COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE LODGE 5	:	
	:	
	:	
v.	:	Case No. PF-C-15-42-E
	:	PF-C-15-53-E
CITY OF PHILADELPHIA	:	

FINAL ORDER

The Fraternal Order of Police, Lodge 5 (FOP) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) on September 5, 2018, from a Proposed Decision and Order issued on August 16, 2018, in which the Hearing Examiner found that the City of Philadelphia (City) did not violate Section 6(1)(a), (c) or (e) of the Pennsylvania Labor Relations Act (PLRA), as read in *pari materia* with Act 111 of 1968. The City filed a response to the exceptions on September 24, 2018. The Secretary of the Board granted the FOP several continuances for filing of a supporting brief, which the FOP timely filed on January 11, 2019. The Secretary granted an extension of time for the City to respond, and a brief in response to the exceptions was filed by the City on February 28, 2019.

On June 2, 2015, the FOP filed a Charge of Unfair Labor Practices, as amended on July 2, 2015, to Case No. PF-C-15-42-E, alleging that the City violated Section 6(1)(a) and (e) of the PLRA by unilaterally implementing a policy concerning the use of force by police officers, under which the City would publicly release the names of police officers involved in officer related shootings. On July 8, 2015, the FOP filed a Charge of Unfair Labor Practices, docketed at Case No. PF-C-15-53-E, alleging that the City violated Section 6(1)(a), (c), and (e) of the PLRA by refusing to provide protection for a police officer after releasing his name to the public following an officer involved shooting. The Secretary issued Complaints and Notices of Hearings in both charges, and after several continuances of the hearing dates, the charges docketed at Case Nos. PF-C-15-42-E and PF-C-15-53-E were consolidated.

Hearings were held on September 26, 2016 and December 11, 2017, at which time the parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Based on the evidence presented by the parties, the Hearing Examiner made necessary Findings of Fact, which are adopted herein and for purposes of the exceptions, are summarized as follows.

The FOP and the City were parties to a collective bargaining agreement (CBA), which was effective from July 1, 2008 through June 30, 2009. (FF 5). During negotiations for a successor agreement, the FOP made a proposal to break the residency requirement that required the City's police officers to live in the City as a condition of employment. (FF 4 and 6). The bargaining proceeded to interest arbitration under Act 111, and on December 18, 2009, the interest

arbitration panel issued an Opinion and Award that eliminated the residency requirement, in part. (FF 7).[1]

Additionally, the parties' current CBA, which is effective from July 1, 2014 through June 30, 2017, contains the following provision:

> [t]he FOP shall be notified of all substantive changes or new rules and regulations applicable to the Police Department affecting members of the FOP bargaining unit at least ten (10) days before the effective date of such change, unless the change is occasioned by an emergency.

(FF 10).

Since at least 1989, the City Police Department's use of force rules and regulations for its police officers had been codified in Directives 10 (use of lethal force) and 22 (use of non-lethal force). (FF 9). On May 29, 2015, the Police Department's Research and Planning Unit forwarded to the FOP, via electronic mail, Use of Force directives that were revised and approved by the Police Commissioner. (FF 11).

On June 2, 2015, the FOP filed the charge docketed at Case No. PF-C-15-42-E, alleging that the City had unilaterally implemented a policy concerning the use of force by police officers. (FF 12). The Police Department subsequently decided to submit these four directives for further review, and the versions forwarded to the FOP were not published or codified. (FF 13).

On July 2, 2015, Lieutenant Kevin Long, on behalf of the Police Commissioner, emailed to the FOP a protocol for releasing the names of officers involved in shootings. (FF 15). Prior thereto, the City did not have a formal written policy regarding the release of names of officers involved in shootings. Instead, a longstanding practice was that the City would not release the names of officers unless they themselves had been shot or they were being cited for heroic actions. (FF 14). On July 3, 2015, the City released the names of two police officers who were involved in an earlier 2015 shooting, Michael Minor and Robert Hoppe. (FF 16).

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[1] Specifically, Section 6 of the Award provides, in relevant part, as follows:

> Effective July 1, 2010, employees who are eligible for or currently enrolled in the DROP will not be required to live in the City of Philadelphia.
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> Effective January 1, 2012, employees who have five (5) or more years of service as a police officer in the City of Philadelphia will not be required to live in the City of Philadelphia.
>
> All employees will be required to reside in the Commonwealth of Pennsylvania.

(FF 8).

Upon releasing the police officers' names, the City provided a 24/7 police security detail at Officer Hoppe's home address, which was within the City. (FF 17). Officer Minor lived outside the City limits, and the City contacted the Lansdowne Chief of Police to request a 24/7 security detail. The Lansdowne Police Department did not have sufficient personnel for a 24/7 detail, but assigned extra patrols every hour to Officer Minor's block. (FF 18). On July 8, 2015, the FOP filed the charge docketed at Case No. PF-C-15-53-E, alleging, *inter alia,* that the City discriminated against Officer Minor, who resided outside of the City limits, because of the 2009 interest arbitration award eliminating the City's residency requirement. (FF 19).

On August 27, 2015, the Police Department's Research and Planning Unit again forwarded to the FOP, via electronic mail, revised and renumbered Use of Force directives as approved by the Police Commissioner. (FF 20). On September 18, 2015, Directives 10.1 through 10.4 became effective. (FF 21).

Based on the testimony and evidence presented, the Hearing Examiner found that the FOP's Amended Charge of Unfair Labor Practices, in Case No. PF-C-15-42-E, was premature, because the FOP's charge challenging implementation of the use of force directives and the protocol for releasing the police officers' names, was filed before the directives at issue became effective. Therefore, the Hearing Examiner concluded that the Amended Charge of Unfair Labor Practices in Case No. PF-C-15-42-E, must be dismissed as a matter of law.

Even if the charge were found to be timely in Case No. PF-C-15-42-E, the Hearing Examiner concluded that the City's use of force directives, and the protocol for releasing the names of officers involved in shootings, involved matters of inherent managerial prerogative under the test announced in City of Philadelphia v. International Association of Firefighters, Local 22, 999 A.2d 555 (Pa. 2010), and Borough of Ellwood City v. PLRB, 998 A.2d 589 (Pa. 2010). Therefore, the Hearing Examiner determined that the use of force directives and the policy to release names of officers were not subject to bargaining, and the FOP's charge at Case No. PF-C-15-42-E, alleging a violation of Section 6(1)(a) and (e) of the PLRA, would nevertheless need to be dismissed for that reason.

With regard to the charge filed at Case No. PF-C-15-53-E, alleging discrimination under Section 6(1)(a) and (c) of the PLRA, the Hearing Examiner credited the testimony of the City's Police Commissioner, Richard Ross, that he could not provide 24/7 protection for officers who live outside the City due to a lack of resources and legal restrictions. Accordingly, the Hearing Examiner determined that the lack of a 24/7 security detail for Officer Minor, who lived outside the City limits, was not due to any unlawful discriminatory or union animus. Therefore, the Hearing Examiner concluded that the FOP failed to sustain its burden of proof on its charge of discrimination under Section 6(1)(a) and (c),[2] and thus dismissed the charge and rescinded the complaint issued at Case No. PF-C-15-53-E.

[2] The Hearing Examiner also dismissed the FOP's claim in Case No. PF-C-15-53-E, that the City repudiated the CBA in violation of Section 6(1)(e) of the PLRA.

On exceptions the FOP argues that the Hearing Examiner erred in concluding that the Amended Charge of Unfair Labor Practices filed at Case No. PF-C-15-42-E, was prematurely filed before implementation of the City's use of force directives and protocol for releasing the names of officers involved in shootings. It is the nature of the unfair practice claim that is alleged which frames the limitations period for that cause of action. Upper Gwynedd Township Police Dept. v. Upper Gwynedd Township, 32 PPER ¶32101 (Final Order, 2001). Thus, for a refusal to bargain a change in terms and conditions of employment, notice to the union of the implementation of the challenged policy or directive triggers the statute of limitations. Harmar Township Police Wage and Policy Committee v. Harmar Township, 33 PPER ¶33025 (Final Order, 2001). Implementation is the date when the directive becomes operational and serves to guide the conduct of employes, and has an impact on employes, even though no employes may have been disciplined or corrected for failure to abide by the directive. Id. Mere statement of future intent to engage in activity, which arguably would constitute an unfair labor practice, does not constitute an unfair labor practice for engaging in that activity. APSCUF v. PLRB, 40 PPER 113 (Pa. Cmwlth., *unreported*, October 22, 2009); Upper Gwynedd Township, at 264. Therefore, the Board has routinely and consistently dismissed charges of unfair labor practices as prematurely filed where the complainant files the charge prior to actual implementation. APSCUF, *supra.*; City of Allentown, 19 PPER ¶19120 (Final Order, 1988).

Upon review of the record, the charge, as amended, in Case No. PF-C-15-42-E, was clearly filed prior to actual implementation of the City's use of force directives, and thus is premature. The record establishes that on May 29, 2015, the City forwarded to the FOP, via electronic mail, Use of Force directives that were revised and approved by the Police Commissioner: Directive 10; Directive 22; Directive 160; and Directive 161. Notably, the directives as emailed contained no effective date. Further, the CBA between the parties required that the City provide ten days' notice to the FOP prior to the effective date of any proposed rule changes affecting police officers. Thus, the record supports the reasonable finding that the use of force directives emailed to the FOP on Friday, May 29, 2015, were not made effective on that date. Nevertheless, on June 2, 2015, the FOP filed the charge docketed at Case No. PF-C-15-42-E with the Board. Thereafter, the City further reviewed the use of force directives, and the versions forwarded to the FOP on May 29, 2015 were not published or implemented.

The FOP amended its charge at Case No. PF-C-15-42-E on July 2, 2015, alleging that the City had violated the PLRA by unilaterally implementing the policy of releasing the names of officers involved in shootings. Although the FOP was aware of the City's intent to release the names of two officers involved in a shooting earlier in 2015, and on July 2, 2015 the City had emailed to the FOP a protocol for releasing the names of officers involved in shootings, it was not until July 3, 2015, that the City released the names of the two police officers. Accordingly, the City's protocol for releasing the names of officers involved in shootings was not implemented until July 3, 2015, when the City released the names of Officers Minor and Hoppe.

On August 27, 2015, the City forwarded to the FOP, via electronic mail, revised Use of Force directives that were approved by the Police Commissioner: Directive 10.1; Directive 10.2; Directive 10.3; and

Directive 10.4. On September 18, 2015, Directives 10.1 through 10.4 became effective.

As found by the Hearing Examiner, and supported by the record evidence, the FOP's July 2, 2015, Amended Charge of Unfair Labor Practices, alleging violations of Section 6(1)(a) and (e) of the PLRA, was prematurely filed prior to actual implementation of the use of force directives and protocol for release of the names of officers involved in shootings. The FOP did not file any additional amendments to Case No. PF-C-15-42-E after July 3, 2015, or after the use of force directives became effective on September 18, 2015. As a result, the July 2, 2015 Amended Charge of Unfair Labor Practices in Case No. PF-C-15-42-E, was premature, and therefore, the Hearing Examiner did not err in concluding that the charge, as amended, must be dismissed as a matter of law.

Even had the Amended Charge of Unfair Labor Practices at Case No. PF-C-15-42-E been timely, the Hearing Examiner found that the City's use of force directives involve matters of inherent managerial prerogative, and thus were not subject to bargaining under Section 6(1)(e) of the PLRA. Under the balancing test announced by the Pennsylvania Supreme Court to determine whether a particular subject is negotiable, it must first be found that the subject matter in dispute is rationally related to the terms and conditions of employment, or germane to the work environment; if so, the subject matter will nevertheless be found to be a managerial prerogative if collective bargaining over the topic would unduly infringe upon the public employer's essential managerial responsibilities. Borough of Ellwood City, *supra.*; City of Philadelphia, *supra.* In City of Philadelphia, the Pennsylvania Supreme Court opined that "matters of managerial decision making that are fundamental to public policy or to the public enterprise's direction and functioning do not fall within the scope of bargainable matters under Section 1 [of Act 111.] Such managerial prerogatives include the standards of service, overall budget, use of technology, organizational structure, and the selection and direction of personnel." City of Philadelphia, 999 A.2d at 569-570.

Relying on Middletown Borough Police Officers Association v. Middletown Borough, 46 PPER 78 (Proposed Decision and Order, 2015), *aff'd in part, rev'd in part on other grounds,* 47 PPER 30 (Final Order, 2015), and Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia, 45 PPER 105 (Proposed Decision and Order, 2014), the Hearing Examiner noted that employer rules pertaining to the use of force and weapons are valid exercises of managerial prerogative and not subject to bargaining. Therefore, the Hearing Examiner concluded that Directives 10.1 through 10.3 "represent nothing more than the simple direction of personnel and are each a proper exercise of the City's managerial prerogative." (PDO at 8). In addition, the Hearing Examiner recognized that the Board has previously held that establishing a police advisory commission to investigate complaints of police misconduct is a managerial prerogative. FOP Lodge 5 v. City of Philadelphia, 29 PPER ¶ 29000 (Final Order, 1997). Consistent with that precedent, the Hearing Examiner found here that Directive 10.4 and "the City's establishment of the Use of Force Review Board, as well as its various rules and procedures, to evaluate instances of police use of force is a valid exercise of managerial prerogative." (PDO at 9).

As regards to the City's protocol for releasing the names of police officers involved in shootings, the Hearing Examiner found that "the City has presented a compelling argument in favor of transparency of government when its police employes take a life in the line of duty, which ensures integrity in public employment, increases public confidence in government, and significantly outweighs the safety interests advanced by the FOP." PDO at 10. Relying on City of Philadelphia, 29 PPER ¶ 29000 (Final Order, 1997), *affirmed sub nom.* Fraternal Order of Police, Lodge No. 5 v. PLRB, 727 A.2d 1187 (Pa.Cmwlth. 1999), the Hearing Examiner determined that the City had an essential managerial interest of ensuring public integrity and trust. The Hearing Examiner concluded that the City's protocol for releasing the name of police officers involved in shootings was a proper exercise of the City's managerial prerogative as a method to ensure integrity in public employment and to increase public confidence in government.

However, in IAFF, Local 1803 v. City of Reading, 31 PPER ¶31151 (Final Order, 2000), while recognizing that the city's implementation of a code of ethics was a managerial prerogative, the Board expressly recognized that "[c]onfidentiality is certainly rationally related to the conditions of employment for employee[s] who are the subjects of investigations. A public employer has a significant interest in maintaining the privacy of its employee[s] and protecting its employes from prejudice in the employment environment and from the public at large." Id., 31 PPER at 358. The Board upheld the employer's code of ethic's confidentiality rule in that case as a managerial prerogative because the employer's policy made the board of ethics filings and proceedings confidential.

Here, to the contrary, the City's protocol for releasing the names of police officers involved in shootings does not make the officer's name or records confidential, but requires that the information be publicly disclosed to the press and media within 72 hours. Because the Board has recognized that the confidentiality of the name of a police officer who is under public scrutiny for their actions is germane to the officers' working conditions, the question under Borough of Ellwood City, *supra.* and City of Philadelphia, *supra.*, is whether submitting the issue of peremptorily releasing an officer's name to the press within 72 hours of an officer involved shooting would unduly infringe upon the City's essential managerial responsibilities regarding the integrity of government and public trust.

As did the Hearing Examiner, we recognize the City's interest in furthering public trust and being proactive ahead of the press and social media by releasing the name of the officer involved in a shooting as soon as possible. However, the officer's interests in confidentiality, and the safety of the police officers, both those involved in the shooting and those providing protection and security details, is at least equally as important and weighty. Upon review of the record, we find that the City's managerial interest involved in releasing the names of police officers within 72 hours of an officer involved shooting would not be unduly burdened by the City having to bargain with the FOP over the policy and protocols for peremptorily releasing the names of officers involved in shootings. Accordingly, had the Charge of Unfair Labor Practices not been prematurely filed before implementation, we would find that the City's protocol for release of police officer's names when they were involved in a shooting would be a

mandatory subject of bargaining under the test announced in Borough of Ellwood City, *supra.* and City of Philadelphia, *supra.*[3]

The FOP next argues that the Hearing Examiner erred in finding that the FOP's Amended Charge of Unfair Labor Practices at Case No. PF-C-15-42-E, did not allege a cause of action for a violation of impact bargaining. To establish a claim of impact bargaining the complainant must allege that 1) the employer lawfully exercised its managerial prerogative; 2) there is a demonstrable impact on wages, hours, or working conditions that is severable from the managerial decision; 3) after implementation of the managerial prerogative, the union has demanded to negotiate those severable negotiable matters; and 4) the public employer has refused the union's demand to bargain. Lackawanna County Detectives' Association v. PLRB, 762 A.2d 792 (Pa. Cmwlth. 2000). Upon review of the Amended Charge of Unfair Labor Practices at Case No. PF-C-15-42-E, the FOP has not alleged sufficient facts supporting a cause of action for impact bargaining with regard to the City's use of force policies and protocol for the release of the names of police officers involved in shootings. Indeed, the FOP's Amended Charge of Unfair Labor Practices was filed with the Board prior to the City's implementation of the directives and protocol at issue. Accordingly, the FOP's exceptions to the Hearing Examiner's determination that the FOP failed to allege a refusal to engage in impact bargaining following the City's implementation of Directives 10.1 through 10.4, and protocol for the release of police officer names, must be dismissed.

The FOP has also filed an exception to the Hearing Examiner's determination in Case No. PF-C-15-53-E, that the City did not violate Section 6(1)(a) and (c) of the PLRA by refusing to provide protection for a police officer after releasing his name to the public after a shooting. Generally, to establish a violation of Section 6(1)(c) under the PLRA, the charging party must prove that the employe engaged in protected activity, the employer knew of that protected activity, and there was an adverse employment action motivated by anti-union animus. *E.g.* Pennsylvania State Troopers Association v. Commonwealth of Pennsylvania, PA State Police, 33 PPER ¶ 33011 (Final Order, 2001). There is no dispute that the FOP engaged in protected activity by advocating and prevailing in a 2009 interest arbitration award to allow police officers to move outside the City. Additionally, as found by the Hearing Examiner, individual police officers engaged in protected activity by exercising a right to live outside the City consistent with the award, and the City was aware of these protected activities. The issue in Case No. PF-C-15-53-E is therefore, whether the City was

[3] In this case, we do not address whether the City would have an obligation to release the name of a police officer involved in a shooting to a member of the public or media who make a request under the Pennsylvania Right-to-Know Law, Act of February 14, 2008, P.L. 6, 65 P.S. §§67.101-67.3104. *See* Michael G. Lutz, Lodge No. 5 v. City of Philadelphia, 6 A.3d 669 (Pa. Cmwlth. 2010). Instead, the question in this Charge of Unfair Labor Practices, is whether the City's interest in a protocol for being able to preemptively release the name of an officer within 72 hours of a shooting, would be unduly burdened by collective bargaining regarding concerns and working conditions of the FOP and police officers.

motivated by anti-union animus when it failed to provide an officer with a 24/7 security detail at his residence outside of the City. *See,* PLRB v. Ficon, 254 A.2d 3 (Pa. 1969) (an unlawful discriminatory motive for an adverse employment action creates the offense under Section 6(1)(c) of the PLRA).

In finding that the City did not act out of an unlawful discriminatory motive or based on anti-union animus, the Hearing Examiner expressly stated as follows:

> I have credited the specific testimony of the City's witnesses on this issue and accepted the City's explanation for why it did not provide a 24/7 security detail for an officer living outside the City as persuasive. The City's Police Commissioner, Richard Ross, testified credibly that he cannot provide 24/7 protection for officers who live outside the City due to a lack of resources and legal restrictions. (N.T. 193-194). Indeed, Captain Francis Healy convincingly explained how the statewide municipal police jurisdiction statute, found at 42 Pa.C.S.A. §8953, distinguishes between police powers in an officer's primary jurisdiction, i.e. where he or she works, and a secondary jurisdiction, which is any other jurisdiction in the state. (N.T. 235; City Exhibit 15). Healy credibly described how police powers are much more limited in a secondary jurisdiction than in their primary jurisdiction. (N.T. 236-237). Healy testified that the statute is designed to address officers traveling through secondary jurisdictions on official business and what they can do if they witness a crime in that secondary jurisdiction. (N.T. 237). Healy further explained that the statute does not give officers the authority to exercise general police powers in secondary jurisdictions at the discretion of their primary jurisdiction. (N.T. 237). Indeed, he persuasively noted that the City cannot station a police officer in another jurisdiction and expect that officer to take police action. (N.T. 237). As a result, I am unable to conclude that the City was unlawfully motivated when it did not provide a 24/7 security detail to an officer who exercised his contractual right to live outside the City. The City requested that the outside jurisdiction provide a 24/7 security detail to protect its officer and still negotiated for extra patrols on that block when the Lansdowne Police Chief declined, which was essentially the best the City could do.

PDO at 12.

Such matters of the credibility of witnesses and the weight to afford evidence are matters reserved to the Hearing Examiner. *E.g.* Amalgamated Transit Union Local 1279 v. PLRB, 50 PPER 79, 1134 C.D. 2018 (Pa. Cmwlth., *unreported,* April 30, 2019). There are no compelling circumstances of record that warrant disturbing the Hearing Examiner's credibility determinations and findings of fact. Having found as fact that the City had non-discriminatory business reasons why it was unable to provide 24/7 security detail for a police officer who lived outside the City limits, the FOP failed to establish an unlawful discriminatory

motive under Section 6(1)(c) of the PLRA. Accordingly, the Hearing Examiner did not err in dismissing the FOP's charge under Section 6(1)(c) of the PLRA, and the FOP's exceptions in Case No. PF-C-15-53-E must be dismissed.

After a thorough review of the exceptions and all matters of record, the Hearing Examiner did not err in concluding that the FOP's Amended Charge of Unfair Labor Practice in Case No. PF-C-15-42-E was prematurely filed, and therefore the City did not violate Section 6(1)(a) and (e) of the PLRA. Additionally, the Hearing Examiner did not err in Case No. PF-C-15-53-E in concluding that the City did not violate Section 6(1)(a) and (c) of the PLRA when it did not provide a 24/7 security detail to a police officer who resided outside of the City.[4] Accordingly, the exceptions filed by the FOP at Case Nos. PF-C-15-42-E and PF-C-15-53-E shall be dismissed, and the August 16, 2018 PDO made absolute and final.

ORDER

In view of the foregoing and in order to effectuate the policies of the Pennsylvania Labor Relations Act and Act 111, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed by the Fraternal Order of Police, Lodge 5 are hereby dismissed in part, and sustained in part, and the August 16, 2018 Proposed Decision and Order, be and hereby is made absolute and final, as modified herein.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, James M. Darby, Chairman and Albert Mezzaroba, Member this sixteenth day of July, 2019. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within Order.

MEMBER ROBERT H. SHOOP, JR., DID NOT PARTICIPATE IN THE CONSIDERATION OR DECISION OF THIS CASE.

[4] The FOP withdrew its exception to the Hearing Examiner's dismissal of its alleged violation of Section 6(1)(e) of the PLRA filed at Case No. PF-C-15-53-E.