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	:	

PROPOSED DECISION AND ORDER

On June 2, 2015, the Fraternal Order of Police Lodge 5 (FOP or Union) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) against the City of Philadelphia (City or Employer), alleging that the City violated Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA) as read with Act 111 by unilaterally implementing changes to its use of force policies without bargaining with the FOP. The charge was docketed at PF-C-15-42-E.

On June 11, 2015, the Secretary of the Board issued a Complaint and Notice of Hearing, assigning the charge to conciliation for the purpose of resolving the matters in dispute through mutual agreement of the parties, and designating January 8, 2016, in Harrisburg, as the time and place of hearing, if necessary. On July 2, 2015, the FOP filed an amended charge of unfair labor practices to PF-C-15-42-E with the Board against the City, alleging that the City also violated Section 6(1)(a) and (e) of the PLRA by unilaterally implementing a policy whereby the City would release the names of police officers, who discharged their firearms, in officer involved shootings, to the public in contravention of decades of past practice whereby the officers' names were protected. On July 31, 2015, the Secretary of the Board issued an Amended Complaint and Notice of Hearing, once again directing a hearing on January 8, 2016.

On July 8, 2015, the FOP filed a charge of unfair labor practices with the Board against the City, 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 in retaliation for the FOP obtaining a favorable interest arbitration award, which eliminated the City residency requirement for police officers, and for the officer exercising the contractual right to live outside of the City. The FOP further alleged that the City violated the PLRA by unilaterally changing the terms and conditions of employment for police officers by failing to fully comply with the interest arbitration award in violation of its bargaining obligation. The charge was docketed at PF-C-15-53-E.

On July 30, 2015, the Secretary of the Board issued a Complaint and Notice of Hearing, assigning the charge to conciliation, and designating August 31, 2015, in Harrisburg, as the time and place of hearing, if necessary. After several continuances, the charges docketed at PF-C-15-42-E and PF-C-15-53-E were eventually consolidated for hearing purposes at the request of the FOP and without objection from the City.

Hearings were necessary and were held on September 26, 2016 and December 11, 2017[1], at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The City filed a post-hearing brief on April 3, 2018. The FOP filed a post-hearing brief on April 5, 2018. On April 25, 2018, I granted the City's request to file a response to the FOP's brief and set forth an additional briefing schedule, in which the City's response was due on May 16, 2018 and the FOP's reply was due 21 days following receipt of the same. The City filed a responsive brief on May 15, 2016. The FOP did not file a reply to the City's responsive brief.

The Examiner, on the basis of the testimony presented at the hearing and from all other matters and documents of record, makes the following:

FINDINGS OF FACT

1. The City of Philadelphia is a public employer and political subdivision under Act 111 as read *in pari materia* with the PLRA. (N.T. 8)

2. The FOP is a labor organization under Act 111 as read *in pari materia* with the PLRA. (N.T. 8)

3. The FOP is the exclusive bargaining representative for police employes at the City. (Union Exhibit 1)

4. Prior to 2009, the City's police officers were required to live in the City as a condition of employment. (N.T. 41)

5. The FOP and the City were parties to a collective bargaining agreement (CBA), which was effective from July 1, 2008 through June 30, 2009. (Union Exhibit 15)

6. During negotiations for a successor agreement, the FOP made a proposal to break the residency requirement, so that police officers would no longer be required to live within the confines of the City. The City contested the proposal. (N.T. 42-45)

7. On December 18, 2009, an Act 111 interest arbitration panel issued an Opinion and Award, which was effective from July 1, 2009 through June 30, 2014, and which eliminated the residency requirement, in part. (N.T. 44-45; Union Exhibit 15)

8. 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.

[1] The second day of hearing was originally scheduled for March 15, 2017, but was continued due to inclement weather. The hearing was continued indefinitely at the request of both parties to accommodate their schedules with regard to an approaching interest arbitration proceeding.

> All employees will be required to reside in the Commonwealth of Pennsylvania.

(Union Exhibit 15)

9. Prior to 2015, and at least as long ago as 1989, the City's Police Department codified its use of force rules and regulations in Directives 10 (use of lethal force) and 22 (use of non-lethal force). (City Exhibits 1(a), 1(b), 2(a), 2(b); Union Exhibits 2, 3)

10. 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.

(Joint Exhibit 1; Union Exhibit 1)

11. On May 29, 2015, the Police Department's Research and Planning Unit forwarded to the FOP, via electronic mail, the following Use of Force directives that were revised and approved by the Police Commissioner: Directive 10 (current 10.1); Directive 22 (current 10.2); Directive 160 (current 10.3); and Directive 161 (current 10.4).[2] (Joint Exhibit 1)

12. On June 2, 2015, the FOP filed the charge docketed at PF-C-15-42-E with the Board. (Joint Exhibit 1)

13. The Police Department subsequently decided to submit these four directives for further review, and the versions forwarded to the FOP were not published. (Joint Exhibit 1)

14. Prior to July 2015, the City did not have a formal written policy regarding the release of names of officers involved in shootings. The 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. (N.T. 25-27, 72-79; City Exhibit 4(a), 4(b), 4(c), 4(d))

15. On July 2, 2015, Lieutenant Kevin Long, on behalf of the Police Commissioner, emailed to the FOP a response protocol for releasing the names of officers involved in shootings. (N.T. 67-68; Joint Exhibit 1)

16. 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. (N.T. 27-29, 270; Union Exhibit 11, City Exhibit 16)

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[2] Specifically, Directive 10 governed the discharge of firearms, while Directive 22 controlled the use of "moderate/limited force." Directive 160 governed the use of electronic control weapons or TASERs, while Directive 161 involved the Use of Force Review Board to review the appropriateness and reasonableness of force. (Union Exhibit 7, 8, 9, 10).

17. The City provided a 24/7 police security detail at Hoppe's home address, which was within the City, prior to his name being released. (N.T. 269)

18. Minor initially declined protection, but the City required him to accept based on a complaint Hoppe made to the FOP. The City contacted the Lansdowne Chief of Police, which was where Minor resided, and requested a 24/7 security detail. The Lansdowne Police Department did not have sufficient personnel for a 24/7 detail. Instead, the Lansdowne Police assigned extra patrols every hour to Minor's block. (N.T. 269-270; City Exhibit 16)

19. On July 8, 2015, the FOP filed the charge docketed at PF-C-15-53-E with the Board. (Joint Exhibit 1)

20. On August 27, 2015, the Police Department's Research and Planning Unit forwarded to the FOP, via electronic mail, the following Use of Force directives that were revised and approved by the Police Commissioner: Directive 10 (current 10.1); Directive 22 (current 10.2); Directive 160 (current 10.3); and Directive 161 (current 10.4). (Joint Exhibit 1)

21. On September 18, 2015, Directives 10.1 through 10.4 became effective. (Joint Exhibit 1)[3]

DISCUSSION

The FOP has charged the City in PF-C-15-42-E with violating Section 6(1)(a) and (e) of the PLRA[4] and Act 111 by unilaterally implementing changes to its use of force policies without bargaining with the FOP. The FOP subsequently amended the charge in PF-C-15-42-E to include an allegation that the City violated the same provisions of the PLRA by unilaterally implementing a policy of releasing the names of police officers who discharged their firearms in shootings in contravention of a longstanding practice of withholding the names. The City contends that the charge should be dismissed because the policies are a matter of inherent managerial prerogative.

Section 1 of Act 111 provides, in pertinent part, as follows:

> Policemen or fireman employed by a political subdivision of the Commonwealth or by the Commonwealth shall, through labor organizations or other representatives designated by fifty percent or more of such policemen or firemen, have the right to bargain collectively with their public employers concerning the terms and conditions of their employment, including compensation, hours, working conditions, retirement, pensions, and other benefits, and shall have the right to an adjustment or settlement

[3] The record shows that the City renumbered the directives following a recommendation from the Justice Department, which conducted an assessment of the City's use of force policies in 2015. (N.T. 133-134; City Exhibit 5).

[4] Section 6(1) of the PLRA provides that "[i]t shall be an unfair labor practice for an employer: (a) To interfere with, restrain or coerce employes in the exercise of the rights guaranteed in this act...(e) To refuse to bargain collectively with the representatives of his employes, subject to the provisions of section seven (a) of this act. 43 P.S. § 211.6.

> of their grievances or disputes in accordance with the terms of this act.

43 P.S. § 217.1.

The Pennsylvania Supreme Court has applied a balancing test when deciding whether a managerial decision is a mandatory subject of bargaining for municipalities in collective bargaining relationships with their police and fire employes under Act 111. Middletown Borough Police Officers Ass'n v. Middletown Borough, 46 PPER 78 (Proposed Decision and Order, 2015). Once it is determined that the decision is rationally related to the terms and conditions of employment, or germane to the work environment, the inquiry is whether collective bargaining over the topic would unduly infringe upon the public employer's essential managerial responsibilities. If so, it will be considered a managerial prerogative and non-bargainable. If not, the topic is subject to mandatory collective bargaining. *Id.* citing Borough of Ellwood City v. PLRB, 998 A.2d 589, 600 (Pa. 2010); City of Philadelphia v. International Ass'n of Firefighters, Local 22, 999 A.2d 555, 570-571 (Pa. 2010). The Board must not analyze employer changes to work rules as a whole, but rather on a rule-by-rule basis to determine whether the work rules constitute mandatory subjects of bargaining. Commonwealth Department of Transportation v. PLRB, 543 A.2d 1255 (Pa. Cmwlth. 1988).

Section 9(e) of the PLRA provides that "[n]o petition or charge shall be entertained which relates to acts which occurred or statements which were made more than six weeks prior to the filing of the petition or charge." 43 P.S. § 211.9(e). As a general matter, the nature of the unfair practice claim alleged frames the limitations period for that cause of action. Upper Gwynedd Township Police Dept. v. Upper Gwynedd Township, 32 PPER § 32101 (Final Order, 2001). 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, 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. Upper Gwynedd Township, at 264. The Board will dismiss a charge as prematurely filed where the complainant files the charge prior to actual implementation. City of Allentown, 19 PPER § 19120 (Final Order, 1988).

In this case, the record shows that the charge in PF-C-15-42-E, as amended, was premature. Prior to 2015, and at least as long ago as 1989, the City's Police Department codified its use of force rules and regulations in Directives 10 (use of lethal force) and 22 (use of non-lethal force). 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.

On May 29, 2015, the Police Department's Research and Planning Unit forwarded to the FOP, via electronic mail, the following Use of Force directives that were revised and approved by the Police Commissioner: Directive 10 (current 10.1); Directive 22 (current 10.2); Directive 160 (current 10.3); and Directive 161 (current 10.4). On June 2, 2015, the FOP filed the charge docketed at PF-C-15-42-E with the Board. The Police Department subsequently decided to submit these four directives for further review, and the versions forwarded to the FOP were not published. On July 2, 2015, the City emailed to the FOP a response protocol for releasing the names of officers involved in shootings. The FOP immediately amended its charge at PF-C-15-42-E on July 2, 2015, alleging the City had violated the PLRA by unilaterally implementing the policy of releasing the names of officers involved in shootings. On July 3, 2015, the City released the names of two police officers, who were involved in an earlier 2015 shooting. On August 27, 2015, the Police Department's Research and Planning Unit forwarded to the FOP, via electronic mail, the following Use of Force directives that were revised and approved by the Police Commissioner: Directive 10 (current 10.1); Directive 22 (current 10.2); Directive 160 (current 10.3); and Directive 161 (current 10.4). On September 18, 2015, Directives 10.1 through 10.4 became effective.

The timeline set forth directly above clearly shows that the FOP initially filed its charge in PF-C-15-42-E on June 2, 2015 and subsequently amended the charge on July 2, 2015, which was well before most of the policies were actually implemented on September 18, 2015. With respect to the policy of releasing the names of police officers involved in shootings, the record shows that, while the FOP amended the charge on July 2, 2015 alleging a violation of the PLRA for this alleged unilateral action, the City did not take such action until July 3, 2015 when it released the names of Minor and Hoppe. The FOP did not file any additional amendments to PF-C-15-42-E at any time after July 2, 2015. Thus, the FOP did not file any unfair labor practice charges or amended charges after the directives at issue became effective. As a result, the charge, as amended, in PF-C-15-42-E, was clearly premature, and therefore, it must be dismissed as a matter of law.

In any event, the four directives at issue clearly involve matters of inherent managerial prerogative, and are therefore, not subject to bargaining. In City of Philadelphia v. International Association of Firefighters, Local 22, 999 A.2d 555 (Pa. 2010), 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." *Id.* at 569-570.

The record shows that Directive 10.1 covers the use of lethal force or discharge of firearms and contains a series of rules and procedures governing the conduct of police officers in this regard. The FOP has specifically challenged the following rules contained within Directive 10.1:

> Section 4(A), Specific Prohibitions: "[p]olice officers shall not draw their firearms unless they reasonably believe an immediate threat for serious bodily injury or death to themselves or another person exists." (Union Exhibit 12, Section 4(A)).

Section 3 contains a use of force decision chart, which illustrates the amount of force an officer should use based on the suspect's behavior and threat. The chart is essentially a continuum of options ranging from no force through moderate/limited and less than lethal force to deadly force, complete with instructions to use the option that represents the minimal amount of force necessary to reduce the immediate threat.

Section 4(G) provides that "[p]olice officers shall not discharge their firearms FROM a moving vehicle unless the officers are being fired upon. Shooting accurately from a moving vehicle is extremely difficult and therefore, unlikely to successfully stop a threat of another person." (Union Exhibit 12)(Emphasis in original).

Section 5(A)(2)(d) states that "[e]ach officer at the scene of a discharge of a firearm by any police officer will...[r]eport to the first supervisor on the scene, whether they (sic) had a BWC [body-worn camera] and if it was on during the incident."

Section 5(A)(3)(b)(9), which requires police radio to immediately notify the Police Advisory Commission (PAC) Executive Director after the discharge of a firearm.

Supervisor's Firearm Discharge Checklist which contains a series of questions presumably for the police supervisor to pose to the officer involved in a shooting.

Section 5(A)(4)(j), which states that the "[f]irst supervisor on the scene [after an officer discharges his or her firearm] will be responsible for the following...[w]ill brief the PAC Executive Director or designee on all the known facts of the discharge."

Section 6(E) which is entitled "Investigation of Police Discharges," and which contains the following NOTE: "[Employee Assistance Program] peer counselors will only respond to police discharges where the suspect was fatally wounded or injured as a result of the discharge. The exception is when there is a request from the investigating shooting team, the officer's Commanding Officer, CIB or the Commanding Officer, EAP."

Section 9(A), Release of Information Regarding Officer Involved Shootings (OIS), which states that "[a] press conference and/or an official press statement will be released by the Police Commissioner or his designee within 72 hours of an officer involved shooting in which an individual was killed or wounded as a result of a weapons discharge by a member of the department. The information will include officer's name, years of service, assignment and duty status."[5]

[5] The directive goes on to provide a procedure for the department to follow in performing a threat assessment of the OIS to ensure the safety of its officers. The procedure includes an intelligence assessment of any potential threats, steps to minimize the officer's social media or online presence, the provision of security details within the boundaries of the City and/or efforts with outside jurisdictions to provide patrols or coverage, and prioritizing the officer's home address within the police radio system for any calls coming from that location. (Union Exhibit 12).

Directive 10.2 covers the use of "moderate/limited force" and contains a similar series of rules and procedures related to the use of weapons other than firearms, such as an ASP baton and OC spray, along with the use of strikes, kicks, and certain holds. (Union Exhibit 12). The FOP has specifically challenged the following rules contained within Directive 10.2:

> Section 4 contains a use of force decision chart, which once again illustrates the amount of force an officer should use based on the suspect's behavior and threat. The chart appears to be identical to the one contained in Directive 10.1 set forth above.
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> Section 4(E) states: "[t]hough many officers may be at the scene of a police incident where force is being used, some officers may not be directly involved in taking police action. As officers, we have an obligation to protect the public and other officers. Therefore, it shall be the duty of every officer present at any scene where force is being applied to either stop or attempt to stop another officer when force is inappropriately used and/or no longer required. Your actions will both protect the officer from civil or criminal liability and the civilian from serious injury."
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> Section 5(B)(3) states that: "[o]fficers responding to any incident that may require the use of force **WILL NOT**...[o]ffensively kick and/or stomp on a subject. **NOTE:** Kicks are authorized for defensive purposes only."

(Union Exhibit 12)(Emphasis in original).

Directive 10.3 also covers the use of less than lethal force, specifically electronic control weapons or TASERS. As a result, the directive contains a series of rules and procedures governing the use of these weapons for police officers. The FOP objects to this directive in its entirety.

Finally, Directive 10.4 covers the City's Use of Force Review Board (UFRB) and includes a series of rules and procedures for evaluating certain instances of police use of force. The FOP has specifically challenged the addition of the Executive Director of the Police Advisory Commission to the UFRB as a voting member and the FOP President as a non-voting member in Section 1(D).

Having reviewed each of these rules individually, as set forth above, including each of the four directives in their entirety, I must conclude that these rules represent nothing more than the simple direction of personnel and are each a proper exercise of the City's managerial prerogative. Indeed, it cannot be seriously contended that the City is without the managerial authority to direct its police employes to refrain from the use deadly force in certain situations and/or to use a lesser amount or no force altogether in others. In fact, this issue has already been decided.

As the City persuasively notes in its post-hearing brief, the Board has previously held that rules pertaining to the use of force and weapons are valid exercises of managerial prerogative and not subject to bargaining. Middletown Borough Police Officers Ass'n 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); *see also* Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia, 45 PPER 105 (Proposed Decision and

Order, 2014). In addition, the Board has previously held that establishing a police advisory commission to investigate complaints of police misconduct is a managerial prerogative because it includes action to ensure integrity in public employment and to increase public confidence in government. FOP Lodge 5 v. City of Philadelphia, 29 PPER ¶ 29000 (Final Order, 1997). In that case, the Board opined as follows:

> ...we agree with the hearing examiner that these core managerial interests of City government are directly and substantially affected by its creation of an advisory commission with power to publicly consider complaints that police officers have mistreated the citizenry and violated their civil rights, and that the City's interest in establishing the PAC substantially outweighs any impact on the police officers (which essentially consists of the addition of another investigatory body that may uncover police misconduct that may result in discipline). The City of Philadelphia police department, which is charged with enforcement of the law, certainly has a compelling interest in attempting to ensure that its own employes abide by the law in the performance of their duties. As the New Jersey Public Employment Relations Commission aptly stated in finding no duty to collectively bargain over creation of an internal investigation unit in a municipal police department:
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> The broad issue involved...is the method by which a public employer maintains an awareness of the alleged misconduct of its employees. All employers, both public and private, are rightfully concerned that their employees not engage in conduct violative of the law, rule or regulation. This is perhaps of greater importance to the public employer, whose function is to serve the public interest, and especially so in the case of a municipal police department, which exists to enforce the law and to protect the general citizenry.
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> We do not view the decision of a public employer to maintain such an awareness, or the decision to utilize a particular method of doing so, as constituting a term or condition of employment of its employees. As such, the employer's decision is not a required subject for collective negotiations. City of Trenton, 1 NJPER 58, 59 (1975).
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> In this case, as in City of Trenton, the public employer is a city police department which exists to enforce the law and to protect the city's residents. The decision to establish the PAC strikes at the core of the City's basic mission because it was established to ensure that the City's police officers lawfully carry out their duties without mistreatment of the citizens who are to receive their protection. This type of decision regarding the appropriate means to fulfill the essential mission of the public employer principally involves managerial policy and thus is not subject to mandatory negotiation.

29 PPER at 2.

In the same vein, 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. Indeed,

this represents nothing more than the creation and/or alteration of an investigatory body which may or may not uncover evidence of police misconduct. The City's method for utilizing the same is not an employe term or condition of employment. Moreover, the City's policy of releasing the names of police officers involved in shootings is also 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. Although the FOP argues that the release of names policy triggers important safety considerations for police officers, the record shows only that a police officer whose name was released encountered hostility from several members of the public during an unruly protest on his street outside his home. (N.T. 297-299). However, the Board addressed this very same consideration in City of Philadelphia, 29 PPER ¶ 29000 (Final Order, 1997) wherein the police officers who testified during a police advisory commission hearing also encountered hostility from members of the public after the hearings concluded. 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. As such, it must be concluded that collective bargaining over the policy of releasing the names would unduly infringe upon the City's essential managerial responsibilities.

It is well settled that the Board properly relies on precedent to determine whether a matter constitutes a mandatory subject of bargaining rather than reinventing the wheel by applying the Act 111 balancing test to arrive at the same result as the established precedent. Pennsylvania State Corrections Officers Ass'n v. Commonwealth of Pennsylvania, Dept. of Corrections, Fayette SCI, 35 PPER 58 (Proposed Decision and Order, 2004) citing Teamsters Local 77 & 250 v. PLRB, 786 A.2d 299 (Pa. Cmwlth. 2001). Although the decision regarding the negotiability of a particular subject is in part fact driven (i.e. balancing the relationship of the issue to Section 1 matters on one hand and core managerial interests on the other), once the Board has conducted this analysis the result is precedential for future cases on the same or similar facts. Fayette SCI, *supra.* Of course, where a party introduces new or different facts that may alter the weight the matter at issue bears on the interests of the parties, additional analysis may be warranted. The burden is on the party requesting departure from established precedent to demonstrate on the record facts warranting such a departure. *Id.* (citing Wilkes-Barre Police Benevolent Ass'n v. City of Wilkes-Barre, 33 PPER ¶ 33087 (Final Order, 2002).

In the instant matter, the City has advanced legitimate managerial concerns for the directives at issue. Specifically, the four directives clearly involve the direction of personnel and are a proper exercise of managerial authority. Likewise, the City has a compelling interest in releasing the names of officers involved in shootings, as action to ensure integrity in public employment and to increase public confidence in government, as well as to maintain its standards of service. Further, the FOP has not introduced any new or different facts, which alter the weight the matter bears on the interests of the parties or to justify any departure from the Board's established precedent. Accordingly, the charge in PF-C-15-42-E must be dismissed.[6]

[6] The FOP also includes in its post-hearing brief an impact bargaining claim, as well as a contention that "many" of the directives are vague and/or overbroad. However, the FOP did not include any impact bargaining claim in

With respect to the charge docketed at PF-C-15-53-E, the FOP has alleged that the City violated the PLRA by refusing to provide protection for a police officer after releasing his name to the public following an officer involved shooting in retaliation for the FOP obtaining a favorable interest arbitration award, which eliminated the City residency requirement for police officers, and for the officer exercising the contractual right to live outside of the City.

To establish a violation of Section 6(1)(c) under the PLRA[7], the charging party must show that the employe 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, 254 A.2d 3 (Pa. 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).

In addition, the Board has recognized that, in the absence of direct evidence, it will give weight to several factors upon which an inference of unlawful motive may be drawn. City of Philadelphia, 26 PPER ¶ 26117 (Proposed Decision and Order, 1995). The factors which the Board considers are: the entire background of the case, including any anti-union activities by the employer; statements of supervisors tending to show their state of mind; the failure of the employer to adequately explain the adverse employment action; the effect of the adverse action on unionization activities-for example, whether leading organizers have been eliminated; the extent to which the adversely affected employes engaged in union activities; and whether the action complained of was "inherently destructive" of employe rights. City of Philadelphia, *supra*, *citing* PLRB v. Child Development Council of Centre County, 9 PPER ¶ 9188 (Nisi Decision and Order, 1978). Although close timing alone is insufficient to support a basis for discrimination, Teamsters Local 764 v. Montour County, 35 PPER 12 (Final Order, 2004), the Board has long held that the timing of an adverse action against an employe engaged in protected activity is a legitimate factor to be considered in determining anti-union animus. Berks Heim County Home, 13 PPER ¶ 13277 (Final Order, 1982).

In this case, there is no dispute that the FOP engaged in protected activity when it proposed to break the residency requirement and won the right for police officers to move outside the City pursuant to the 2009 interest arbitration award. Likewise, there is no dispute that the individual police officer engaged in protected activity by exercising his

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the original or amended charge of unfair labor practices, and as a result, this argument must be dismissed. Further, the FOP has not specifically identified which rules it alleges are vague and/or overbroad, nor has the FOP explained how any specific rules fail to place the police officers on notice of what course of conduct is to be expected. As such, this contention must be rejected as well.

[7] Section 6(1) of the PLRA provides that "it shall be an unfair labor practice for an employer: (c) By discrimination in regard to hire or tenure of employment, or any term or condition of employment to encourage or discourage membership in any labor organization..." 43 P.S. § 211.6.

right to live outside the City consistent with the award. Nor does the City dispute its knowledge of these events. Therefore, the issue depends on whether the City was motivated by anti-union animus when it failed to provide the officer with a 24/7 security detail at his residence outside of the City.

In support of its contention that the City was unlawfully motivated, the FOP points to a prior unfair labor practice case in PF-C-15-37-E, during which the City took the position that certain ranks of police officers were not covered by an arbitrator's award, which permitted the use of take-home vehicles outside the City following the 2009 interest award. (City Exhibit 21). The FOP also contends that the City's unlawful motive can be found by its inclusion of a question regarding continuous City residency for the prior 12 months in connection with a March 1, 2014 promotional examination, which the FOP has grieved. (Union Exhibit 16). However, I am unable to discern any discriminatory intent on behalf of the City with regard to either of these alleged factors.

First of all, as the City persuasively notes, the record shows that the City's use of residency as a tie-breaker in promotional examinations was added to the City's Home Rule Charter in 2008, which was well before the 2009 interest award was issued. (City Exhibits 21-24). Thus, it cannot possibly be the source of any alleged retaliation. Similarly, the litigation in PF-C-15-37-E is devoid of any evidence of unlawful motive on behalf of the City. The charge under Section 6(1)(c) of the PLRA was dismissed in that case. And, the City's position that the arbitrator's award did not cover all ranks of police officers is not discriminatory in and of itself.

In any case, 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. Accordingly, the charge under Section 6(1)(c) of the PLRA in PF-C-15-53-E must be dismissed.

Finally, the FOP has alleged in PF-C-15-53-E that the City violated Section 6(1)(e) of the PLRA by unilaterally changing the terms and conditions of employment for police officers by failing to fully comply with the 2009 interest arbitration award. However, the FOP does not include this argument in its post-hearing brief and has not explained how the City allegedly committed an unfair labor practice in this regard.

It is well settled that the Board exists to remedy violations of statute, i.e., unfair labor practices, and not violations of contract. Pennsylvania State Troopers Ass'n v. PLRB, 761 A.2d 645 (Pa. Cmwlth. 2000). Where a breach of contract is alleged, interpretation of collective bargaining agreements typically is for the arbitrator under the grievance procedure set forth in the parties' collective bargaining agreement. *Id.* at 649. However, the Board will review an agreement to determine whether the employer has clearly repudiated its provisions because such a repudiation may constitute both an unfair labor practice and a grievance. *Id.*

The FOP has not sustained its burden of proving that the City repudiated the CBA in any way or failed to comply therewith. The record does not show that the City is refusing to permit officers to live outside the confines of the City. Further, the FOP has not identified any provision in the interest award or the CBA, which addresses the City's obligation to provide a security detail outside of the City. As such, the charge in PF-C-15-53-E under Section 6(1)(e) of the PLRA will also be dismissed.

CONCLUSIONS

The Examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds as follows:

1. The City is a public employer and political subdivision under Act 111 as read *in pari materia* with the PLRA.

2. The FOP is a labor organization under Act 111 as read *in pari materia* with the PLRA.

3. The Board has jurisdiction over the parties hereto.

4. The City has not committed unfair labor practices in violation of Section 6(1)(a), (c), or (e) of the PLRA.

ORDER

In view of the foregoing and in order to effectuate the policies of the PLRA and Act 111, the Examiner

HEREBY ORDERS AND DIRECTS

that the charges of unfair labor practices in PF-C-15-42-E and PF-C-15-53-E are dismissed and the complaints are rescinded.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty days of the date hereof, this decision and order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this 16th day of August, 2018.

PENNSYLVANIA LABOR RELATIONS BOARD

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John Pozniak, Hearing Examiner