COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FAIRVIEW TOWNSHIP POLICE ASSOCIATION	:	
v.	:	Case No. PF-C-99-34-E
FAIRVIEW TOWNSHIP	:	

FINAL ORDER

On October 20, 1999, Fairview Township (Township) filed timely exceptions and a brief in support of exceptions to a proposed decision and order (PDO) issued on September 30, 1999. In the PDO, the hearing examiner concluded that the Township violated Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA) and Act 111 by unilaterally changing its policy regarding the retention of disciplinary records of its police officers. Thus, the hearing examiner directed the Township to rescind the policy and restore the status quo ante. On October 29, 1999, the Fairview Township Police Association (Association) filed a brief in opposition to the Township's exceptions.

After a thorough review of the exceptions and all matters of record, the Board makes the following:

AMENDED FINDING OF FACT

3. Prior to September 4, 1996, the police department's policy was to maintain records of all disciplinary actions for a period of two years. (N.T. 41-42; Association Exhibit 1). However, this policy was not necessarily followed in practice and the former police chief would keep all records, disciplinary or otherwise, in an officer's file indefinitely, with the exception of those records he would expunge in his discretion. (N.T. 24).

DISCUSSION

Prior to September 4, 1996, the Township's police depar tment had a policy of maintaining records of all disciplinary actions for a period of two years. However, this policy was not necessarily followed in practice and the former police chief would keep all records, disciplinary or otherwise, in an officer's file indefinitely, with the exception of those records he would delete in his discretion. On September 4, 1996, the department modified the policy to provide that records of disciplinary actions will be kept on file for differing periods of time in accordance with the type of discipline imposed: (1) oral reprimands will be kept on file for a period of six months; (2) written reprimands will be kept on file for a period of one year; (3) suspensions will be kept on file for a period of eighteen months. The policy further noted that "the above listed time lengths are EFFECTIVE IMMEDIATELY and shall supersede any previously indicated time constraints which may appear on any disciplinary action the officer(s) may currently have. Should a situation occur however, whereby the officer(s) becomes involved in a situation which results in additional or subsequent and perhaps a 'heightened' level of disciplinary action being

taken, a previously documented disciplinary action may have to be kept on a file to possibly show a course of conduct. This type of situation will be handled on a case-by-case basis." (Association Exhibit 1). No bargaining occurred over the implementation of the September 4, 1996, changes regarding retention of disciplinary records.

The policy set forth in the September 4, 1996, memo was utilized in subsequent disciplinary actions. Specifically, a written reprimand issued to an officer in May 1997, provided that: "A copy of this reprimand shall be placed in your personnel file for a period of one (1) year at which time, baring any further such violations which may or may not indicate a possible continuing course of conduct, it will be purged." (Association Exhibit 2). A subsequent September 8, 1998, written reprimand contained identical language. In February or March 1999, the Township unilaterally set forth a new policy for retention of disciplinary records. Under the new disciplinary records policy, records of disciplinary actions would remain in the officers' file permanently. The new policy provides in part as follows:

> It is the policy of the Fairview Township Police Department that all records of disciplinary actions will be permanently retained in each employee's or member's personnel file. All disciplinary records will be considered in imposing sanctions for infractions of department Rules and Regulations, Policies, Procedures, Orders or Directives, or any other Inappropriate Conduct. These disciplinary records will also be utilized in possible promotional considerations.

(Association Exhibit 4). The 1999 disciplinary retention records policy was not bargained with the Association. The charge was filed regarding the 1999 changes to the disciplinary policy.

The Township has filed four separately enumerated exceptions to the PDO. In its first two exceptions, the Township contends that the disciplinary records policy has no relationship to the duties of its police officers. The Township further contends that its policy has no effect on the officers' terms and conditions of employment such as compensation, hours, working conditions, retirement, pension or other benefits, which Commonwealth Court has described as a limited category of issues subject to mandatory bargaining under Act 111. Frackville Borough Police Dep't v. PLRB, 701 A.2d 632 (Pa. Cmwlth. 1997), appeal denied, 551 Pa. 706, 712 A.2d 287 (1998). The Township asserts that the policy at issue here has less of an effect on employe duties than the implementation of such things as a first responder program, City of Philadelphia v. PLRB, 588 A.2d 67 (Pa. Cmwlth. 1987), a performance standard, Delaware County Lodge No. 27, Fraternal Order of Police v. PLRB, 722 A.2d 1118 (Pa. Cmwlth. 1998), or even a physical examination, City of Sharon v. Rose of Sharon Lodge No. 3, 315 A.2d 355 (Pa. Cmwlth. 1973), all of which are matters considered to be managerial prerogative. Moreover, the Township argues the hearing examiner never looked at management's interests behind the policy, which include treating officers in a fair and equal manner, conforming the retention of disciplinary records to the retention of other employe records such as commendations, which are maintained indefinitely, and measuring and evaluating employe performance. Thus, the Township claims the hearing examiner erred by concluding that the Township was obligated to bargain over the implementation of the policy.

Under Act 111, police officers employed by a political subdivision of the Commonwealth have the right, through their designated representatives, to collectively bargain with their public employers concerning the "terms and conditions of their employment, including compensation, hours, working conditions, retirement, pensions and other benefits." Section 1 of Act 111, 43 P.S. § 217.1. In order to determine whether a particular subject is mandatorily bargainable for an Act 111 employer, the Board must inquire into whether the subject "'bears a rational relationship to employees' duties.'" City of Clairton v. PLRB, 528 A.2d 1048, 1049-50 (Pa. Cmwlth. 1987). In applying the rational relationship test, the public employer's managerial objectives must also be considered. Delaware County. Where a managerial policy concern substantially outweighs any impact the change will have on employes, the change is a non-bargainable managerial prerogative. Township of Upper Saucon v. PLRB, 620 A.2d 71 (Pa. Cmwlth. 1993).

Under the Township's new policy, officers' disciplinary records will be retained permanently, will be used in considering future discipline and will be utilized in promotional considerations. (FF 8). Thus, the Township's new policy regarding the retention of disciplinary records contains elements of discipline and promotion. Matters of employe discipline and disciplinary procedures in both the public and private sector are generally regarded as mandatory subjects of bargaining. Commonwealth of Pennsylvania (Governor Dick Thornburgh), 13 PPER ¶ 13097 (Final Order, 1982), *aff'd sub nom.*, AFSCME v. PLRB (*Code of Conduct*), 479 A.2d 683 (Pa. Cmwlth. 1984); Cambria County Transit Authority, 21 PPER ¶ 21007 (Final Order, 1989); Electri-Flex Co. v. NLRB, 570 F.2d 1327 (7th Cir. 1978) (employer violated its bargaining obligation by implementing a new system of discipline that significantly changed employe working conditions). Moreover, changes in promotional procedures, as opposed to changes in the qualifications for promotion, have been held to constitute mandatory subjects of bargaining. Salisbury Township, 25 PPER ¶ 25041 (Final Order, 1994); Capitol Area Transit, 24 PPER ¶ 24088 (Proposed Decision and Order), 24 PPER ¶ 24113 (Final Order, 1993); *cf*. City of Sharon, 29 PPER ¶ 29147 (Final Order, 1998), *aff'd*, 729 A.2d 1278 (Pa. Cmwlth. 1999).

The hearing examiner determined that the change in the retention of disciplinary records is mandatorily bargainable because it involves a more stringent disciplinary procedure that also specifically incorporates the promotional process, thereby impacting officers' potential for job advancement. It is difficult to perceive a greater "term or condition employment" for employes under Section 1 of Act 111 than the terms and conditions of discipline imposed by the public employer. After a thorough review of the record, the Board concludes that the hearing examiner's decision is supported by substantial evidence and the PDO will not be reversed.

The Township contends that its interests outweigh the interests of employes and therefore the hearing examiner erred as a matter of law. However, the Township has failed to set forth any interest that can reasonably be found to outweigh the employes' interest in job security. There can be no more fundamental concern to employes than job security. School Dist. of the City of Erie, 10 PPER ¶ 10112 (Court of Common Pleas of Erie County, 1979). By unilaterally deciding to retain disciplinary records and use those records in future disciplinary and promotional decisions, the Township has in effect increased the likelihood that an

employe will be more severely disciplined or denied a promotion based on an infraction that would have been expunged under the former policy. The Board has held that changes in an employer's policy that substantially increase the severity of discipline are mandatorily bargainable. Pennsylvania Dep't of Transportation, 18 PPER ¶ 18009 (Final Order, 1986).

Although the Township's new policy does further the Township's interest in conforming its retention of disciplinary records with its retention of other employe records such as commendations, that interest can hardly be said to outweigh the interest of officers in retaining their jobs. Further, the Township's alleged interest in treating officers more fairly and equally through the retention of disciplinary records is certainly not a matter that goes to the core of providing an efficient system of law enforcement and ensuring the safety of the public - matters traditionally considered to strike at the basic mission of a police department. City of Philadelphia, 28 PPER ¶ 28109 (Proposed Decision and Order, 1997), *aff'd*, 29 PPER ¶ 29000 (Final Order, 1997), *aff'd sub nom.*, FOP v. PLRB, 727 A.2d 1187 (Pa. Cmwlth. 1998). Fairness and equality of treatment of employes through record retention is more akin to a working condition in which the employes have an overriding interest.

The Township's position negates the underlying statutory purpose of Act 111 to encourage discussion between the public employer and its police employes to address employe concerns over fairness and equality in the employment relationship. Far from negatively impacting the fairness and equality of the employment relationship, the bargaining process serves those ends by including employes in the establishment of policies that directly impact them. It must be noted that such bargaining does not limit the employer's discretion to discipline employes with its managerial authority. Indeed, although an employer maintains the statutory right to enforce reasonable rules for the conduct of its business, which includes the right to discipline employes for violating the rules or for inefficient production, the institution of a new system of discipline, or a significant change from the previously existing system, is included within employe "terms and conditions of employment" considered subject to mandatory bargaining. Electri-Flex, 570 F.2d at 1333. Bargaining over the change here would address the procedural and impact aspects of discipline so that employes are fairly and equitably apprised of the disciplinary consequences of their actions. Based on the record in this case, the Board must dismiss the Township's first two exceptions.

In its third exception, the Township excepts to the failure of the hearing examiner to conclude that the policy change was within its contractual rights. The Township contends that the plain language of Section 19.00 of their collective bargaining agreement clearly and unambiguously vests the Township with the right to make managerial decisions such as the issuance of the policy here. Section 19.00 provides:

> **Section 19.00 Control.** It is specifically understood and agreed that Township shall have the exclusive right to supervise, manage and control the operation of its Police Protection Program. Township shall not exercise any rights in violation of this Agreement. Township specifically retains the right to exercise all powers and rights granted or not denied to Township under the laws of Pennsylvania or the United States.

> Township specifically retains the right, but not the obligation, to publish a Township manual from time to time and to enforce the material terms (including work rules) therein set forth, to the extent not inconsistent with this Agreement. Township specifically may adopt and enforce such reasonable rules and regulations which are not inconsistent with this Agreement, as it may deem necessary and proper regarding the management of the affairs of its Police Protection Program.

(Employer Exhibit 1 at 25).

Contrary to the Township's arguments, however, Section 19.00 does not authorize the Township to unilaterally implement the policy at issue. The Township is arguing that Section 19.00 shows that the parties have agreed to vest the Township with the right to make policy changes regarding disciplinary matters without bargaining. The Township's argument then is a waiver argument based on what is commonly referred to as a management rights or zipper clause. The law is clear that a "waiver of bargaining rights will not be lightly inferred." Crawford County v. PLRB, 659 A.2d 1078, 1082 (Pa. Cmwlth. 1995). In order to find a waiver of bargaining rights, the language relied upon must show a clear and unmistakable waiver. Township of Upper Saucon v. PLRB, 620 A.2d 71 (Pa. Cmwlth. 1993). As the hearing examiner recognized, there is simply no evidence of record that the Association waived its right to bargain over a retention of records policy that implicates the disciplinary and promotional processes.

The only portion of Section 19.00 of the agreement that could possibly support waiver here is the language in the second paragraph regarding the right of the Township to publish a manual of rules and regulations (including work rules). However, the Township's own witness, Chief Bistline, testified that the department has both policies and a separate manual of rules and regulations and he delineated the differences between the two. (N.T. 42-43). As the Association points out, Section 19.00 only refers to the manual of rules and regulations and does not refer to the implementation of specific policies regarding the retention and use of disciplinary records. Thus, Section 19.00 does not provide clear and unmistakable language that supports a waiver of the right to bargain over policies considered mandatorily bargainable under Act 111. The Township's third exception must therefore be dismissed.

Finally, the Township contends that the hearing examiner should have found that the parties through past practice have interpreted their collective bargaining agreement to allow the Township to make such policy changes without bargaining. The Township argues that the hearing examiner erred by holding that the Association did not waive their right to bargain over the policy change. The Township asserts that it is not arguing waiver but is instead arguing that the past actions of the parties should have been reviewed in order to interpret their collective bargaining agreement. The Township claims the parties' past actions show that their intent was to allow the Township to change managerial items without bargaining.

The Township's arguments are without merit. First, it is not the role of the Board's hearing examiner to interpret the parties' collective bargaining agreement, a role typically reserved for an arbitrator pursuant to the parties' contractually agreed to grievance procedure. Parents Union for Public Schools in Philadelphia v. Board of Education of the School

District of Philadelphia, 480 Pa. 194, 389 A.2d 577 (1978); Port Authority of Allegheny County, 27 PPER ¶ 27184 (Final Order, 1996). The cases cited by the Township in urging the Board to interpret the parties' agreement clearly involved situations where the courts were called upon to interpret the parties' contractual provisions to assist in fixing civil liability, a matter not within the Board's jurisdiction. Penn Hills School Dist., 15 PPER ¶ 15120 (Final Order, 1984). Second, despite its protestations the Township's argument is one of waiver by way of bargaining history or past inaction on the part of the Association. Pennsylvania law is clear that a union does not waive its statutory right to bargain over an issue simply because it failed to demand bargaining over changes in the past. Crawford County. Indeed, the Board has not adopted a waiver-by-inaction rule but has instead held that an employer has an affirmative duty to introduce proposals dealing with mandatory subjects of bargaining in face-to-face negotiations with the union. Jersey Shore Area School District, 18 PPER ¶ 18061 (Proposed Decision and Order), *aff'd*, 18 PPER ¶ 18117 (Final Order, 1987). Finally, the Township's argument would give employers carte blanche to implement changes in mandatory subjects of bargaining based on boilerplate language in management rights clauses; a notion that has been clearly rejected under Pennsylvania law. Crawford County. Therefore, the Township's final exception is likewise dismissed.

In cases where the employer has unilaterally enacted changes in the employes' terms and conditions of employment, the Board follows a policy of directing restoration of the status quo but does not direct bargaining over the matter in dispute. City of Easton, 22 PPER ¶ 22122 (Final Order, 1991). However, should the Township choose to pursue enactment of the policy regarding the retention of disciplinary records after it restores the status quo, the Township must offer to bargain over the policy with the Association. Thus, the relief directed by the hearing examiner in the PDO is appropriate.

After a thorough review of the exceptions and all matters of record, the Board shall dismiss the exceptions and make the Proposed Decision and Order as amended herein final.

ORDER

In view of the foregoing and in order to effectuate the policies of the Pennsylvania Labor Relations Act and Act 111, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed to the Proposed Decision and Order in the above-captioned matter be and the same are hereby dismissed, and the Proposed Decision and Order as amended herein be and the same is hereby made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania, pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, John Markle Jr., Chairman, and Members L. Dennis Martire and Edward G. Feehan, this twenty-first day of December, 1999. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within Order.

CHAIRMAN JOHN MARKLE JR. DISSENTS

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FAIRVIEW TOWNSHIP POLICE ASSOCIATION	:	
	:	
v.	:	Case No. PF-C-99-34-E
	:	
FAIRVIEW TOWNSHIP	:	

AFFIDAVIT OF COMPLIANCE

Fairview Township hereby certifies that it has ceased and desisted from its violation of Sections 6(1)(a) and (e) of the PLRA and Act 111; that it has rescinded the retention of disciplinary records policy implemented on or about March 8, 1999, and restored the status quo ante; that it has posted the proposed decision and order and final order as directed, and that it has served a copy of this affidavit on the Association at its principal place of business.

_____
Signature/Date

_____
Title

SWORN AND SUBSCRIBED TO before me
the day and year first aforesaid.

_____
Signature of Notary Public