COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

ALLEGHENY COUNTY PRISON EMPLOYEES INDEPENDENT UNION	:	
v.	:	CASE NO. PERA-C-21-136-W
COUNTY OF ALLEGHENY	:	

PROPOSED DECISION AND ORDER

On July 2, 2021, the Allegheny County Prison Employees Independent Union (ACPEIU or Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (PLRB or Board) alleging that Allegheny County (County or Employer) violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA or Act) when the County implemented an ordinance passed by voter referendum which restricted the use of solitary confinement, leg shackles, restraint chairs and chemical agents at the County Jail.

On October 5, 2021, the Secretary of the Board issued a letter which stated that no complaint would be issued based on the charge because the allegations in the charge did not support a finding that the County's ordinance alters the wages, hours or terms and conditions of employment of the bargaining unit Corrections Officers. In response, the Union filed exceptions and a supporting brief to the Secretary's letter on October 21, 2021. On January 18, 2022, the Board issued an Order directing the charge be remanded to the Secretary for further proceedings based on the additional factual allegations provided in the Union's exceptions and supporting brief.

On February 9, 2022, the Secretary of the Board issued a Complaint and Notice of Hearing assigning the matter to conciliation and designating April 27, 2022, in Pittsburgh, as the time and place of hearing.

The hearing was held on April 27, 2022, in Pittsburgh, before the undersigned Hearing Examiner, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The Union filed its post-hearing brief on June 29, 2022. The County filed its post-hearing brief on August 30, 2022.

The Hearing Examiner, based upon all matters of record, makes the following:

FINDINGS OF FACT

1. The County is a public employer within the meaning of Section 301(1) of PERA. (N.T. 7).

2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 7).

3. The Union is the exclusive bargaining representative of a unit comprised of the County's Corrections Officers (COs). (Union Exhibit 2).

4. During the May 18, 2021, election, the voters of Allegheny County approved a ballot initiative (the Referendum) that concerned the County Jail. The question on the ballot was "Shall the Allegheny County Code, Chapter 205. Allegheny County Jail, be amended and supplemented to include a new Article III, as set forth below, which shall set forth standards governing conditions of confinement in the Allegheny County Jail?". The proposed changes to the Code were as follows:

> The Allegheny County Code, Chapter 205 is hereby amended by adding the following:
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> Chapter 205 Allegheny County Jail
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> § 205-30 Solitary confinement prohibited except in emergencies.
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> A. Solitary confinement, meaning the confinement of a detainee or inmate in a cell or other living space for more than 20 hours a day, has devastating and lasting psychological consequences on all persons, but especially for vulnerable populations, including youth and persons with diagnosed or undiagnosed cognitive or emotional disabilities.
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> B. No person being held in the Allegheny County Jail for any reason shall be subjected to solitary confinement except as set forth below.
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> C. Solitary confinement is never to be used as punishment.
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> D. If, in accordance with this Article, solitary confinement is permitted, every effort must be made to ensure that every detainee and inmate has the daily opportunity to leave their cell for hygiene and exercise.
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> E. When solitary confinement is authorized:
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> a. A person held in solitary confinement may not be denied access to food, water or any other basic necessity.
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> b. A person held in solitary confinement may not be denied access to appropriate medical care, including emergency medical care.

F. A restraint chair, chemical agents or leg shackles may not be used on any person in the custody of the Allegheny County Jail.

§ 205-31 Exceptions to the rule against solitary confinement.

A. Facility-wide lockdown

If the facility warden determines that a facility-wide lock down is required to ensure the safety of persons held in the facility, the prohibition on solitary confinement shall not apply until the warden determines that these circumstances no longer exist. The facility warden shall document specific reasons why any lockdown is necessary for more than 24 hours, and why less restrictive interventions are insufficient to accomplish the facility's safety goals. Even during lockdown, every effort must be made to ensure that every detainee and inmate has the daily opportunity to leave their cell for hygiene and exercise, to the extent that is possible given the reason for the lockdown.

B. Emergency use of short-term solitary confinement for individuals

a. A person may be held in solitary confinement for a period of 24 hours, but no longer than necessary to determine whether that person should be isolated from other detainees and/or inmates for medical reasons or in order to ensure the safety of other detainees or inmates, and, if so determined, to make arrangements to house that person in a manner that protects them and other inmates while allowing them to spend 4 hours or more outside their cell each day.

b. No person may be held in emergency or short-term solitary confinement unless:

i. The warden has made and documented an individualized determination of the necessity for that person’s confinement; and

ii. The person has received a personal and comprehensive medical and mental health examination conducted by licensed professionals, and that professional or professionals have certified that the person’s confinement is

necessary for medical reasons or to ensure the safety of others;

iii. The medical and mental health professionals have set forth any condition or conditions they believe, in their clinical judgment, are necessary to protect the person being confined from undue physical or mental health adverse consequences from the confinement.

c. Request for protective custody: Any person who requests separation from other detainees or inmates because that person fears for their safety may be placed in short-term solitary confinement for a period not to exceed 72 hours by signing a voluntary consent form. The purpose of such short-term confinement is to ensure there are less restrictive arrangements that will keep the person safe, and the person shall be entitled to those less restrictive arrangements as soon as they are available. Any person who requests protective custody shall have the medical and mental health evaluation required for short-term solitary confinement within 24 hours of being placed in that status. Any person who requests protective custody may rescind that request at any time, by signing a consent form. The jail shall keep copies of all consent forms executed under this subsection.

C. Reporting

The warden shall be responsible for collecting the following information on the use of lock-downs and solitary confinement at the Allegheny County Jail, which shall be compiled into a report on a monthly basis and provided to the Jail oversight Board and posted on the Jail's website:

a. The dates and reasons for any lockdown of the Jail, or any section of the jail

b. The number of times any person has been subjected to temporary solitary confinement, with the duration and reason for each confinement, as well as the number of instances of the same person being held in solitary confinement more than once in the calendar month.

c. The age, sex, gender identity, race and ethnicity of each person held in solitary confinement during the month.

D. Violation of this Article

a. A person held in solitary confinement in violation of this Article may bring a habeas petition to end the confinement in any court of competent jurisdiction. A petition under this section shall be heard on an emergency basis.

E. Effective date

The reporting requirements set forth in Section C of this Article shall become effective 30 days after its adoption, with the first reports due on the fifth day of the following calendar month. All other provisions of this Article shall take effect 180 days after the adoption of the Article.

(N.T. 21-31; Joint Exhibit 1).

5. The Referendum was approved by the voters. After the Referendum passed on May 18, 2021, and became an ordinance, the Jail had approximately six months (180 days) to come into compliance. The Warden immediately came up with plans to comply with the Referendum. The Warden implemented Jail policies which forbid the use of restraint chairs, forbid the use of leg irons, forbid the use of OC (pepper spray), and modified the Jail's policies on solitary confinement to comply with the referendum. It took the Jail approximately six months to come into compliance with the Referendum. (N.T. 33-35, 201-203).

6. With respect to the changes to solitary confinement, the only change the Jail made to existing policies was to allow inmates four hours of recreation per day. The Jail was, when the Referendum passed, already under a Court mandate to give inmates in segregated housing more recreation time. When the Referendum was passed, the Warden was in the process of getting inmates in segregated housing more recreation time because the longer an inmate is in a segregated cell, the more inmates have negative effects on their mental capabilities. Having more than one hour outside of a cell is beneficial for inmates as it improves their mental capabilities. (N.T. 186, 203).

7. When the Referendum passed, the Jail did not have any explicit "solitary confinement" wing or facility. The Jail did have a restrictive housing unit (RHU) where some of the most dangerous inmates with behavioral issues are held. Inmates who commit serious misconduct are sent to RHU. The RHU is a segregation unit in that inmates in the RHU are segregated from the general inmate population. The inmates in RHU get moved by two COs everywhere they go on the RHU. When the Referendum passed, the inmates on the RHU got one hour of recreation time a day and were typically double bunked unless they were a danger to other inmates and then they were single bunked. Inmates on RHU also have shower schedules and access to tablets which allow access to a law

library, phone calls, reading material, TV shows, etc. (N.T. 37-40, 110-114).

8. The Jail has policies with respect to discipline of inmates. One of these policies is the Informal Resolution Policy. The Informal Resolution policy allows COs to administer punishments to inmates for minor rule infractions. One possible punishment allowed under the Informal Resolution Policy before the Referendum was confinement of an inmate to his or her cell for a period of 4, 8, 24, 48 or 72 hours. If an inmate was locked up under this policy in their cell for 24 hours or more, they would still get one hour of recreation a day outside of their cell. (N.T. 40-43, 114; Union Exhibit 10).

DISCUSSION

The Union claims that the County committed unfair practices in violation of Section 1201(a)(1) and (5) of the Act when it certified a voter referendum petition leading to passage of a new ordinance inconsistent with PERA that unilaterally eliminated longstanding jail rules and enforcement practices that directly impact officer safety and security and constitute employee working conditions of the Union's members that are mandatory subjects of collective bargaining.

Section 1201(a) of PERA provides that "[p]ublic employers, their agents or representatives are prohibited from: (1) Interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of this act... (5) Refusing to bargain collectively in good faith with an employe representative which is the exclusive representative of employes in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative." 43 P.S. § 1101.1201. The Board will find an employer in violation of its bargaining obligation enforceable under Section 1201(a)(1) and (5) of the Act if the employer unilaterally changes a mandatory subject of bargaining. PLRB v. Mars Area School District, 389 A.2d 1073 (Pa. 1978). If, however, the employer changes a matter of inherent managerial policy under Section 702 of the Act, then no refusal to bargain may be found. State College, supra. The complainant in an unfair practices proceeding has the burden of proving the charges alleged. St. Joseph's Hospital v. PLRB, 373 A.2d 1069 (Pa. 1977).

Moving to this case, the record shows that the Referendum led to four distinct changes to Jail policies. Addressing the changes to solitary confinement in the Referendum first, these changes, when actually applied to the reality of the Jail, led to the Jail changing policy to ensure that inmates had four hours of recreation time (or time outside of their cell) per day. In practice, this change led to changes in the Jail's Informal Resolution Policy, which had allowed COs to assign inmates to their cells for up to 23 hours a day as part of a low-level discipline system. It is clear from this record that this change in policy is well within Jail's managerial prerogative as, under Section 702 of the Act, an employer is not required to bargain over matters of inherent managerial policy which, in the context of jails, include policies relating to the care, custody and control of inmates. Lebanon County, PERA-C-20-104-E, ___ PPER ___ (Final Order, 2022).

Setting the standard for how much time an inmate must be in or out of their cell is manifestly an issue relating to the care, custody and control of inmates.

The Union argues that the policy with respect to how much time an inmate must be outside of their jail cell is clearly a policy which touches wages, hours and other terms of conditions of employment and therefore must be bargained under Section 701 of the Act. In its Brief, the Union argues:

> Pre-[Referendum], the Jail utilized a corrective behavior method referred to as "Informal Resolution" by Policy . . . . Informal Resolution was used by corrections officers as a progressive discipline, to correct General Population inmate non-compliance and/or rule-breaking for minor, policy-defined rule infractions. An officer will order an inmate confined to their cell for a period of four (4) hours up to a maximum of Seventy-Two (72) hours maximum (though that maximum period is rarely utilized). Informal Resolution was an alternative to the officer lodging a formal misconduct on the inmate and transferring them to the more restrictive RHU. When on Informal Resolution, the cells where the inmates are housed are on General Population, and contain their own toilets and sinks, and the inmates are fed in their cells. The Ordinance changes existing working conditions by greatly limited the effectiveness of Informal Resolution by limiting its use to 20 hours, with four (4) hours Recreation ("Rec") time and limiting the discipline to limitations on the use of inmate tablets. The Jail does not have the officer staffing available to monitor an inmate, or even several inmates, on 4 hours of Recreation time per day as required by the Ordinance, which the Jail advised resulted in discontinuance of the Informal Resolution option. Further, as Informal Resolution was used as a "corrective measure", its reduction or elimination will embolden inmates to escalate their rule violations, as their Informal Resolution confinement time is now limited to 20 consecutive hours. This will result in a dramatic increase in the potential for serious injury to the officers and the inmates due to emboldening inmate non-compliance, making care, custody and control of the inmates more difficult.

(Union's Brief at 48).

I address first the Union's argument that the change in policy "will result in a dramatic increase in the potential for serious injury to the officers and the inmates due to emboldening inmate non-compliance, making care, custody and control of the inmates more

difficult." I find that the record does not support a finding that the change in policy caused or may lead to a dramatic increase for serious personal injury to the COs. The Union in this matter has the burden of proving the charges alleged. St. Joseph's Hospital v. PLRB, supra. Findings of fact must be drawn from substantial evidence and conclusions drawn from those facts must be reasonable. Id. Reviewing the record as a whole, and especially the testimony on N.T. 43-44, 51-53, 111-124, and 171, I find that the Union has not met its burden of showing a legally substantial health and safety impact on the COs due to the change in policy to four hours of recreation time for inmates. On its face the policy has nothing to do with CO safety. The policy change concerns inmates and how much time they must be outside of their cells. So, since the policy change on its face does not concern CO health and safety, the Union must show how the change in policy reasonably led to some observable impact on COs' health and safety or other term and condition of employment. Reviewing the record, there was no evidence of any specific and actual harm to a CO due to the change in this specific policy. I did not hear testimony from any CO that was harmed or injured as a result of the change in policy. There was only general references made by Union leadership. I find that the conclusions the Union asks me to reach with respect to CO safety are not reasonable given the facts presented. Thus, I find that the overly general conclusory statements by the Union witnesses are not sufficient to carry the Union's burden.

I next address the Union's second argument that "[t]he Jail does not have the officer staffing available to monitor an inmate, or even several inmates, on 4 hours of Recreation time per day as required by the Ordinance, which the Jail advised resulted in discontinuance of the Informal Resolution option." The Union is following the argument found in Ellwood City Police Wage and Policy Unit, 36 PPER ¶ 89 (Final Order, 2005), where the Board held that a policy which assigned the number of police officers used to transport prisoners was an issue of safety and therefore a mandatory subject of bargaining. In Ellwood City, the Board wrote:

> The Hearing Examiner's order directs the Borough to reinstate a policy that required two police officers to transport a prisoner, but the order does not require the Borough's police department to employ a set minimum or maximum number of officers on the police force. As the Commonwealth Court stated when dealing with an analogous issue relating to firefighters in City of Scranton:
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> > The courts that have dealt with this issue have drawn a very fine line in distinguishing between the total number of persons on the force [not a mandatory subject of bargaining], and the number of persons on duty at a station, or assigned to a piece of equipment, or to be deployed to a fire [all mandatory subjects of bargaining because they are

> rationally related to the safety of the fire fighters].
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> IAFF Local 669 v. City of Scranton, [429 A.2d 779 (Pa. Cmwlth. 1981)]. The number of officers assigned to transport a prisoner is clearly more analogous to the total number of firefighters assigned to an apparatus than to the total number of firefighters employed by the fire department. As the Court observed, the number of firefighters assigned to a particular apparatus is a safety issue, as is the officers assigned to prison transport (as demonstrated by the record here). Therefore, the issue is a mandatory subject of bargaining as described in City of Scranton, and the Borough committed an unfair practice when it unilaterally changed the existing transport policy.

Ellwood City, supra. In this case, I cannot follow the Union and agree that this line of cases applies to the record in this matter. For one, the policy in question here, which requires inmates to be outside of their cell for four hours a day, on its face does not implicate any issue comparable to the issues in City of Scranton or Ellwood City. The policy in this matter is about inmates. The policies in City of Scranton or Ellwood City were specifically about the public employes. The policy in this matter is not akin to policies which deal with number of persons on duty at a station, or assigned to a piece of equipment, or to be deployed to a fire. Obviously, just because a policy does not mention public employes explicitly, that does not mean that the policy does not therefore have an effect on the terms and conditions of employment. After a thorough review of the record in this matter, I find, as above, that the Union has not carried its burden of showing that the policy of requiring inmates to be outside of their cell for four hours a day instead of one reasonably implicates CO safety. More specifically, I do not find the testimony from Union witnesses as a whole, and specifically at N.T. 43-44, 51-53, 111-124, and 171, sufficient to show how the policy in question is related to the safety of COs as the statements are overly general, conclusory, and speculative. The hearing in this matter was held at the end of April, 2022, which was more or less six months after the policy in question was implemented. I would expect in that amount time the impact of the policy change would have been fully observed and any concrete impact on the terms and conditions of employment would have been apparent.

Almost any policy promulgated by the Jail which deals with the inmates could remotely impact officer safety in some arguable way as the COs deal with the inmates every day in close proximity. However, it is not the aim of PERA or Board policy for public unions to be co-managers of the workplace and hold all policy in the grip of collective bargaining. The COs are "employees, not employers." City of Scranton, supra. Moreover, public unions under Board policy and Commonwealth Court precedent may demand impact bargaining in cases where there is a demonstrable impact on wages, hours, or working conditions that is severable from the managerial decision. Lackawanna County Detectives' Association v. PLRB, 762 A.2d 792 (Pa. Cmwlth. 2000).

Should the Board disagree and find that the policy in question here does relate to or touch upon officer safety or some other condition of employment following the Ellwood City line of cases or other theory, I find that any such interest does not outweigh the probable effect on the basic policy of the Jail. PLRB v. State College Area School District, 337 A.2d 262 (Pa. 1975). The Warden testified credibly at the hearing that giving inmates more time out of there cell is beneficial for their mental health, which is a proper concern and target of Jail policy and echoes the policy statements contained in the Referendum. This concern outweighs the concern of the COs in this matter, which, on this record, were overly generalized, speculative and based on conclusory statements by witnesses.

Moving to the remaining policy changes which banned the use of leg shackles, restraint chairs, and pepper spray; these policies are all clear expressions of the Employer's right to direct personnel in the form of a Use of Force policy. The direction of personnel, including Use of Force policies, has long been held by the Board to be a managerial prerogative. Local 22, International Association of Firefighters, AFL-CIO v. PLRB, 588 A.2d 67 (Pa. Cmwlth. 1991); FOP Lodge No. 5 v. City of Philadelphia, 29 PPER ¶ 29142 (Final Order, 1998); Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia, 45 PPER 105 (Proposed Decision and Order, 2014); 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); Fraternal Order of Police Lodge No. 44 v. City of Pottsville, 49 PPER ¶ 17 (Final Order, 2017); Fraternal Order of Police Lodge 5 v. City of Philadelphia, 52 PPER ¶ 67 (Final Order, 2019).[1] 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 State College balancing test to arrive at the same result as the established precedent. PSCOA v. Commonwealth of Pennsylvania Dept. of Corrections, Waynesburg SCI, 33 PPER ¶ 33178 (Final Order, 2002); 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, once the Board has conducted this analysis the result is precedential for future cases on the same or similar facts. Fayette SCI, supra. 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.

In this matter the Union has not presented sufficient facts to depart from established precedent. Therefore, the Use of Force

[1] These cases cited were decided under Act 111 and the PLRA. If a matter is a managerial prerogative under Act 111, then it *a fortiori* is a managerial prerogative under PERA. Teamsters Loc. 77 & 250 v. PLRB, 786 A.2d 299, 305 (Pa. Cmwlth. Ct. 2001).

policies with respect to leg shackles, restraint chairs, and pepper spray are properly managerial prerogatives. I note here again that public unions under Board policy and Commonwealth Court precedent may demand impact bargaining in cases where there is a demonstrable impact on wages, hours, or working conditions that is severable from the managerial decision. Lackawanna County Detectives' Association, supra.

Finally, the County argues that there was no unfair practice because the County did not unilaterally implement any policy change as it was merely complying with the dictates of the Referendum. The law is clear that the County cannot use a local ordinance to sidestep bargaining obligations. Borough of Geistown. 679 A.2d 1330, 1331 (Pa. Cmwlth. Ct. 1996). I do not find the fact that the Referendum was sponsored by a party that is not the County to be legally significant as the County created the referendum process. I agree with the Union in their Brief at pages 8 through 20 that the Referendum is a creation of County law and the County cannot sidestep responsibility for answering challenges by public unions if referendums change terms and conditions of employment. The County cannot use a referendum process to effect unilateral changes to employes' terms and conditions of employment that it itself is barred from accomplishing by law.

CONCLUSIONS

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

1. The County is a public employer within the meaning of Section 301(1) of PERA.

2. The Union is an employe organization within the meaning of Section 301(3) of PERA.

3. The Board has jurisdiction over the parties hereto.

4. The County has not committed unfair practices in violation of Section 1201(a)(1) and (5) of PERA.

ORDER

In view of the foregoing and in order to effectuate the policies of PERA, the Hearing Examiner

HEREBY ORDERS AND DIRECTS

that the charge is dismissed and the complaint rescinded.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed pursuant to 34 Pa. Code § 95.98(a) within twenty (20) days of the date hereof, this decision and order shall become and be absolute and final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this second day of November, 2022.

PENNSYLVANIA LABOR RELATIONS BOARD

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STEPHEN A. HELMERICH, Hearing Examiner