

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

ALLEGHENY COUNTY POLICE ASSOCIATION :  
v. : Case No. PF-C-21-83-W  
ALLEGHENY COUNTY :

**PROPOSED DECISION AND ORDER**

On September 30, 2021, Allegheny County Police Association (ACPA or Union) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) against Allegheny County (County or Employer) alleging that the County violated Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA), as read *in pari materia* with Act 111, when on September 29, 2021, the County announced a COVID-19 Vaccine Policy (Vaccine Policy) which required all bargaining-unit member Police Officers to be fully vaccinated against COVID-19 by December 1, 2021, or be disqualified from employment with the County.

On October 20, 2021, the Secretary 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 26, 2022, in Pittsburgh, as the time and place of hearing, if necessary.

The January 26, 2022, hearing date was continued. The first day of hearing was held on February 22, 2022, via Microsoft TEAMS, 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, also via Microsoft TEAMS. ACPA submitted a post-hearing brief on June 6, 2022. The County submitted a post-hearing brief on August 5, 2022.

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

**FINDINGS OF FACT**

1. The County is a public employer and political subdivision under Act 111 as read *in pari materia* with the PLRA. (N.T. 6-7).
2. The Union is a labor organization under Act 111 as read *in pari materia* with the PLRA. (N.T. 6-7).
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 employees and the public safe. The County believed that County employees (and especially those employees with the County Police) deal directly with the public. The County believed that the best way to keep employees 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. (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 ACPA. Rich Fitzgerald, the County Executive, called every union representative,

including ACPA, before September 29, 2021, to let the unions know that he was going to issue the County Vaccine Policy. (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 employe:

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.

. . . .

#### 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 employes 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-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) ,

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 15<sup>th</sup>. 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. The County Police Department is primarily an assisting agency. The Police Department has a general investigative unit which provides detective services for approximately 100 municipal police departments in Allegheny County. The County Police also perform similar functions as a regular police force. Uniformed Police Officers have a large presence in the Pittsburgh International Airport. Uniformed Police Officers are also present in the North Park and South Park districts. County Police Officers also enter homes regularly and respond to mass protests. (2/22/22 N.T. 80-83, 147-151).

17. There are two divisions in the Police Department. There is a Patrol Division and a Detective Division. The Patrol Division covers Pittsburgh International Airport. That is the largest section with over 80 Police Officers assigned and 10 supervisors. At the Airport, the Police Department provide traditional police and security functions and have daylight and overnight shifts. There is a total of 36 Police Officers assigned to the parks along with seven sergeants and two lieutenants. There is also a Detective Division in the Police Department divided into Investigations, Homicide and Narcotics. Detectives often respond to crime scenes, work with other municipal police and County employees, and interview witnesses. (2/23/22 N.T. 124-129).

18. ACPA and the County are subject to a collective bargaining agreement. The last such agreement was an interest arbitration award with the effective dates of January 1, 2019, to December 31, 2022. (2/22/22 N.T. 84-85; Union Exhibit 71).

19. The concerns ACPA had about the Vaccine Policy included unit members losing their jobs and side effects. With respect to losing their jobs, ACPA was concerned about the impact of the termination on wages and benefits. ACPA was also concerned of the effect of the termination for unit members with respect to being hired as police officers again by some other police force. ACPA was concerned about how the termination was reported as insubordination to the Pennsylvania State Police repository pursuant to Act 57 of 2020. ACPA was also concerned that the discipline with respect to the County Vaccine Policy was not progressive. ACPA was also concerned about the availability of medical and religious exemptions. (2/22/22 N.T. 113-115, 128, 173-179, 188-193, 199-200).

20. The Police Department has approximately 217 employees. Of that number, two Police Officers did not comply with the County Vaccine Policy by December 1, 2021. Two more Police Officers were terminated after December 1, 2021, after their medical exemption requests were denied. (2/22/22 N.T. 104, 2/23/22 N.T. 123-124).

21. Prior to the promulgation of the Vaccine Policy, approximately 70 percent of the Police Officers had been vaccinated for COVID-19. (2/23/22 N.T. 131).

22. For the Police Department, social-distancing was not always available as a mitigation for COVID-19. Moreover, the mask mandate was not always effective since Police Officers sometimes get into physical altercations which removed masks. (2/23/22 N.T. 132-134).

23. COVID-19 impacted the functions of the Police Department by negatively effecting manpower. In the early parts of the pandemic, the Police Department was forced due to manpower concerns to put detectives into uniformed police work at the Airport. Prior to the Vaccine Policy, the Police Department had problems with staffing and overtime due to employes being off of work for COVID-19 related reasons. (2/23/22 N.T. 133-135, 154).

24. ACPA filed four grievances with respect to the bargaining unit members who were dismissed for failure to comply with the Vaccine Policy. These grievances allege the County violated the applicable disciplinary sections of the parties' CBA. (Union Exhibit 85).

25. When the Superintendent for the Police made an Act 57 notification to the Pennsylvania State Police for the terminated Police Officers, he noted that the separation was due to being "disqualified due to vaccine mandate". (2/23/22 N.T. 137-138).

26. In 2020, the Police Department had 12 employes miss time due to positive test results, 30 missed time due to exposure to COVID-19, and 13 missed time due to COVID-like symptoms. Between January and May 2021, the Police Department had 10 employes miss time due to positive test results, 20 missed time due to exposure to COVID-19, and 1 missed time due to COVID-like symptoms. There were no positive cases from May 2021 to July 2021. Then from July 2021 to December 2021, the Police Department had 40 employes miss time due to positive test results, 3 missed time due to exposure to COVID-19, and 6 missed time due to COVID-like symptoms. (2/23/22 N.T. 140-142).

27. After vaccines became available and the majority of the Police Department was vaccinated, the Police Department saw a sharp reduction in the number of employes who missed time from exposure to COVID-19 due to the change in rules relating to quarantines for vaccinated people. (2/23/22 N.T. 143, 156-157).

## **DISCUSSION**

In its charge, ACPA alleges that the County violated Section 6(1)(a) and (e) of the PLRA as read with Act 111 when it unilaterally imposed the Vaccine Policy without bargaining. ACPA alleges that the Vaccine Policy covers topics which are mandatory subjects of bargaining.

Section 7(a) of the PLRA mandates bargaining between an employer and a union over wages, hours, and other conditions of employment:

Representatives designated or selected for the purposes of collective bargaining by the majority of employes in a unit appropriate for such purposes, shall be the exclusive representatives of all the employes in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employe or a group of employes shall have the right at any time to present grievances to their employer.

43 P.S. § 211.7(a).

Act 111 provides:

§ 217.1. Right to bargain. Policemen or firemen 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 of their grievances or disputes in accordance with the terms of this act.

43 P.S. § 217.1.

Under the PLRA, an employer commits an unfair labor practice if it refuses to collectively bargain with a union representing its employees over mandatory topics. Specifically, Section 6(1) (a) and (e) of the PLRA provide:

(1) It 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(1) (a) and (e). Therefore, an employer's unilateral change of a term and condition of employment, without first negotiating with the union, interferes with the employes' collective bargaining rights and constitutes an unfair labor practice under the PLRA and Act 111.

Whether a topic constitutes a mandatory subject of bargaining is an important threshold determination. Act 111 states that terms and conditions of employment include compensation, hours, working conditions, retirement, pensions and other benefits. Act 111 does not define working conditions. The Supreme Court of Pennsylvania, in Borough of Ellwood City v. PLRB, 606 Pa. 356 (2010), defined working conditions as those matters that bear a rational relationship to the employes duties, or, in other words, are germane to the working environment.

While Act 111 requires bargaining over working conditions it is silent as to any limitation on bargaining over topics that constitute managerial prerogatives. However, Pennsylvania Courts have determined that, under Act 111, managerial prerogatives are not subject to collective bargaining. Ellwood City, 606 Pa. 356, 373-75. In City of Philadelphia, the Pennsylvania Supreme Court held that "matters of managerial decision making that are fundamental to public policy or to the public enterprise's direction and functioning do not fall within the scope of bargainable matters under Section 1 [of Act 111.] Such managerial prerogatives include the standards of service, overall budget, use of technology, organizational structure, and the selection and direction of personnel." City of Philadelphia v. Int'l Ass'n of Firefighters, Loc. 22, 606 Pa. 447, 471-72 (2010).

For cases where it appears that a topic may touch on some term and condition of employment and also on some managerial prerogative, the Supreme Court has provided a test for determining if the topic constitutes a

managerial prerogative or a mandatory subject of bargaining for Act 111 bargaining units. The Supreme Court held as follows:

Consistent with the history of Act 111, as well as the above-stated policy concerns, when addressing topics which straddle the boundary between ostensibly mandatory subjects of bargaining and managerial prerogatives, we believe once it is determined that . . . the topic is rationally related to the terms and conditions of employment, i.e., germane to the work environment, the proper approach is to inquire 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.

Ellwood City, 606 Pa. 356, 375 (footnotes omitted).

Turning to this matter, it is uncontested that the Vaccine Policy was implemented without bargaining. The initial analysis will be to determine if the County's Vaccine Policy is related to working conditions under Act 111. A working condition bears a rational relationship to an employes duties, or, in other words, is germane to the working environment. Ellwood City, 606 Pa. 356.

In its Brief, ACPA 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, [ACPA] 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.

(ACPA Brief at 99-100).

I agree with ACPA that the County's Vaccine Policy touches topics that are working conditions 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, insurance and pensions.

I do not agree with ACPA, 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 ACPA has not demanded impact bargaining on this issue. ACPA has filed grievances for the discipline imposed on the four 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. 153-154 on the impact of COVID-19 on staffing critical County programs.

The record also shows that in 2020, the Police Department had many employees miss time due to COVID-19. The Police Department experienced the problem of employees missing time through May, 2021. There was a lull in missed work due to COVID-19 until July, 2021. Then, from July, 2021, through December, 2021, the Police Department again saw many employees miss work due to COVID-19.

Based on the record as a whole, I find that the County has identified two conceptually distinct managerial responsibilities for adopting its Vaccine Policy. These managerial responsibilities 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 managerial responsibilities, is manifestly a subject related to the working conditions of the bargaining member employees.<sup>1</sup>

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

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<sup>1</sup> 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 Act 111. Act 111 (as read with the PLRA) therefore controls the determination of whether a topic is bargainable.

County Police 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 Ellwood City, 606 Pa. 356, 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 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 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 Police Department. 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 Police 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 germane to the work environment and therefore implicate working conditions. I have determined that the Vaccine Policy is an exercise of the County's essential managerial responsibilities. I must now determine if collective bargaining over the Vaccine Policy would unduly infringe upon said essential managerial responsibilities.

Based on this record, it is clear that collective bargaining over the Vaccine Policy would unduly infringe on 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 County Police, 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.

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 employees 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).

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 Police Department was a real, concrete issue and not conjectural. In comparison, ACPA has not demonstrated comparable substantial health impacts on specific bargaining unit members from the vaccine based on legally credible evidence. I do not credit the testimony of ACPA President Scanlon on 2/22/22 N.T. 127 where he describes the alleged side effects suffered by bargaining unit members who did not testify and the recommendations from doctors who also did not testify. This is inadmissible hearsay. However, I do take note of the CDC guidance distributed by the County to its employees 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. Furthermore, I note that on this record no actual impact of side effects on topics such as health insurance and pensions was shown. These impacts also remain conjectural.

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 109.) The Union's argument is, in part, that the vaccines were not effective therefore there can be no undue infringement on the County's managerial responsibility by

bargaining over the Vaccine Policy. 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 bargaining over the Vaccine Policy would unduly infringe on the County's managerial responsibilities. Therefore, the Vaccine Policy is a proper exercise of a managerial prerogative. ACPA has not shown that the County committed an unfair labor 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 as follows:

1. The County is a public employer and political subdivision under Act 111 as read *in pari materia* with the PLRA.
2. ACPA 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 County has not committed an unfair labor practice in violation of Section 6(1)(a) and (e) of the PLRA and Act 111.

#### **ORDER**

In view of the foregoing and in order to effectuate the policies of the PLRA and Act 111, 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 seventh day of September, 2022.

PENNSYLVANIA LABOR RELATIONS BOARD

/s/ Stephen A. Helmerich

STEPHEN A. HELMERICH, Hearing Examiner