Union's argument does not exist.

Also, there is no evidence of an adverse employment action against employees by requiring a vaccine for Sergeant applicants because the requirement does not constitute discipline. COO Casey credibly testified that discipline is progressively imposed as follows: verbal warning, written warning, 1-day suspension, 3-day suspension, 5-day suspension, and discharge. A promotional requirement to obtain a vaccine is not discipline as understood by the parties. If, for example, the City required a bachelor's degree for a Sergeant promotion, which is a substantive requirement pertaining to level of education and training, applicants know that they need to obtain a bachelor's degree to qualify for the promotion. An applicant is not being disciplined or discriminated against if the applicant chooses not to obtain the substantive educational requirements that the City deems necessary for the position.

Such is the case here, where the City has imposed a substantive fitness for duty requirement, i.e., obtain the vaccine, which is not a reprimand, suspension or discharge. It cannot be argued that rejecting an applicant for his/her failure to receive a vaccine is discipline any more than it would be discipline for rejecting an applicant for his/her failure to maintain a driver's license, MPOETC or NCIC certifications or for applying before they have the requisite years of service. Therefore, the City does not take adverse employment action against employees by rejecting unqualified applicants for promotion when the choice resides with the applicants to meet the substantive promotional criteria required by the City.

Also, the record does not contain facts from which to infer an unlawful motive on the part of the City by requiring Sergeant applicants to receive a vaccine. The City's motive existed prior to the grievance settlement or the vaccine requirement for the Sergeant promotion announcement in October 2022. The City's motive was to have all City workers, except those who qualified for exemptions, vaccinated against the virus to maintain safety of employees and citizens as well as the continuation of essential government operations. The City never lifted the mandate on all employees. The inclusion of the mandate on the Sergeant promotion announcement was merely the reiteration of the original vaccine mandate as a qualification for all employees' continued

employment. The promotional vaccine mandate is not a change, and it could not have been motivated by the Union's subsequent grieving of the Policy or obtaining the agreement to suspend discipline for PBP employees, which Union activity post-dated the City's legitimate motive, as previously determined by this Board. See, Allegheny County, supra. Also, the Union's bald assertion, that the City is discriminating between bargaining unit members by placing unvaccinated officers "at odds" with voluntarily vaccinated officers, is unsupported by the record. There is no evidence that unvaccinated and vaccinated officers are "at odds" with each other.

The Union also contends that the City has failed to provide a legitimate operational reason for requiring Sergeants to be vaccinated for promotion more than a rank-and-file patrol officer. (Union Brief at 22). This argument, however, mischaracterizes the record. As stated above, the City is not requiring managers or supervisors to be vaccinated while excusing rank and file officers. As repeated several times herein, the City has never suspended the vaccine mandate for all employees. The City's mandate is not a new, separate requirement for supervisors or managers. Also, the City has the prerogative to want its employees in supervisory or managerial positions in the PBP to lead by example by complying with the orders and directives lawfully implemented by the Mayor, including the vaccine mandate.

The City additionally has a right to ensure that its managers and supervisors are safe from COVID so as to prevent a leadership vacuum in its various departments. In this manner, the City is requiring the vaccine mandate on all promotional announcements throughout the City and not just the Sergeant promotion announcement disseminated in October 2022. Accordingly, there is no proof of adverse employment action, unlawful motive, or a change in Policy application, and the Union did not establish a prima facie case of discrimination. Additionally, the City presented legitimate, credible, and non-discriminatory reasons for its actions, which pre-dated the grievance and the agreement. As previously stated, the substantive qualification, and the reasons therefore, for all employees to be vaccinated for continued employment was not a change. The Sergeant announcement is no different than a memo to the rank-and-file officers reminding them that they still need to get the vaccine and is based on the City's original, legitimate business reasons for the November 2021 vaccine mandate.

The Union argues that the vaccine mandate itself is not in effect and became "a dead letter," because the policy is not enforced through discipline. (Union brief at 16). The Union emphasized that HR Director Kellerman testified that, although the City has placed the vaccine requirement on promotional criteria list for Sergeant, the City in practice is not requiring proof of vaccine for a Sergeant promotion, which shows that the City did in fact place the vaccine mandate itself in abeyance.

However, HR Director Kellerman did not testify that the City is not in practice requiring proof of vaccine of the Sergeant promotion. Director Kellerman testified that, "**to her knowledge,**" applicants will not be asked about vaccine status, but that the Public Safety Director is involved in that process. Director Kellerman was clear in her testimony when she stated: "I am not the one that would be requiring that, so. . . at this point." She further equivocally testified that, "**to her knowledge,**" the City is only requiring vaccines for new hires. In this regard, the record does not unequivocally establish with substantial evidence that the City is currently not requiring the vaccines for Sergeant promotions in practice because Director Kellerman did not know.

Moreover, HR Director Kellerman's equivocal testimony concerns post-charge and post-exceptions conduct which is not relevant to the disposition of the charge. The Union's charge specifically complains of the October 11, 2022 Sergeant promotional announcement and the state of the mandate at that time. Notably, the Union did not amend its charge after exceptions. The Union's characterization of Director Kellerman's testimony is also in conflict with the overwhelming record evidence that the City has not held the vaccine mandate, for all City employees, in abeyance.

#### **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 of Pittsburgh is a public employer and political subdivision pursuant to the Acts.
2. The Union is a labor organization pursuant to the Acts.
3. The Board has jurisdiction over the parties hereto.
4. The City has not committed unfair labor practices within the meaning of Section 6(1)(a), (c) or (e) of the Acts.

#### **ORDER**

In view of the foregoing and in order to effectuate the policies of the Acts, the hearing examiner

#### **HEREBY ORDERS AND DIRECTS**

That the charge is dismissed, the complaint is rescinded and that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty (20) days of the date hereof, this order shall be and become final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this nineteenth day of July 2023.

PENNSYLVANIA LABOR RELATIONS BOARD

JACK E. MARINO/S

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JACK E. MARINO  
Hearing Examiner