

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

ALLEGHENY COUNTY PRISON EMPLOYEES :
INDEPENDENT UNION :
 :
 v. : CASE NO. PERA-C-21-188-W
 :
COUNTY OF ALLEGHENY :

PROPOSED DECISION AND ORDER

On August 19, 2021, 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 a policy that required County employes who were not vaccinated against COVID-19 to wear masks and undergo weekly COVID-19 testing.

On September 22, 2021, 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 November 19, 2021, in Pittsburgh, as the time and place of hearing.

Before the scheduled hearing date, on September 30, 2021, the Union filed an amended charge of unfair practices with the Board alleging that the County violated Section 1201(a)(1) and (5) of the Act when on September 29, 2021, the County announced a COVID-19 Vaccine Policy (Vaccine Policy) which required employes including bargaining-unit member Corrections Officers (COs) to be fully vaccinated against COVID-19 by December 1, 2021, or be disqualified from employment with the County.

On October 1, 2021, the Secretary of the Board issued an amended 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 November 19, 2021, in Pittsburgh, as the time and place of hearing

The first day of hearing was held on November 19, 2021, in Pittsburgh, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Additional days of hearing occurred on February 23, 2022, February 25, 2022, and March 22, 2022, via Microsoft TEAMS. ACPEIU submitted a post-hearing brief on June 6, 2022. The County submitted a post-hearing brief on August 5, 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. (11/19/21 N.T. 7).

2. ACPEIU is an employe organization within the meaning of Section 301(3) of PERA. (11/19/21 N.T. 7).

3. The County developed the Vaccine Policy because there were an alarming number of deaths in Allegheny County, many County employes were getting sick with COVID-19, and two County employes had died from COVID-19. The County had seen a spike in cases with a related rise in employes needing to quarantine and a large wave of employes missing work. The County first saw a spike in COVID-19 cases in March, 2020, and then late 2020 and early 2021. The County then saw another spike in cases in late 2021 and early 2022. (2/23/22 N.T. 33-36).

4. The County started internal discussions about the need for a Vaccine Policy in late 2020. In the late Summer and early Fall of 2021, the County saw a spike in COVID-19 cases. At this time, the County received and relied on information from the County Department of Health, the State Department of Health, and the CDC to expect a huge spike of cases due to the Delta variant of COVID-19. At this time, the idea of the Covid Vaccine Policy gained momentum with the County. The County implemented the County Vaccine Policy because it believed that a huge spike of Delta and Omicron variants were coming. The County did in fact see these spikes. Based on information it received from the State Department of Health and the CDC, the County believed that even though there would be spikes of COVID-19 cases, COVID-19 vaccinations would help slow the spread of the disease and lessen the severity of symptoms for those people who tested positive. (2/23/22 N.T. 36-42, 93, 106-108, 114-115, 3/22/22 N.T. 9-24, 28-29, 46).

5. The County believes it has the obligation to keep County employes and the public safe. The County believed that County employes (and especially those employes with the County Police) deal directly with the public. The County believed that the best way to keep employes and the public safe was to mandate vaccines. (2/23/22 N.T. 36-39).

6. The County had used other COVID-19 mitigation efforts such as masking, social-distancing and remote work where possible. The County began requirements for masking and social-distancing early in 2020. Approximately 72% of the County workforce cannot work from home including 911 operators, Police Officers, laborers, truck drivers, and Corrections Officers. In certain work situations, social-distancing was impossible. The County found that masking and social-distancing alone were not sufficient to stop the spread of COVID-19. The County noted specific problems with COVID-19 outbreaks in close-contact or congregate settings such as the County Jail. (2/23/22 N.T. 39-43, 71, 79).

7. New hires for the County must be vaccinated against COVID-19. (2/23/22 N.T. 109).

8. When the County decided on its Vaccine Policy, it made the news public. The following press release, issued on September 29, 2021, promulgated the County's Vaccine Policy:

Fitzgerald Announces COVID Vaccines Required for All County Employees

Unvaccinated Employees Have Until December 1 to Comply with Policy

PITTSBURGH - County Executive Rich Fitzgerald today announced that COVID-19 vaccinations will be required of all county employees under the executive branch, subject to such exceptions as required by law. The measure is being taken to promote the health and safety of the county workforce, and to ensure the continued protection of the public with whom the workforce interacts and communities they serve.

"As we continue to see cases of COVID in our county, and different populations being affected than were previously, it is even more important that our workforce be protected so that the public that we serve is protected as well," said Fitzgerald. "The CDC, the FDA, the PA Department of Health, the county Health Department and even the Occupational Safety and Health Administration (OSHA) are in agreement that vaccines are highly effective at protecting most fully vaccinated people against symptoms and severe disease from COVID. This is the right thing for our county and our workforce."

Employees will have until December 1, 2021 to provide proof of vaccination to department management. While employees do not have to be considered fully vaccinated (defined by the CDC as two weeks following the first dose of Janssen or second dose of Pfizer or Moderna) by December 1, they will have to have received the one-shot Janssen/Johnson & Johnson vaccine, or received the second dose of the two-shot Pfizer/BioNTech or Moderna vaccine, on or before December 1.

Vaccinated employees who still get COVID or have been ordered or directed to quarantine will also have an additional benefit of being provided 10 days of paid leave. The leave is applicable only for the affected vaccinated employee.

From the beginning of the pandemic, the county has worked to halt the spread of coronavirus disease and, most recently, the Delta variant. It has relied on the best available data and science-based public health measures. The Delta variant, currently the predominant variant of the virus in the United States, is highly contagious and has led to a rapid rise in cases and hospitalizations.

That continues to be the case locally as well. In the past few days, new daily cases of COVID have numbered in the 400s for county residents. To date, there have been 120,573 cases, 8,126 hospitalizations and 2,160 deaths.

The Centers for Disease Control and Prevention (CDC) has determined that the best way to slow the spread of the virus, and to prevent infection by the Delta variant or other variants, is to be vaccinated. COVID-19 vaccines are widely available in the United States, and in Allegheny County. Data on the vaccines show that they protect people from getting infected and severely ill, and significantly reduce the likelihood of hospitalization and death.

One of the vaccines, the Pfizer-BioNTech vaccine (now known as Comirnaty) has received full approval from the Food and Drug Administration (FDA). Two other vaccines, Moderna and Janssen, have been authorized by the FDA for emergency use. All three vaccines have met the rigorous standards for safety, effectiveness and manufacturing quality.

According to the PA Department of Health's Vaccine Dashboard, Allegheny County currently ranks fifth in the state with the percent of residents with at least one vaccine dose. As of today, 718,178 residents are fully covered. An additional 68,462 residents have received at least one dose in a two dose vaccine series. Another 14,524 people have also availed themselves of a Pfizer-BioNTech booster.

The health and safety of the county workforce, and the health and safety of the members of the public with whom they interact, are integral parts of the services provided to residents. To ensure that the county can continue to meet the needs of residents and provide critical services, county employees must take all available steps to

protect themselves and avoid spreading COVID-19 to their co-workers and members of the public.

All employees are being notified of the new policy today. Those employees who have not yet provided proof of vaccination will also receive additional details provided to them by their supervisor. Information will also be sent to impacted employees at their home regarding how to comply with the new policy.

Beginning on December 2, anyone in violation of the requirement who does not meet any exception will face termination.

This announcement follows on the heels of the decision in early August to require all new hires to be vaccinated and to require current employees who are unvaccinated to wear masks and be tested regularly for COVID. Based on data from the Department of Human Resources, over 75% of employees under the executive branch have been vaccinated with over 700 employees receiving vaccination following the August announcement.

Applicability of the new policy to non-executive branch employees will be up to the leadership of those respective offices. These include the Courts, County Council and the independently elected offices of the Controller, District Attorney, Sheriff, and Treasurer.

(2/22/22 N.T. 89, 2/23/22 N.T. 49, 57; Union Exhibit 4, County Exhibit D).

9. The County did not bargain the County Vaccine Policy with ACPEIU. Rich Fitzgerald, the County Executive, called every union representative, including ACPEIU, before September 29, 2021, to let the unions know that he was going to issue the County Vaccine Policy. (11/19/21 N.T. 49, 2/23/22 N.T. 60-61, 102-103).

10. The Vaccine Policy covered Police Officers, Corrections Officers, other employees of the Jail and Police Department, and other employees including those employees of the Kane Senior Living Home, Facilities, and the Departments of Parks, Economic Development, Health, Law, and Human Services. In total, the Vaccine Policy covered approximately 5,000 employees. The Vaccine Policy did not cover employees of County row offices. (2/23/22 N.T. 57-60).

11. On September 29, 2021, the following email was sent to every County employee:

From: HR, Notifications

Sent: Wednesday, September 29, 2021 12:01 PM

Subject: Employee COVID-19 Vaccination Requirement

Earlier today, Allegheny County Executive Rich Fitzgerald announced that in the interest of the health and safety of the county workforce and of the communities we serve, and in light of public health guidance regarding the most effective and necessary defenses against COVID-19, all county employees under the executive branch are required to receive a COVID-19 vaccination, subject to such exceptions as required by law.

Current county employees must show proof of their second dose of a two-dose COVID-19 vaccine, or proof of a one-dose vaccine on or before December 1, 2021. Employees who fail to submit proof of completed vaccination to their department Point of Contact (list of POCs attached) by December 1, 2021 will be subject to termination of employment.

Employees who have not submitted proof of completed vaccination to date will receive additional information, via USPS mail and hand-delivery at the workplace by their department management in the coming days. Also attached is a document with information about the vaccine to help address any concerns, and to provide links to additional resources for reference, including the CDC COVID Vaccine Website and the Allegheny County COVID-19 website:

<https://www.cdc.gov/coronavirus/2019-ncov/vaccines/index.html>

<https://alleghenycounty.us/Health-Department/Resources/COVID-19/COVID-19.aspx>

Please be advised that employees who have submitted proof of vaccination will be entitled to up to eighty (80) hours of paid leave for reasons related to COVID-19: 1) if an employee tests positive for COVID-19; 2) if an employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19; or 3) if an employee has been advised by a health care provider to self-quarantine related to COVID-19 (with appropriate documentation provided by the employee).

(11/19/21 N.T. 53, 2/22/22 N.T. 88-90, Union Exhibit 4, 72).

12. The email from the County to employees linked to a CDC website regarding vaccines. That CDC website had the following relevant information on COVID-19 vaccines on or about the time the email was sent on September 29, 2021:

Key Things to Know about COVID-19 Vaccines:

What You need to Know:

- COVID-19 vaccines are effective at helping protect against severe disease and death from variants of the virus that causes COVID-19 currently circulating, including the Delta variant;

- If you are fully vaccinated you can resume many activities that you did before the pandemic, but you should wear a mask indoors in public if you are in an area of substantial or high transmission to maximize protection from the Delta variant and possibly spreading it to others;

- You may have side effects after vaccination. These are normal and should go away in a few days.
. . .

Effectiveness

What we know

Studies show that COVID-19 vaccines are effective at keeping you from getting COVID-19. Getting a COVID-19 vaccine will also help keep you from getting seriously ill even if you do get COVID-19. Learn more about the benefits of getting vaccinated.

COVID-19 vaccines teach our immune systems how to recognize and fight the virus that causes COVID-19. It typically takes 2 weeks after vaccination for the body to build protection (immunity) against the virus that causes COVID-19. That means it is possible a person could still get COVID-19 before or just after vaccination and then get sick because the vaccine did not have enough time to build protection. People are considered fully vaccinated 2 weeks after their second dose of the Pfizer-BioNTech or Moderna COVID-19 vaccines, or 2 weeks after the single-dose Johnson & Johnson's Janssen COVID-19 vaccine.

People with moderately to severely compromised immune systems should receive an additional dose of mRNA COVID-19 vaccine after the initial 2 doses.

Safety

What we know

Millions of people in the United States have received COVID-19 vaccines, and these vaccines have undergone the most intensive safety monitoring in U.S. history. This monitoring includes using both established and new safety monitoring systems to make sure that COVID-19 vaccines are safe. COVID-19 vaccines cannot give you COVID-19. Learn more to bust myths and learn the facts about COVID-19 vaccines. . . . While COVID-19 vaccines were developed rapidly, all steps have been taken to ensure their safety and effectiveness.

You may have side effects after vaccination, but these are normal.

After COVID-19 vaccination, you may have some side effects. These are normal signs that your body is building protection. The side effects from COVID-19 vaccination, such as tiredness, headache, or chills, may affect your ability to do daily activities, but they should go away in a few days. . . .

Variants and Vaccines

- FDA-authorized COVID-19 vaccines help protect against Delta and other known variants.
- These vaccines are effective at keeping people from getting COVID-19, getting very sick, and dying.
- To maximize protection from the Delta variant and prevent possibly spreading it to others, you should wear a mask indoors in public if you are in an area of substantial or high transmission even if you are fully vaccinated.
- We don't know how effective the vaccines will be against new variants that may arise.

New Variants

What we know

- Infections happen in only a small proportion of people who are fully vaccinated, even with the Delta variant. When these infections occur among vaccinated people, they tend to be mild.
- If you are fully vaccinated and become infected with the Delta variant, you might be able to spread the virus to others.
- People with weakened immune systems, including people who take immunosuppressive medications, may not be protected even if fully vaccinated.

Different COVID-19 Vaccines

Updated Sept. 1, 2021

CDC now recommends that people aged 65 years and older, residents aged 18 years and older in long-term care settings, and people aged 50-64 years with underlying medical conditions should receive a booster shot of Pfizer-BioNTech's COVID-19 Vaccine at least 6 months after completing their Pfizer-BioNTech primary series. Other groups may receive a booster shot based on their individual risk and benefit

Different COVID-19 Vaccines

Vaccines are now widely available. In most cases, you do need an appointment. Do not wait for a specific brand. Learn how to find a COVID-19 vaccine so you can get it as soon as you can.

All currently authorized and recommended COVID-19 vaccines:

- are safe,
- are effective, and
- reduce your risk of severe illness.

CDC does not recommend one vaccine over another.

Safety of COVID-19 Vaccines

Updated Sept. 27, 2021

What You Need to Know

- COVID-19 vaccines are safe and effective.
- Millions of people in the United States have received COVID-19 vaccines under the most intense safety monitoring in U.S. history.
- CDC recommends you get a COVID-19 vaccine as soon as possible.
- If you are fully vaccinated, you can resume activities that you did prior to the pandemic. Learn more about what you can do when you have been fully vaccinated.

Millions of People Have Safely Received a COVID-19 Vaccine

Over 390 million doses of COVID-19 vaccine have been given in the United States from December 14, 2020, through September 27, 2021.

COVID-19 vaccines are safe and effective. COVID-19 vaccines were evaluated in tens of thousands of participants in clinical trials. The vaccines met the Food and Drug Administration's (FDA) rigorous scientific standards for safety, effectiveness, and manufacturing quality needed to support approval or authorization of a vaccine.

Millions of people in the United States have received COVID-19 vaccines since they were authorized for emergency use by FDA. These vaccines have undergone and will continue to undergo the most intensive safety monitoring in U.S. history. This monitoring includes using both established and new safety monitoring systems to make sure that COVID-19 vaccines are safe.

Results Are Reassuring

Results from vaccine safety monitoring efforts are reassuring. Some people have no side effects. Others have reported common side effects after COVID-19 vaccination, like

- swelling, redness, and pain at injection site
- fever
- headache

- tiredness
- muscle pain
- chills
- nausea

Serious Safety Problems Are Rare

To date, the systems in place to monitor the safety of these vaccines have found only two serious types of health problems after vaccination, both of which are rare. These are anaphylaxis and thrombosis with thrombocytopenia syndrome (TTS) after vaccination with J&J/Janssen COVID-19 Vaccine.

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Long-Term Side Effects Are Unlikely

Serious side effects that could cause a long-term health problem are extremely unlikely following any vaccination, including COVID-19 vaccination. Vaccine monitoring has historically shown that side effects generally happen within six weeks of receiving a vaccine dose. For this reason, the FDA required each of the authorized COVID-19 vaccines to be studied for at least two months (eight weeks) after the final dose. Millions of people have received COVID-19 vaccines, and no long-term side effects have been detected.

CDC continues to closely monitor the safety of COVID-19 vaccines. If scientists find a connection between a safety issue and a vaccine, FDA and the vaccine manufacturer will work toward an appropriate solution to address the specific safety concern (for example, a problem with a specific lot, a manufacturing issue, or the vaccine itself).

(PLRB 1).

13. On September 29, 2021, the following letter from the County was sent to County employees who the County believed had not complied with the Vaccine Policy based on County records:

Dear County Employee,

First, let me thank you for your service to Allegheny County and its residents during the last two years. Your efforts have been of the greatest importance in continuing to serve the public interest and helping to stop the spread of

COVID -19, both in the workforce and in the community.

If you have received this letter, it means that Allegheny County has not received proof that you have been vaccinated against COVID-19.

As you know, Allegheny County has enacted policies and practices designed to halt the spread of COVID- 19 and protect its employees. These policies and practices were informed by the best available data and public-health guidance, and included masking and social distancing at first, and more recently the requirement that all employees under the Executive branch be vaccinated or be required to undergo regular testing and continued masking and social distance measures.

Recently, the Delta variant has become the predominant variant in the United States and in Allegheny County. The Delta variant is more contagious than previously dominant variants and has led to a rapid rise in cases and hospitalizations in our area. The Centers for Disease Control and Prevention (CDC), the Pennsylvania Department of Health, and the Allegheny County Health Department have determined that the best way to slow the spread of COVID-19 and to prevent infection by the Delta variant or other variants is to be vaccinated.

Allegheny County considers the health and safety of its employees and members of the public with whom they interact to be of paramount importance and will again take action in light of the developments presented by the spread of the Delta variant.

On or before December 1, 2021, all Allegheny County employees under the Executive branch must have received their second dose of a two-dose COVID-19 vaccine or a one-dose vaccine, with exceptions only as required by law. Employees who fail to submit proof of completed vaccination by December 1, 2021 (without an approved accommodation) will be subject to termination of employment.

Please be advised that employees who have submitted proof of vaccination will be entitled to eighty(80) hours of paid leave for reasons related to COVID-1 9: 1) If an employee tests positive for COVID-19; 2) if an employee is

subject to a Federal, State, or local quarantine or isolation order related to COVID-19; or 3) If an employee has been advised by a health care provider to self-quarantine related to COVID-19 (with appropriate documentation provided by the employee) ,

I am enclosing a document with information about the vaccine to help address any concerns you might have, and to provide links to additional resources for your reference. If you have any unanswered questions about this announcement, please contact Human Resources at (412) 350-6830.

Sincerely,

Laura J. Zaspel Director

(2/23/22 N.T. 52-53; County Exhibit E).

14. Approximately 215 exemption requests to the Vaccine Policy were filed with the County. The vast majority were religious with the remaining being medical or a combination of religious and medical. The County reviewed the exemptions and the review was ongoing at the time of the 2/23/22 hearing. At the time of the 2/23/22 hearing, no religious exemptions had been granted and some employees with pending medical exemptions were still working subject to masking and weekly testing requirements. The County granted one or two medical exemptions. (2/23/22 N.T. 53-54, 87-90, 103-104; 3/22/22 N.T. 34).

15. On or about October 21, 2021, every County employee who had not yet complied with the Vaccine Policy received the following letter from the County:

October 21, 2021

Dear County Employee,

As of the date of this letter, Allegheny County has not received proof that you have been vaccinated against COVID-19. As a follow-up to the letter dated September 29, 2021, this is a reminder that on or before December 1, 2021, all Allegheny County employees under the Executive branch must have received their second dose of a two-dose COVID-19 vaccine or a one-dose vaccine, with exceptions only as provided by law. Employees who fail to submit proof of completed vaccination by December 1, 2021 (without an approved exemption or accommodation) will be subject to termination of employment.

If you plan on presenting sufficient vaccination documentation by December 1, 2021, for planning purposes you should know the following timeline:

- the two doses of the Moderna vaccine are to be administered four weeks (28 days) apart. Therefore, in order to complete the second dose by December 1st, you would need to receive the first dose by November 3rd •

- the two doses of the BIONTECH/Pfizer vaccine need to be administered three weeks (21 days) apart, so in order to complete the second dose of the Pfizer vaccine by December 15 the first dose must be taken by November 10th.

- the one dose Janssen/Johnson&Johnson vaccine would need to be taken by December 15th. This is the final reminder letter that you will receive about the December 1st deadline.

Enclosed is a document with information about the vaccine to help address any concerns you might have, and to provide links to additional resources for your reference, including information on where you can get a COVID-19 vaccination. If you have questions, you may contact Human Resources at (412) 350 -6830.

Sincerely,

Laura J. Zaspel

(2/23/22 N.T. 54-55; Union Exhibit 4, County Exhibit G).

16. ACPEIU and the County are subject to a collective bargaining agreement which terminates on December 30, 2023. This agreement is in the form of an interest arbitration award detailing the terms and conditions of employment between the parties. (11/19/21 N.T. 32-34).

17. A Corrections Officer's (CO) primary duties are the care, custody and control of the inmate population. The inmate population is very transitory. The County Jail processes around 30,000 inmates per year. COs primarily work in the Allegheny County jail but also transfer inmates to nearby hospitals. (11/19/21 N.T. 31-32, 2/23/22 N.T. 38, 174).

18. At the time of the November 19, 2022, hearing there were approximately 402 COs. At the time of the November 19, 2022, hearing approximately 60% of COs were fully vaccinated against COVID-19. (11/19/21 N.T. 34-37).

19. COs put in for religious and medical exemptions to the COVID-19 vaccination policy. No religious exemptions were granted by the County. (11/19/21 N.T. 50-51).

21. The Jail has provided vaccine availability for the COs to get vaccinated on paid time. The Jail sent COs to a vaccination site

(near the Jail or in the Jail) while they were on their shifts. (11/19/21 N.T. 52-53).

22. By the time of the hearing on February 22, 2022, 10 COs lost their jobs due to not complying with the County's vaccine mandate. Grievances were filed for the 10 COs terminated for failure to comply with the County's Vaccine Policy. (2/22/22 N.T. 14-16; Union Exhibit 85).

23. Since December 1, 2021, all COs employed by the County are fully vaccinated pursuant to the County's Vaccine Policy. (2/22/22 N.T. 14-15).

24. As of December 2, 2021, one COs had died due to COVID-19. No COs has died due to COVID-19 from December 12, 2021 to the date of the hearing on February 2, 2022. (2/22/22 N.T. 19-21; Union Exhibit 68, 69).

25. The President of ACPEIU, Brian Englert, felt lousy for a few days after receiving a COVID-19 vaccine dose and missed work with paid time off. (2/22/22 N.T. 33).

26. The Jail was forced to use lockdowns due to severe shortages of personnel due to COVID-19. (2/23/22 N.T. 181-182).

27. In April or May 2020, the Jail moved to a 12-hour shift rotation for COs due to the number of COs quarantined due to positive COVID-19 tests. The Jail did not have its total complement due to COVID-19 absences. The Jail normally runs a three-shift rotation. On the 12-hour rotation, COs would be on shift for four days for 12 hours. This continued for approximately 3 months in 2020. (2/23/22 N.T. 193-195).

28. The Jail reduced the total number of inmates at the Jail. When the COVID-19 pandemic started, the Jail had approximately 2,500 inmates. Due to COVID-19 and with the cooperation of the Courts, the Jail was able to reduce the number of inmates down to approximately 1,400 in 2020 which allowed the Jail to close housing units and reduce the number of COs needed. At the time of the 2/23/22 hearing, the inmate population was approximately 1,500. (2/23/22 N.T. 195-196, 207).

DISCUSSION

In its Amended Charge, the Union asserts that the County violated Section 1201(a) (1) and (5) of the Act when the County unilaterally implemented a Vaccine Policy which required employes including bargaining-unit member Corrections Officers to be fully vaccinated against COVID-19 by December 1, 2021, or be disqualified from employment with the County.

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 employee representative which is the exclusive representative of employees in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative." 43 P.S. § 1101.1201. In PLRB v. State College Area School District, 337 A.2d 262 (Pa. 1975), the Pennsylvania Supreme Court held as follows:

[W]hen an item of dispute is a matter of fundamental concern to the employees' interest in wages, hours, and other terms and conditions of employment, it is not removed as a matter subject to good faith bargaining under Section 701 simply because it may touch upon basic policy. It is the duty of the Board in the first instance and the Courts thereafter to determine whether the impact of the issue on the interest of the employee in wages, hours and terms and conditions of employment outweighs its probable effect on the basic policy of the system as a whole. If it is determined that the matter is one of inherent managerial policy but does affect wages, hours, and terms and conditions of employment, the public employer shall be required to meet and discuss such subject upon request by the public employees' representative pursuant to Section 702.

Id. at 268. 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). 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*.

Turning to this matter, it is clear that the County implemented the Vaccine Policy without bargaining. The record in this matter also supports the conclusion that the Vaccine Policy involves topics that are mandatory subjects of bargaining. In its Brief, ACPEIU argues that the Vaccine Policy covers topics that are mandatory subjects of bargaining and writes:

[T]he effects of the vaccine are primarily localized upon, and seen in, the officer employee. The officer receives the vaccination via needle injection, which is an invasive form of administering "officer safety and protection" to the employee. . . . The vaccine is a permanent addition to the officer's body which cannot be removed and reversed once administered - it cannot be "taken off" once the shift ends. The vaccine is unquestionably a medical treatment, which the County asserts is designed to protect the officer by reducing the risk of contagion, spread, symptomology, hospitalization and death

from COVID-19. To that end, the County mandate makes a blanket, uniform medical decision affecting the health and safety of all of its employees. . . .

[T]he vaccines are subject to ongoing safety surveillance by the CDC and FDA and their manufacturers, and are casually-linked by the CDC to several serious, life-threatening and debilitating side effects, including but not limited to myocarditis, pericarditis, thrombosis, and Guillain-Barre syndrome. Even if those risks are rare or minimal, they nevertheless exist And the Unions and employees have no certain idea if the County would be liable in any way for any adverse [side-effect] events which may occur post-vaccination, such as if an adverse event would qualify as "work-related" for disability pension; whether the employee insurances (health, life, short-term/long-term) would cover the adverse event; whether benefits such as Heart and Lung Act and Worker's Compensation Act would be payable, etc.

. . . .

[I]f the vaccine is refused by the employee, there is no progressive discipline and the officer loses all other terms and benefits of employment (unless otherwise stipulated in the CBA or pension plan). The County calls this "termination" in its mandate materials, but then backpedals and calls it "disqualification". However, prior to this mandate, [ACPEIU] members were [never] required to have a vaccination as a condition of employment [D]iscipline issued for such a new requirement is a new term of employment.

(ACPEIU Brief at 98-100).

I agree with ACPEIU that the County's Vaccine Policy touches fundamental concerns of the employee's terms and conditions of employment because it requires that employees must undergo one or two medical procedures which involve being injected with a needle with a vaccine that has demonstrable side effects. The record shows that mild side effects are common and severe side effects are extremely rare. Side effects do exist however, and such side effects may impact the health and safety of bargaining unit members and other terms and conditions of employment such as sick leave, health insurance and pensions.

I do not agree with ACPEIU, however, that the Vaccine Policy is a new form of discipline and thus a term and condition of employment in that sense. The Board has held that where the discipline for violating new work rules is already subsumed within the existing collective bargaining agreement, there is no new discipline but there is a severable impact on employees that has to be bargained. State College &

University Professional Association, PSEA/NEA v. Pennsylvania State System of Higher Education (PASSHE), 48 PPER 88 (Final Order, 2017); Fraternal Order of Police Lodge 5 v. City of Philadelphia, 50 PPER ¶ 36 (Proposed Decision and Order, 2018). The record in this matter shows that ACPEIU has not demanded impact bargaining on this issue. ACPEIU has filed grievances for the discipline imposed on the ten bargaining unit members who were dismissed for failing to comply with the Vaccine Policy.

Moving to the analysis of the County's reasons for implementing the Vaccine Policy, the justifications for the County's policy are contained in the press release which announced it. The press release states in relevant part:

The measure is being taken to promote the health and safety of the county workforce, and to ensure the continued protection of the public with whom the workforce interacts and communities they serve.

. . . .

From the beginning of the pandemic, the county has worked to halt the spread of coronavirus disease and, most recently, the Delta variant. It has relied on the best available data and science-based public health measures. The Delta variant, currently the predominant variant of the virus in the United States, is highly contagious and has led to a rapid rise in cases and hospitalizations.

That continues to be the case locally as well. In the past few days, new daily cases of COVID have numbered in the 400s for county residents. To date, there have been 120,573 cases, 8,126 hospitalizations and 2,160 deaths.

. . . .

The health and safety of the county workforce, and the health and safety of the members of the public with whom they interact, are integral parts of the services provided to residents. To ensure that the county can continue to meet the needs of residents and provide critical services, county employees must take all available steps to protect themselves and avoid spreading COVID-19 to their co-workers and members of the public.

(Finding of Fact # 8). The reasons put forth in this press release were fully supported by the testimony of County witnesses throughout the record. Importantly, County witnesses credibly testified at 2/23/22 N.T. 35-39 and 2/23/22 N.T. 181-195 on the impact of COVID-19 on staffing critical County programs including the Jail.

The record shows that, due to staff shortages from COVID-19, the Jail was forced to go into lockdown multiple times. The record shows that, due to staff shortages from COVID-19, the Jail moved to 12-hour shifts as opposed to its normal three shift rotation. The record also

shows that the Jail, in response to staff shortages due to COVID-19, worked with various other County departments to drastically reduce the number of inmates in the Jail in order to close housing units and reduce the number of COs needed.

Based on the record as a whole, I find that the County has identified two conceptually distinct inherent managerial policies for adopting its Vaccine Policy. These inherent managerial policies are 1) protecting the health and safety of the members of the public and 2) ensuring that the County can continue to provide critical services by making sure it has adequate staffing. The health and safety of the bargaining unit members, mentioned often by the County as one of its inherent managerial policies, is manifestly a subject related to the working conditions of the bargaining member employees.¹

With respect to protecting the health of County citizens, the basis for the County's actions is plain. COVID-19 is a communicable disease and lessening the spread of COVID-19 through the partial protection of the vaccines protects the health of the citizens of the County. The County, relying on its own Department of Health, the Commonwealth's Department of Health, and the CDC, determined that making sure its employees were vaccinated would be a proper response to the ongoing COVID-19 pandemic afflicting its citizens. It is also clear from the record that the Vaccine Policy would likely have its intended effect as employees in the County, and especially the Corrections Officers in this matter, often interact with the public and may sometimes be in situations where alternative COVID-19 mitigation methods such as working from home, social-distancing, and masking are not available or effective. Following Borough of Ellwood City, 606 Pa. 356 (2010), I find that this is a permissible managerial responsibility as the concerns of the County are far wider in scope than the isolated context of a bargaining unit member's working conditions. In Ellwood City, the Supreme Court held that collective bargaining rights under Act 111 did not interfere with the employer's authority to pass local legislation protecting the health, safety, and general welfare of its citizens, to the extent the ordinance banned tobacco use in public places including the use of tobacco by bargaining unit members in public spaces. I find the demonstrated threat of COVID-19 in this case to be analogous to the threat of public smoking. Like the threat to public health created by the toxic and carcinogenic air created by smoking, COVID-19's threat to health is partially expressed in the sharing of breathed air among people in public spaces. The Vaccine Policy is a direct response to the threat of COVID-19 transmission through public spaces as the vaccines frustrates the spread of the disease and thus, I find, fits into the holding of Ellwood City as the

¹ The County also argues that the Pennsylvania Disease Prevention and Control Law of 1955 (35 P.S. Section 521.1 *et seq.*) authorizes municipal authorities to enact regulations and rules relating to disease prevention and control such as mandating vaccines. I do not find this law to, by itself, remove the subject of vaccination from collective bargaining as the law was passed in 1955, well before the passage of PERA. PERA therefore controls the determination of whether a topic is bargainable.

Vaccine Policy is aimed at a public evil which threatened all County citizens in public spaces.

The County has also shown its Vaccine Policy is aimed at ensuring that the County can continue to provide critical services by making sure it has adequate staffing. The County needs healthy employees showing up to work to maintain the effectiveness of its vital programs, including the County Jail. The record shows that the County relied on information from various governmental health agencies to determine that COVID-19 vaccines would help to lessen the spread and severity of COVID-19 and thus help to bolster the health of its employees and improve the standards of services provided by the County and effectiveness of its programs including the County Jail by making sure employees were available to work. The more COVID-19 spreads, the more County services are negatively impacted. The worse the symptoms of COVID-19 are for those employees who contract it, the more County services are negatively impacted. The Board has found that a public employer's decision which involves maintaining the necessary standards of services and effectiveness of its operation is clearly a management prerogative. Fraternal Order of Transit Police v. SEPTA, 36 PPER 115 (Final Order, 2005); Easton Area Education Association v. Easton Area School District, 32 PPER ¶ 32163 (Final Order, 2001); American Federation of State, County and Municipal Employees, District Council 89 v. Lebanon County, PERA-C-20-104-E, ___ PPER ___ (Final Order, 2022).

Moving forward with the analysis, I have determined that the Vaccine Policy touches topics that are terms and conditions of employment. I have also determined that the Vaccine Policy is an exercise of the County's inherent managerial policies. I must now determine whether the interests of employees in this matter outweigh the interests of the employer.

Based on this record, the impact of the Vaccine Policy on the terms and conditions of employment does not outweigh the impact of the Vaccine Policy on the inherent managerial policies of the County. Importantly, if the issues covered by the Vaccine Policy were determined to be mandatory subjects of bargaining, collective bargaining over the Vaccine Policy would clash with the County's policy of ensuring that all employees were vaccinated by December 1, 2021. In choosing December 1, 2021, the County was relying on information from government health agencies about the coming waves of COVID-19 infections over the winter of 2021-2022. The record shows that the County wanted its employees to be vaccinated by December 1, 2021, to ameliorate the negative effects of the imminent waves of COVID-19 infections. To subject the Vaccine Policy to collective bargaining would likely completely frustrate the timing of the Vaccine Policy. If the deadline to comply with the Vaccine Policy were delayed, I infer from the record that it would have been likely that some County employees, including Corrections Officers, would not have been vaccinated by December 1, 2021, which would have frustrated the County's interest in protecting the health of its citizens and maintaining critical staffing and its standards of operation through a predicted and realized surge in COVID-19.

Furthermore, as discussed above, the record shows that the impact of COVID-19 on the health of the County's citizens and on the staffing

of the County Jail was a real, concrete issue and not merely conjectural. Due to staff shortages from COVID-19, the Jail implemented lockdowns, completely changed the CO's schedule to 12-hour shifts, and reduced the number of inmates by about 1000. In comparison, ACPEIU has not demonstrated comparable substantial health impacts on bargaining unit members from a vaccine based on legally credible evidence. I do not credit the testimony of ACPEIU President Englert on 2/22/22 N.T. 33 where he describes the alleged side effects suffered by bargaining unit members who did not testify. This is inadmissible hearsay. I do credit his testimony that, after he got a COVID-19 vaccine, he felt lousy for two days and had to use sick time. I do also take note of the CDC guidance distributed by the County to its employes and put forth above in Finding of Fact # 12, which states that mild side effects from the vaccine are common and severe side effects are extremely rare. From this record, it is clear that the impact of the Vaccine Policy on the interests of the employes in wages, hours and terms and conditions of employment does not outweigh the interests of Allegheny County.

My opinion in this matter is in accord with persuasive authority from a neighboring jurisdiction. In Matter of City of Newark, 469 N.J. Super. 366 (Superior Court, Appellate Division, 2021), a New Jersey appellate court held that the City of Newark had a non-negotiable managerial prerogative to immediately implement its COVID-19 vaccination mandate. The vaccine policy in this City of Newark case was similar to the Vaccine Policy in this matter in that public employes would be terminated if they did not comply. In weighing whether bargaining would interfere with a managerial prerogative, the Court in City of Newark held:

In the context of a public health emergency, negotiating procedures for the implementation of a COVID-19 vaccination mandate, or the enforcement or timing of the mandate, would interfere with the managerial prerogative. COVID-19 has created an immediate and ongoing public health emergency that requires swift action to protect not only the City's employees, but the public they are hired to serve. Tens of thousands of people are sickened each day in our country. Hundreds are dying each day. Delaying, even on a temporary basis, the timelines for implementing the vaccination mandate undercuts the effectiveness of the mandate.

City of Newark, at 385-386 (footnotes omitted).

In its Brief, the Union argues that the County's managerial responsibility would not be infringed by bargaining over the Vaccine Policy because the Vaccine Policy was not an effective policy. The Union argues: "[V]accinated employees who remained on the job [after the December 1, 2021 deadline] nevertheless contracted COVID; were considered a factor in risk of spread; required quarantine and perhaps forms of treatment; received payments of COVID-paid leave, and contributed to increased overtime, lack of manpower, and increased risk to public safety." (Union's Brief at 108-109.) The Union's argument

is, in part, that the Vaccine Policy is not effective therefore the impact on the bargaining unit members outweighs any impact on the County's policies. However, it is not my place, nor the Board's, to judge the wisdom of a public employer's actions and it is not the burden of the County in this case to show the wisdom of its exercise of managerial policy to the satisfaction of the Union. Reading Fraternal Order of Police, Lodge #9 v. City of Reading, 30 PPER ¶ 30121 (Final Order, 1999); Correctional Institution Vocational Education Association PSEA/NEA v. Commonwealth of Pennsylvania Department of Corrections, et al, 37 PPER ¶ 118 (Final Order, 2006) (The Board will not delve into the wisdom of an employer policy, once the Board has determined that the issue at hand is one of managerial prerogative).

The record in this case shows that the interests the County has in its Vaccine Policy outweighs the interests of the Corrections Officers. ACPEIU has not shown that the County committed an unfair practice when it implemented its Vaccine Policy without bargaining.

CONCLUSIONS

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

1. Allegheny County is a public employer within the meaning of Section 301(1) of PERA.
2. ACPEIU is an employe organization within the meaning of Section 301(3) of PERA.
3. The Board has jurisdiction over the parties hereto.
4. Allegheny 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
sixteenth day of September, 2022.

PENNSYLVANIA LABOR RELATIONS BOARD

/s/ Stephen A. Helmerich
STEPHEN A. HELMERICH, Hearing Examiner