

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

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

**FINAL ORDER**

On September 5, 2023, the City of Pittsburgh (City) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) challenging a Proposed Decision and Order (PDO) issued on August 15, 2023.<sup>1</sup> In the PDO, the Board's Hearing Examiner concluded 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 of 1968, by repudiating numerous provisions of General Order 12-10 (Critical Incident Policy). Pursuant to an extension of time granted by the Secretary of the Board, the City filed a brief in support of its exceptions on October 20, 2023. The Fraternal Order of Police Fort Pitt Lodge 1 (FOP) filed a response and brief in opposition to the exceptions on November 20, 2023, after receiving an extension of time granted by the Secretary.

The facts of this case are summarized as follows. On May 8, 2020, a proposed decision and order (May 8, 2020 PDO) was issued in Case Number PF-C-18-26-W in which the Hearing Examiner held that the City repudiated the bargained-for Critical Incident Policy by entering into a memorandum of understanding (MOU) with Allegheny County that was contrary to the policy. (FF 3, 4).<sup>2</sup> Although the City filed exceptions to the May 8, 2020 PDO, the

---

<sup>1</sup> The City's exceptions are timely because the twentieth day following issuance of the PDO, Monday, September 4, 2023, was a legal holiday (Labor Day), and is therefore excluded from computation of the twenty-day period for filing exceptions. 34 Pa. Code § 95.100(b).

<sup>2</sup> While litigation was pending before the Board at Case No. PF-C-18-26-W, the parties were engaged in interest arbitration for a successor agreement. On January 9, 2020, an interest arbitration award was issued which added a new Section 25 concerning critical incidents to the parties collective bargaining agreement. Section 25 stated, in relevant part, as follows:

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

parties engaged in negotiations to draft a new and updated version of the Critical Incident Policy to incorporate, among other things, the MOU with Allegheny County into the policy. (FF 6, 7). On June 8, 2021, the City and the FOP came to a final agreement on the revised Critical Incident Policy, which resolved the issues leading to the litigation before the Board at Case No. PF-C-18-26-W. The revised Critical Incident Policy was reissued by the Pittsburgh Bureau of Police on June 10, 2021.<sup>3</sup> (FF 8).

The June 10, 2021, revised Critical Incident Policy states, in relevant part, as follows:

2.5 Involved Officer - PBP member who deployed deadly or physical force resulting in critical bodily injury or death to any person, or a member who was engaged in a primary or secondary pursuit where the pursuit was the cause of the critical injury or death, or a member who intentionally discharges a firearm at a subject.

\* \* \* \*

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

\* \* \* \*

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

\* \* \* \*

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

\* \* \* \*

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

\* \* \* \*

5.5.7 All involved and witness officers will be transported to the Investigators' facilities for a preliminary interview and evidence collection. FOP Counsel may be present for the

---

<sup>3</sup> On June 8, 2022, the City's exceptions at Case No. PF-C-18-26-W were administratively dismissed based upon the parties' settlement of the underlying issues in the case. (FF 4).

preliminary interview and any subsequent criminal interview. However, in order to maintain the integrity of each involved officer's statement, involved officers shall not consult or meet with a FOP Representative or FOP Counsel collectively or in groups prior to being interviewed.

\* \* \* \*

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

\* \* \* \*

5.5.10 All other PBP officers and supervisors who witnessed the critical incident will be required to be interviewed by the Investigators, including a statement at the scene and at their facility. ... Witness officers may have counsel present during their interview; however, witness officers may not be represented by the same legal counsel as involved officers.

\* \* \* \*

5.5.12 The [Allegheny County Police Department] will make arrangements to receive members of the PMAP in order to provide timely support to members.

\* \* \* \*

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

Late on the night of May 27, 2022, Sergeants Loscar and Gray and Officers Livesay, Noonan and Suaro encountered a man firing gun shots near North Homewood. The suspect fired directly at Sergeants Loscar and Gray who were in their police car. The suspect also fired at Officers Noonan and Livesay. Officer Livesay returned fire. The suspect was eventually taken into custody. (FF 10).

After the suspect had been taken into custody, Sergeants Loscar and Gray and Officers Livesay, Noonan and Suaro were instructed by Lieutenant Abraham to sit in their vehicles and wait for further instructions. (FF 11). Officer Livesay joined Sergeants Loscar and Gray in their police vehicle. (FF 12). While sitting at the scene, Officer Livesay reached out to another Sergeant in a different zone and asked whether he should contact the FOP about the critical incident. The Sergeant thereafter contacted the FOP for Officer Livesay. FOP President Bob Swartzwelder talked to Officer Livesay on the phone and in-person at the scene. (FF 13). At some point, Officer Livesay was taken for drug testing and was returned to the scene. Officer Livesay was able to speak with PMAP at the drug testing location. (FF 14).

Sergeant Loscar and Officer Noonan were not given an opportunity to talk to an FOP Representative while at the scene. (FF 13). Sergeant Loscar was not contacted by PMAP until the afternoon of May 28, 2022, when PMAP

called him and left a message. Officer Noonan was not given an opportunity to speak to PMAP the night of the incident or the next day in the early morning. (FF 15).

After several hours, Lieutenant Abraham told Sergeant Loscar that the five officers were to proceed to Allegheny County Police Headquarters. Lieutenant Abraham told Sergeant Loscar to turn on his in-car camera and body camera and go with Sergeant Gray and Officer Livesay in one car without talking about the incident. Lieutenant Abraham told Sergeant Loscar that Officers Noonan and Suaro would also turn on their cameras and drive in their vehicle. (FF 16).

The five officers traveled to Allegheny County Police Headquarters and were placed in a conference room together. Sergeant Loscar and Officer Noonan were interviewed by County Police. However, they were not provided an opportunity to speak with an FOP representative or FOP Counsel. (FF 17). FOP President Swartzwelder arrived at County Police Headquarters around 6:00 a.m. on May 28, 2022, and met Officers Suaro and Noonan as they were leaving with Lieutenant Wilson. FOP President Swartzwelder confirmed with Lieutenant Wilson that the officers did not have union representation when they were interviewed. (FF 18).

The FOP filed its Charge of Unfair Labor Practices on July 1, 2022, alleging that the City violated Section 6(1)(a) and (e) of the PLRA when it repudiated numerous provisions of the Critical Incident Policy after a critical incident occurred on May 27, 2022. On July 20, 2022, the Secretary of the Board issued a Complaint and Notice of Hearing and assigned this matter to a Hearing Examiner. Hearings were held before the Board's Hearing Examiner on October 21, 2022 and January 20, 2023, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Both parties filed post-hearing briefs.

Based upon the holding in the May 8, 2020 PDO, which found that the Critical Incident Policy was a bargained-for agreement between the City and the FOP, the Hearing Examiner concluded that the City was collaterally estopped from arguing that the Critical Incident Policy was not a binding agreement. The Hearing Examiner further stated that the record in the instant matter also established that the Critical Incident Policy is a binding agreement because, after issuance of the May 8, 2020 PDO, the parties engaged in negotiations to settle the underlying issues in Case No. PF-C-18-26-W culminating in a revised Critical Incident Policy dated June 10, 2021. Therefore, the Hearing Examiner held that the City violated Section 6(1)(a) and (e) of the PLRA by repudiating the provisions in the Critical Incident Policy relating to sequestration of the involved and witness officers (Sections 3.3.8, 5.2), right of involved and witness officers to have FOP representatives and/or FOP counsel present during interviews (Section 5.5.9), and the provision of psychological services through PMAP (Sections 4.3.5, 5.5.12, 6.3).<sup>4</sup>

---

<sup>4</sup> The Hearing Examiner additionally concluded that the City had not violated Section 6(1)(a) or (e) of the PLRA with regard to the timing for notifying the FOP Executive Board that a critical incident had occurred, the amount of time the involved and witness officers were required to remain at the scene of the incident, Garrity and Miranda rights of the officers, and conducting the interviews of the officers in the County's criminal interrogation rooms.

For purposes of the exceptions, the Hearing Examiner's Findings of Fact will be sustained by the Board where there is substantial evidence in the record to support the finding. Pennsylvania State Rangers Association v. Commonwealth of Pennsylvania, Department of Conservation and Natural Resources, 45 PPER 1 (Final Order, 2013). Substantial evidence is such "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." PLRB v. Kaufman Department Stores, 29 A.2d 90 (Pa. 1942). Further, it is the function of the hearing examiner, who is able to view the witnesses' testimony first-hand, to determine the credibility of the witnesses and weigh the probative value of the evidence presented at the hearing. North Wales Borough Police Department v. North Wales Borough, 38 PPER 181 (Final Order, 2007); E.B. Jermyn Lodge No. 2 of the FOP v. City of Scranton, 38 PPER 104 (Final Order, 2007). A hearing examiner may accept or reject the testimony of any witness in whole or in part. Limerick Township Police Officers v. Limerick Township, 36 PPER 125 (Final Order, 2005). The Board will not disturb a hearing examiner's credibility determinations absent the most compelling of circumstances. City of Scranton, supra.

The City initially alleges in its exceptions that the Hearing Examiner erred by denying its motion to exclude evidence concerning the facts underlying the May 27, 2022 critical incident and making various findings of fact (FF 10-18) relating to that incident. Pursuant to the Board's Rules and Regulations, the hearing examiner "shall have full authority to control the conduct and procedure of the hearing and the record thereof, to admit or exclude testimony or other evidence, and to rule upon motions and objections..." 34 Pa. Code § 95.91(f). Additionally, the hearing examiner "shall see that a full inquiry is made into the matters in issue and to obtain a complete record of facts necessary for a fair determination of the issues by the Board." 34 Pa. Code § 95.91(g). The City argues that, because the Critical Incident Policy is not a binding bargained-for agreement, it was irrelevant what occurred on May 27, 2022. However, the unfair labor practice alleged in the Charge was a repudiation of the Critical Incident Policy. Therefore, it was necessary to permit the FOP to present evidence of the alleged critical incident and surrounding facts in order for the Board to have a complete record to make a determination on whether an unfair labor practice occurred in this matter for a repudiation of the Critical Incident Policy. Accordingly, the Hearing Examiner did not err in denying the City's motion to exclude this evidence and making necessary findings concerning this issue.

The City's main argument on exceptions is that the Hearing Examiner erred in concluding that the City violated its duty to bargain under Section 6(1)(a) and (e) of the PLRA because the Critical Incident Policy is not a binding bargained-for agreement. Regardless of whether the Critical Incident Policy concerns managerial or mandatory subjects, the issue before the Board is whether the parties engaged in negotiations over the Policy thereby making it binding on them. Scranton School Board v. Scranton Federation of Teachers, Local 1147, AFT, 365 A.2d 1339 (Pa. Cmwlth. 1976); Coatesville Area School District v. Coatesville Area Teachers' Association, 978 A.2d 413 (Pa. Cmwlth. 2009), *appeal denied*, 989 A.2d 10 (Pa. 2010).

---

No exceptions were filed by the FOP to the Hearing Examiner's decision on these issues. 34 Pa. Code § 95.98(a)(3) ("[a]n exception not specifically raised shall be waived").

Initially, in order to have a full understanding of the matters raised herein, the Board finds it necessary to take administrative notice of the record at Case No. PF-C-18-26-W. In that case, the Hearing Examiner held that the City repudiated the Critical Incident Policy by entering into a memorandum of understanding with Allegheny County that was contrary to the policy. As a remedy, the Hearing Examiner ordered the City to, among other things, rescind the MOU between the City and the County and restore the *status quo ante*. FOP Lodge 1 Fort Pitt v. City of Pittsburgh, 52 PPER 13 (Proposed Decision and Order, 2020). Although the City filed exceptions to the May 8, 2020 PDO, the Board subsequently received a letter from Kelly Mistick, counsel for the City, dated August 10, 2020, requesting the Board hold the exceptions in abeyance while the parties attempted to resolve the underlying issues.

In that respect, Christopher Cimballa, counsel for the FOP, and FOP President Swartzwelder<sup>5</sup> both testified that the City contacted the FOP in order to reach an amicable resolution of the underlying issues at Case No. PF-C-18-26-W, and that the parties thereafter engaged in bargaining to draft an updated version of the Critical Incident Policy. (N.T. 112-113, 123-124, 171-175, 180; Union Exhibit 5 and 6). On June 8, 2021, the FOP and the City came to a final agreement on the revised Critical Incident Policy, which incorporated the MOU between the City and Allegheny County. The Critical Incident Policy was thereafter reissued by the Pittsburgh Bureau of Police on June 10, 2021. (FF 8).

It is clear from the record that after the May 8, 2020 PDO was issued, the parties engaged in negotiations from September 2020 to June 2021 to settle the underlying issues in that case and come to an agreement on a revised Critical Incident Policy. Indeed, the emails between Attorney Cimballa and Attorney Mistick for that period of time establish that the parties were bargaining over proposed changes to the Policy, and not merely engaging in meet and discuss.

Moreover, the Critical Incident Policy was incorporated into the parties' collective bargaining agreement (CBA) through the January 9, 2020 interest arbitration award, which required the Policy to include "the bargainable terms set forth in the current version" subject to resolution of the unfair labor practices pending in Case No. PF-C-18-26-W. (Joint Exhibit 1 at 27). Accordingly, we find that the record supports the Hearing Examiner's conclusion that the Critical Incident Policy was a bargained-for agreement.<sup>6</sup>

---

<sup>5</sup> The City asserts that the testimony of FOP President Swartzwelder is inadmissible parol evidence because it was presented for the sole purpose of interpreting the meaning of "review and discuss" in Section 4(C) of the parties' collective bargaining agreement. This argument is meritless because FOP President Swartzwelder's testimony concerned the negotiations between the parties that occurred after issuance of the May 8, 2020 PDO to resolve the underlying issues in Case No. PF-C-18-26-W, and not an interpretation of the terms in Section 4(C).

<sup>6</sup> Based upon the disposition of this issue, the Board need not address the City's exceptions concerning the effect of the May 8, 2020 PDO on the instant matter and the Hearing Examiner's collateral estoppel determination.

The City also asserts that Section 4(C) of the CBA only requires the City to review and discuss any proposed changes to rules and regulations of the Pittsburgh Bureau of Police, including the Critical Incident Policy. The City argues that the Hearing Examiner ignored the "review and discuss" language in Section 4(C) of the CBA and the fact that the FOP did not sign a Memorandum of Agreement with the City to memorialize the revisions to the June 10, 2021 Critical Incident Policy. However, the Board notes that even though a public employer is not statutorily required to negotiate regarding matters of inherent managerial rights, if it chooses to do so, it is bound by the terms of that agreement. Scranton School Board, supra.; Coatesville Area School District, supra. For purposes of an unfair labor practice, Section 4(C) of the parties' CBA cannot apply to the Critical Incident Policy. First, if the Critical Incident Policy is incorporated in the CBA, it is no longer a separate rule or regulation, but a negotiated provision of the agreement. Secondly, if the Critical Incident Policy is treated as a separate negotiated agreement, it is governed by its own terms which does not include similar "review and discuss" language. Because the parties bargained over the provisions of the Critical Incident Policy, the City is bound by its terms and the statutory obligation to negotiate changes thereto. Id.

Here, the City negotiated with the FOP to come to a resolution of the claims at Case No. PF-C-18-26-W in order to avoid rescission of the MOU between the City and Allegheny County. The City essentially wishes to retain the benefit of this bargain, *i.e.*, inclusion of the MOU with the County into the Critical Incident Policy, without abiding by its part of the agreement. In Pittsburgh Joint Collective Bargaining Committee v. City of Pittsburgh, 391 A.2d 1318 (Pa. 1978), our Supreme Court opined on an employer's ability to enter into agreements and then subsequently refuse to perform stating, in relevant part, as follows:

To permit an employer to enter into agreements and include terms ... which raise the expectations of those concerned, and then to subsequently refuse to abide by those provisions ... would invite discord and distrust and create an atmosphere wherein a harmonious relationship would be virtually impossible to maintain.

391 A.2d at 1322. Accordingly, the City cannot now claim that the revised Critical Incident Policy dated June 10, 2021 is not a binding bargained-for agreement.

Concerning the issue of repudiation of the provisions of the Critical Incident Policy, the Board exists to remedy violations of statute, and not violations of contract. However, the Board will review an agreement to determine whether the employer clearly has repudiated its provisions because such a repudiation may constitute both an unfair labor practice and a grievance. Pennsylvania State Troopers Association v. PLRB, 761 A.2d 645 (Pa. Cmwlth. 2000).

A review of the record supports the Hearing Examiner's findings that the City repudiated the provisions in the Critical Incident Policy relating to sequestration of the involved and witness officers (Sections 3.3.8, 5.2), right of involved and witness officers to have FOP representatives and/or FOP counsel present during interviews (Section 5.5.9), and the provision of psychological services through PMAP (Sections 4.3.5, 5.5.12, 6.3). Indeed, the record evidence shows that following the critical incident on May 27, 2022, officers were not sequestered, were not afforded FOP representation,

and did not promptly meet with PMAP.<sup>7</sup> Further, the City did not present any evidence at the hearing or on exceptions to refute the Hearing Examiner's findings and conclusions on this matter. Nor has the City demonstrated any compelling circumstances warranting reversal of the Hearing Examiner's credibility determinations. Accordingly, the City's exception on this issue is dismissed.

Accordingly, the Hearing Examiner properly concluded that the City violated Section 6(1)(a) and (e) of the PLRA when it repudiated provisions of the Critical Incident Policy on May 27, 2022. After a thorough review of the exceptions and all matters of record, the Board shall dismiss the exceptions and make the Proposed Decision and Order 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 City of Pittsburgh are hereby dismissed, and the August 15, 2023 Proposed Decision and Order be and the same is hereby made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, James M. Darby, Chairman, Albert Mezzaroba, Member, and Gary Masino, Member this sixteenth day of July, 2024. 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.

---

<sup>7</sup> The City claims the Hearing Examiner improperly considered the FOP's allegation that the City repudiated Sections 4.3.5, 5.5.12, 6.3 (provision of psychological services to involved/witness officers through PMAP) of the Critical Incident Policy because it was not specifically raised in the unfair labor practice charge. This argument fails as the City was clearly on notice of the scope of the charge, *i.e.*, a repudiation of provisions of the Critical Incident Policy, and the City had an opportunity at both hearings to address this issue. This is all that is required under the liberal pleading requirement applied to administrative proceedings. See Youngwood Borough Police Department, 17 PPER ¶ 17039 (Order Directing Remand to Hearing Examiner for Further Proceedings, 1986). Moreover, the unfair labor practice under Section 6(1)(a) and (e) of the PLRA for repudiation of Sections 3.3.8, 5.2 (relating to sequestration of the involved and witness officers) and Section 5.5.9 (right of involved and witness officers to have FOP representatives and/or FOP counsel present during interviews) of the Critical Incident Policy stands independently from any alleged repudiation of Sections 4.3.5, 5.5.12, 6.3 (provision of psychological services through PMAP).



COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

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

**AFFIDAVIT OF COMPLIANCE**

The City of Pittsburgh hereby certifies that it has ceased and desisted from its violations of Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act; that it has immediately made whole any bargaining unit employees who have been adversely affected due to the City's unfair labor practices; that it has posted a copy of the Proposed Decision and Order and Final Order as directed; and that it has served a copy of this affidavit on the FOP 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