COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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| MIDDLETOWN BOROUGH POLICE OFFICERS ASSOCIATION | : | |
| v. | : | Case No. PF-C-13-109-E |
| MIDDLETOWN BOROUGH | : | |

**FINAL ORDER**

Middletown Borough (Borough) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on March 30, 2015, challenging a Proposed Decision and Order (PDO) issued on March 10, 2015. In the PDO, the Board's Hearing Examiner concluded that the Borough violated Section 6(1)(e) of the Pennsylvania Labor Relations Act (PLRA), as read **in pari materia** with Act 111 of 1968, by unilaterally adopting a policy manual changing the police officers' wages, hours and working conditions.[1] The Hearing Examiner further held that the Borough violated Section 6(1)(a) of the PLRA when it refused to provide Officer Dennis Morris with a **Weingarten**[2] representative during a meeting with the Chief of Police. The Middletown Borough Police Officers Association (Association) filed a brief in opposition to the exceptions in April 2015. After a thorough review of the record, the Board makes the following:

**AMENDED AND ADDITIONAL FINDINGS OF FACT**

19. The policy provided a recommended maximum penalty for the first, second and third breaches for Class I, Class II and Class III Offenses. (N.T. 16, Association Exhibit 1).

44. Special Order 3 divided the Borough into two patrol zones (Zone 1 and Zone 2) and set forth assignments, duties and responsibilities of the police officers when engaging in patrol operations. (N.T. 20, Association Exhibit 3).

45. Section 3.1.1(B)(2) of Special Order 3 states that "[p]atrol officers assigned to a zone will not leave their zone without permission of the Sergeant/shift [officer in charge] except in the case of an emergency response to assist another officer or for response to a crime in progress, or when so directed by a supervisor." (N.T. 20, Association Exhibit 3).

46. Zone 1 does not contain any convenience stores, businesses or restaurants where a police officer could stop to take a meal or restroom break. (N.T. 25-26).

47. Prior to issuance of Special Order 3, the police officers were not assigned to a particular patrol zone and could patrol throughout the Borough. The police officers were also able to take meal and restroom breaks at any time without receiving permission from their supervisor to do so. (N.T. 22-25, 172-173).

48. General Order 1.7 established procedures for police officers engaging in extra-duty employment. Section 1.7.1(A)(1) defines extra-duty employment as occurring in instances "where a sworn department employee receives compensation for providing services, where the actual or potential use of police powers is possible or expected,

[1] The Hearing Examiner also concluded that the Borough did not violate its duty to bargain under Section 6(1)(e) of the PLRA in issuing General Order 1.4 – Direction, General Order 2.6 – Criminal Investigations, General Order 2.3 – Internal Affairs and General Order 3.4 – Records because the Examiner found that they involved matters that fall within the Borough's managerial prerogative. The Association did not file exceptions to the Hearing Examiner's decision regarding these policies. Therefore, the issue of whether these policies are mandatorily bargainable is not before the Board.

[2] The Board has adopted the rule set forth in **NLRB v. Weingarten, Inc.**, 420 U.S. 251, 95 S. Ct. 959 (1975), that employes have the right to union representation at investigatory interviews that they reasonably believe may result in discipline. **Commonwealth of Pennsylvania, Office of Administration v. PLRB**, 591 Pa. 176, 916 A.2d 541 (2007).

with payment to the employee by ways other than through the officer's agency payroll." Section 1.7.1(E)(1) provides the Chief of Police the right to revoke any officer's participation in extra-duty employment when it is determined that the best interests of the department are not served by continuing the extra-duty employment opportunity. (N.T. 52, Association Exhibit 10).

49. Section 4:14.3 of the Borough's old policy regarding outside employment prohibits police officers engaging in outside employment from using their department issued uniform and equipment. (N.T. 52, Association Exhibit 9).

50. Article 34 of the parties' collective bargaining agreement states as follows:

> Any officer shall have the right to maintain employment in addition to his position as a Borough police officer. Such outside employment shall not create a conflict of interest with his police duties with the Borough; or otherwise demean the position of a Borough police officer. Any officer, who is so employed as of March 19, 2009, shall be deemed to be properly within the above-stated guidelines for outside employment.
>
> It is understood and agreed that any officer who maintains outside employment shall give notice to the Chief of Police as to the amount of hours that he is so employed….

(N.T. 53, Association Exhibit 11).

**DISCUSSION**

The facts of this case are summarized as follows. The Association is the exclusive representative of the Borough's full-time and regular part-time police officers, excluding the Chief of Police. The Borough and the Association have been parties to several collective bargaining agreements, with the most recent agreement being effective from January 1, 2013 to December 31, 2016.

On February 11, 2013, Steven Wheeler became the Chief of Police. He soon began the process of writing a new departmental policy manual. The Police Department was operating under a manual with some policies that had been in place since 1984 and other policies added over time. Chief Wheeler reviewed the existing manual to determine whether the policies conformed to legal mandates, the standards for law enforcement accreditation in Pennsylvania and the best practices in law enforcement. Chief Wheeler then developed a draft proposed policy.

On April 25, 2013, Chief Wheeler sent the draft of the policy to Association President Officer Mark Laudenslager. Chief Wheeler also attached a companion set of Special Orders which were designed to deal with specific issues affecting the Police Department, such as policies promulgated countywide by the District Attorney. Chief Wheeler sought Officer Laudenslager's review and input for those policies for any conflicts with the parties' collective bargaining agreement (CBA). Chief Wheeler requested a response by May 6, 2013. After receiving no response to his request, Chief Wheeler again requested comment from Officer Laudenslager by June 21, 2013. Officer Laudenslager and Chief Wheeler met in June 2013 to discuss the revised policy manual. However, Officer Laudenslager had issues with the policy manual that remained unresolved.

On September 25, 2013, Chief Wheeler notified the Police Department that he had given the sergeants the revised policy manual to distribute to the officers and to have them acknowledge its receipt. The policy manual went into effect on October 1, 2013.

General Order 1.8 includes Section 1.8.4, Standards of Conduct and Disciplinary Procedures. Subsection 1.8.4(C) – Conduct, Disciplinary Procedures, states, in relevant part:

C. Disciplinary Procedures.

1. Violations of the Department's policies, procedures, and standards of conduct may lead to disciplinary action.

2. Disciplinary action may take the form of the following: oral reprimand, written reprimand, suspension (with or without pay), reduction in rank, or termination.

3. In most instances, the Department will adhere to a system of progressive discipline in response to violations of the Department's policies, procedures, and standards of conduct. The Department, however, reserves the right to administer any level of discipline it determines, in its sole discretion, to be appropriate given the circumstances and the severity of the infraction.

4. This policy will be implemented in a manner consistent with the provisions of the Agreement between the Borough and Police Officers' Association.

The old policy, Disciplinary Action Sanctions and Penalties Guideline, covered 43 separate offenses. The policy divided offenses into three broad classes. The old policy described the three classes of offenses as follows:

**CLASS I OFFENSES**

Breaches of policy and procedure in this category may lead to disciplinary action up to and including immediate dismissal from the Department. A Class I Offense does not automatically mean dismissal, however. The actual disciplinary action will reflect the circumstances of the violation. A second or subsequent offense of a Class II type of offense that occurs within one year of the last offense will become a Class I Offense.

**CLASS II OFFENSES**

Breaches of policy and procedure in this category may lead to any action other than dismissal. A second or subsequent offense of a Class III type of offense that occurs within one year of the last offense will become a Class II Offense.

**CLASS III OFFENSES**

Breaches of policy and procedure in this category will generally result in verbal warning or in written reprimand.

The old policy provided a recommended maximum penalty for the first, second and third breaches for Class I, Class II and Class III Offenses.

Special Order 3 divided the Borough into two patrol zones (Zone 1 and Zone 2) and set forth assignments, duties and responsibilities of the police officers when engaging in patrol operations. Section 3.1.1(B)(2) of Special Order 3 states that "[p]atrol officers assigned to a zone will not leave their zone without permission of the Sergeant/shift [officer in charge] except in the case of an emergency response to assist another officer or for response to a crime in progress, or when so directed by a supervisor." Zone 1 does not contain any convenience stores, businesses or restaurants where a police officer could stop to take a meal or restroom break. Prior to issuance of Special Order 3, the police officers were not assigned to a particular patrol zone and could patrol throughout the Borough. The police officers were also able to take meal and restroom breaks at any time without receiving permission from their supervisor to do so.

General Order 1.7 established procedures for police officers engaging in extra-duty employment. Section 1.7.1(A)(1) defines extra-duty employment as occurring in instances "where a sworn department employee receives compensation for providing services, where the actual or potential use of police powers is possible or expected, with payment. Section 1.7.1(E)(1) provides the Chief of Police with the right to revoke any officer's participation in extra-duty employment when it is determined that the best interests of the department are not served by continuing the extra-duty employment opportunity.

Section 4:14.3 of the Borough's old policy regarding outside employment prohibits police officers engaging in outside employment from using their department issued uniform and equipment. Article 34 of the CBA states as follows:

> Any officer shall have the right to maintain employment in addition to his position as a Borough police officer. Such outside employment shall not create a conflict of interest with his police duties with the Borough; or otherwise demean the position of a Borough police officer. Any officer, who is so employed as of March 19, 2009, shall be deemed to be properly within the above-stated guidelines for outside employment.
>
> It is understood and agreed that any officer who maintains outside employment shall give notice to the Chief of Police as to the amount of hours that he is so employed….

In both the current and prior CBA, Article 37 provided for a three-step grievance procedure ending in binding arbitration. Article 37 provides that disciplinary action may be the subject of a grievance. On November 15, 2013, the Association filed a grievance over the new policy manual.

Officer Dennis Morris is a thirteen-year veteran of the Police Department. Officer Morris was the Association Vice President in 2013. At the beginning of the 3:00 p.m. to 11:00 p.m. shift on October 29, 2013, Sergeant James Bennett informed Officer Morris that Chief Wheeler wanted to see him in the Chief's office. Officer Morris asked Officer Laudenslager, his patrol partner and Association President, to come to the meeting as his **Weingarten** representative. Officer Morris asked for a union representative because of Sergeant Bennett's tone and the fact that it was the first time he was summoned by a sergeant to a meeting with the Chief before he was on duty.

When Officers Morris and Laudenslager entered the Chief's office, Chief Wheeler was sitting at his desk with his hands clasped behind his head and Sergeant Bennett was standing next to him. Chief Wheeler asked Officer Morris why Officer Laudenslager was present. Officer Morris answered that Officer Laudenslager was there as his union representative. Chief Wheeler ordered Officer Laudenslager to leave because he did not deem the meeting to be disciplinary. Officer Laudenslager left the room.

Chief Wheeler then closed the door for a meeting with Officer Morris. Sergeant Bennett remained in the room. Chief Wheeler directed Officer Morris to sit at a conference table across from Sergeant Bennett with Chief Wheeler sitting at the head of the table. Chief Wheeler then asked Officer Morris if he had been given the policy manual. Officer Morris answered that he had been given the policy manual earlier by Sergeant Bennett and that he had signed a paper acknowledging receipt of the manual. Chief Wheeler then placed three different policies in front of Officer Morris. Chief Wheeler asked several questions about each policy and whether Officer Morris understood the policies. The policies were Special Order 1 - Uniform and Appearance Standards; Special Order 3 - Patrol Operations-Deployment Plan and General Order 1.4 - Direction. Chief Wheeler asked Officer Morris if he agreed that Sergeant Bennett was his supervisor and that he had to take orders from Sergeant Bennett. Sergeant Bennett asked Officer Morris whether he was driving an unmarked vehicle. Chief Wheeler took notes during the meeting. The meeting lasted ten minutes.

Sergeant Bennett admitted that he requested the meeting because he believed that Officer Morris had been driving an unmarked police vehicle that Officer Morris had

repeatedly been told not to drive. Sergeant Bennett's goal with the meeting was to give Officer Morris a verbal warning about driving an unmarked police vehicle. A verbal warning is a step in the Police Department's disciplinary policy.

Sergeant Bennett asked Chief Wheeler to be involved in the meeting. Chief Wheeler also wanted to have the meeting with Officer Morris in order to address his alleged failure to follow the Police Department's uniform policy concerning wearing the proper hat. Chief Wheeler additionally wanted to address the chain of command policy in that Officer Morris allegedly would seek supervisory authority from someone who was not his direct supervisor. Only the Chief can impose discipline, which is subject to review/approval by Borough Council. Chief Wheeler did not approve disciplinary action against Officer Morris in October, November or December of 2013. Officer Morris did not receive any discipline as a result of the October 29, 2013 meeting.

The Association filed its Charge of Unfair Labor Practices on November 18, 2013, alleging that the Borough violated its duty to bargain by unilaterally adopting a policy manual, which changed the police officers' wages, hours and working conditions. The Association further alleged that the Borough violated Officer Morris' **Weingarten** rights by refusing his request for a union representative during the meeting with Chief Wheeler. The Association asserted that the Borough's actions violated Section 6(1)(a) and (e) of the PLRA and Act 111. Two days of hearing were held before the Board's Hearing Examiner on March 20 and May 16, 2014, during which all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The Association and the Borough filed post-hearing briefs on July 11 and August 7, 2014, respectively.

In the PDO, the Hearing Examiner concluded that the Borough violated its duty to bargain under Section 6(1)(e) of the PLRA by unilaterally implementing General Order 1.8 - Conduct and Disciplinary Procedures because that policy removed the maximum levels of discipline from the old policy and provided the Chief with greater discretion concerning imposition of discipline. The Hearing Examiner further concluded that the Borough had a managerial prerogative to implement Special Order 3 – Patrol Operations-Deployment Plan, but that it was required to bargain the impact of that policy regarding the police officers' meal and restroom breaks. The Hearing Examiner additionally held that the Borough was required to bargain over General Order 1.7 - Conditions of Work – Extra-Duty Employment because that policy provided the Chief greater discretion concerning the approval and revocation of approval for outside employment contrary to Article 34 of the CBA. The Hearing Examiner also held that the Borough was required to bargain over the impact of General Order 1.3 – Use of Force on the police officers' ability to take administrative leave after being involved in a use of force incident. The Hearing Examiner further determined that the Borough violated Officer Morris' **Weingarten** rights under Section 6(1)(a) of the PLRA by denying his request for a union representative at the October 29, 2013 meeting with Chief Wheeler and Sergeant Bennett.

Initially, the Borough alleges that the Hearing Examiner failed to make various findings of fact. The Hearing Examiner must set forth those findings that are relevant and necessary to support the conclusion reached, but need not make findings summarizing all of the evidence presented. **Page's Department Store v. Velardi**, 464 Pa. 276, 346 A.2d 556 (1975). The Board finds that the Borough's suggested findings of fact are not necessary or relevant. However, the Board has amended Finding of Fact (FF) 19 to more accurately reflect the evidence of record indicating that the Borough's old discipline policy provided a recommended maximum penalty for the first, second and third breaches for Class I, Class II and Class III Offenses. The Board has also determined that some additional findings are necessary to resolve the issues presented in this case. Accordingly, the Board has declined to make the findings suggested by the Borough, amended FF 19 and made additional findings of fact as set forth above.

In its exceptions,[3] the Borough alleges that the Hearing Examiner erred in concluding that General Order 1.8 modified disciplinary penalties and provided the Borough with more discretion in issuing discipline because the Borough's right to issue discipline under the CBA did not change. The Borough further alleges that the Hearing Examiner erred in concluding that it failed to establish a contractual privilege because the management rights clause in Article 3 of the CBA provides the Borough with broad discretion to implement discipline according to the Borough Code.

The Board has held that matters of employe discipline and disciplinary procedures, including the institution of a new system of discipline or a significant change from a previously existing system, are mandatory subjects of bargaining. **Fairview Township Police Association v. Fairview Township**, 31 PPER ¶ 31019 (Final Order, 1999), **aff'd**, 133 C.D. 2000 (Pa. Cmwlth. 2000)(opinion not reported); **International Association of Firefighters, Local 1803, AFL-CIO v. City of Reading**, 31 PPER ¶ 31151 (Final Order, 2000). A refusal to bargain charge alleging a unilateral change by the employer will be dismissed if the employer establishes that it had a sound arguable basis in the collective bargaining agreement for the right to act unilaterally regarding a mandatory subject of bargaining. **Wilkes-Barre Township v. PLRB**, 878 A.2d 977 (Pa. Cmwlth. 2005); **Pennsylvania State Troopers Association v. PLRB**, 761 A.2d 645 (Pa. Cmwlth. 2000). In instances where a contractual privilege is asserted by the employer, the language relied upon in the contract must be specific and indicate that the union expressly and intentionally authorized the employer to take the unilateral action at issue. **Temple University Hospital Nurses Association v. Temple University Health System**, 41 PPER 3 (Final Order, 2010). However, a boilerplate management rights clause provides no defense to a refusal to bargain claim. **Id.**

The Borough's old policy divided offenses into Class I, Class II and Class III, along with corresponding recommended maximum penalties for the first, second and third offense committed in each class. General Order 1.8 does not contain any language setting forth recommended maximum penalties and, in fact, provides the Borough the right to administer any level of discipline that it determines to be appropriate. In **City of Reading**, the Board held that the employer violated its duty to bargain under Section 6(1)(e) of the PLRA when it provided a Board of Ethics with broad discretion to impose any level of discipline contrary to the parties' disciplinary code. As in **City of Reading**, General Order 1.8 grants the Borough the same type of discretion to impose any level of discipline, thereby significantly changing the Borough's previous disciplinary policy which provided for recommended maximum penalties.

With regard to the Borough's claim of contractual privilege, Article 3 of the CBA states, in pertinent part, that "the Borough retains all rights, not specifically modified by … the provisions of Act 111, which include … the suspension, demotion, or discharge of policemen according to the provisions of the Borough Code…." This language generally states the Borough's authority to discipline its police officers under the Borough Code and is not sufficiently specific to indicate that the Association expressly and intentionally authorized the Borough to change the maximum levels of discipline it can impose. **See Temple University, supra** (language in collective bargaining agreement generally stating that tuition reimbursement shall be "in accordance with" Temple policy was insufficient to establish a sound arguable basis). The Borough asserts that the Hearing Examiner impermissibly engaged in contract interpretation when he concluded that Article 3 of the CBA did not provide the Borough with a sound arguable basis to change its discipline policy. However, the Hearing Examiner's decision was based upon a determination that the Borough unilaterally changed the existing disciplinary policy and, not on any interpretation of the CBA. Because the Borough did not establish a sound arguable basis, the Hearing Examiner properly concluded that the Borough violated its duty to bargain under Section 6(1)(e) of the PLRA.

[3] The Borough did not file exceptions to the Hearing Examiner's conclusion that it violated its duty to bargain under Section 6(1)(e) of the PLRA when it implemented General Order 1.3 – Use of Force. Therefore, the Hearing Examiner's decision regarding General Order 1.3 is not before the Board.

The Borough next argues that the Hearing Examiner erred in ordering the Borough to rescind any discipline imposed exceeding the recommended maximum penalty in the old policy because the Association did not request such a remedy. It is irrelevant whether the Association requested such a remedy as it is within the Board's discretion to determine the appropriate remedy in an unfair practice case. **Mid Valley Education Association v. Mid Valley School District**, 25 PPER ¶ 25138 (Final Order, 1994). Pursuant to Section 8(c) of the PLRA, the Board is authorized to issue an order requiring the respondent to "cease and desist from such unfair labor practice, and to take such reasonable affirmative action … as will effectuate the policies of [the PLRA]." 43 P.S. § 211.8(c). The Board's authority to remedy unfair labor practices is remedial in nature, not punitive. **Uniontown Area School District v. PLRB**, 747 A.2d 1271 (Pa. Cmwlth. 2000). The Borough further alleges that the Hearing Examiner's remedy should be rescinded because there is no evidence establishing that any police officer was issued discipline exceeding the recommended maximum penalties in the old policy. However, it was not error for the Hearing Examiner to order the Borough to restore the status quo and to make the bargaining unit members whole regardless of whether discipline had actually been imposed at the time of the hearing in this matter. As such, the Board finds the remedy in this case to be remedial and in furtherance of the purposes and policies of the PLRA and Act 111.

The Borough additionally alleges that the Hearing Examiner erred in concluding that it was required to bargain over the impact of Special Order 3 on the police officers' meal and restroom breaks because the Association did not request impact bargaining concerning this issue. The Association counters that the Hearing Examiner did not order impact bargaining but, rather, concluded that the Borough unlawfully changed the past practice regarding meal and restroom breaks.

The law is well established that employers are not required to bargain over matters of inherent managerial policy, including the direction of personnel and level of services. **See South Park Township Police Association v. PLRB**, 789 A.2d 874 (Pa. Cmwlth. 2002), **appeal denied**, 569 Pa. 727, 806 A.2d 864 (2002); **Local 22, International Association of Fire Fighters, AFL-CIO v. City of Philadelphia**, 21 PPER ¶ 21075 (Final Order, 1990), **aff'd sub nom., City of Philadelphia v. PLRB**, 588 A.2d 67 (Pa. Cmwlth. 1991), **appeal denied**, 528 Pa. 632, 598 A.2d 285 (1991). Where a public employer is charged with violating its duty to bargain under Section 6(1)(e) of the PLRA over the impact of implementation of a managerial prerogative, the employe representative must demonstrate that (1) the employer lawfully exercised its managerial prerogative; (2) there is a demonstrable, severable impact on wages, hours or working conditions as a result of implementation of the managerial prerogative; (3) the employe representative made a demand to bargain over the demonstrable impact; and (4) the employer refused the employe representative's demand to bargain. **Lackawanna County Detectives' Association v. PLRB**, 762 A.2d 792 (Pa. Cmwlth. 2000); **Plains Township Police Officers Association v. Plains Township**, 40 PPER 103 (Final Order, 2009); **Amity Township Police Association v. Amity Township**, 39 PPER 131 (Final Order, 2008). The Hearing Examiner concluded that it was within the Borough's managerial prerogative to implement Special Order 3, which divided the Borough into two patrol zones (Zone 1 and Zone 2) and required the police officers to remain in their assigned zone until relieved by their supervisor. Contrary to the Association's assertion, the change to the police officers' ability to take meal and restroom breaks was a direct result of the Borough's implementation of Special Order 3 and not merely a change in a past practice. Therefore, it was incumbent upon the Association to request impact bargaining over this issue. However, the Association failed to present any evidence demonstrating that it had requested to bargain over the impact of Special Order 3 on the police officers' meal and restroom breaks. Accordingly, the Borough's exception in this regard is sustained and the Hearing Examiner's conclusion is vacated.

The Borough further asserts that the Hearing Examiner erred in concluding that General Order 1.7 provided the Chief of Police with greater discretion regarding approval of outside employment because General Order 1.7 only applies to extra-duty employment. The Borough also asserts that its implementation of General Order 1.7 concerns the direction of personnel and, therefore, is a managerial prerogative.

The creation of a policy providing guidelines for outside/secondary employment is within an employer's managerial prerogative. **Joint Bargaining Committee of the Pennsylvania Social Services Union v. PLRB**, 479 A.2d 683 (Pa. Cmwlth. 1984); **FOP Lodge #9 v. City of Reading**, 27 PPER ¶ 27259 (Final Order, 1996). Nevertheless, if a public employer chooses to negotiate and agree to terms in a collective bargaining agreement that are matters of managerial prerogative, the employer will be bound by those terms for the duration of the agreement. **Scranton School Board v. Scranton Federation of Teachers, Local 1147, AFT**, 365 A.2d 1339 (Pa. Cmwlth. 1976); **see also Pennsylvania State Troopers Association v. Commonwealth of Pennsylvania, Pennsylvania State Police**, 41 PPER 32 (Final Order, 2010). However, the Board's role is to enforce the parties' statutory duty to bargain and not to interpret contracts. **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). Thus, where a complainant files an unfair labor practice charge alleging a failure to bargain based on an alleged failure to comply with the provisions of a collective bargaining agreement, the Board will only find a violation of an employer's duty to bargain if the employer has clearly repudiated express provisions of the agreement. **Millcreek Township School District v. PLRB**, 631 A.2d 734 (Pa. Cmwlth. 1993), **appeal denied**, 537 Pa. 626, 641 A.2d 590 (1994). As the Commonwealth Court stated in **Wilkes-Barre Township v. PLRB**, 878 A.2d 977 (Pa. Cmwlth. 2005):

> With respect to the proper role of the Board in labor disputes, this Court has explained that the Board "exists to remedy violations of statute, *i.e.*, unfair labor practices, and not violations of contract." … Where a breach of contract is alleged, it should be resolved by an arbitrator using the grievance procedure set forth in the parties' collective bargaining agreement. … However, the Board is empowered to review an agreement to determine whether the employer clearly has repudiated its provisions because such a repudiation may constitute both an unfair labor practice and a grievance.

**Id.** at 982 (citations omitted). **See also Capitol Police Lodge No. 85, Fraternal Order of Police v. PLRB**, 10 A.3d 407 (Pa. Cmwlth. 2010).

The Borough argues that Article 34 of the CBA applies to situations where a police officer is working for another municipality, whereas General Order 1.7 applies to extra-duty employment in which a police officer is working for the Borough and utilizing the Borough's equipment, uniform and insurance. Outside employment is not defined in Article 34 of the CBA or in the Borough's old policy. However, Section 4:14.3 of the old policy prohibits officers from using their Borough uniform and equipment when engaging in outside employment. General Order 1.7 defines extra-duty employment as situations "where a sworn department employee receives compensation for providing services, where the actual or potential use of police powers is possible or expected, with payment to the employee by ways other than through the officer's agency payroll." Both Sergeant Heister and Chief Wheeler stated that extra-duty employment occurs when a police officer is paid by a private employer to provide security in their capacity as a Borough police officer and that the officer is authorized to wear their uniform and utilize the Borough's equipment. (N.T. 55, 103, 105-106, 283-284).

The Association responds that extra-duty employment is the same as outside employment. However, the Association's witness, Sergeant Heister, was equivocal on whether General Order 1.7 applied to outside employment. When questioned about General Order 1.7 Sergeant Heister stated, in pertinent part, as follows:

> **Q: You were just talking about the change, and you brought up the collective bargaining units [sic]?**
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> A. Yes. The collective bargaining agreement spells out the ability for us to seek outside employment as does the old policy. And the new policy, it doesn't seem like it really deals with outside employment a whole lot, although I think that at some point, the test as far as the review, approval, and revocation

> process for extra duty employment may be a parallel to an officer doing the same thing outside of work employment. But the larger --- the larger issue at this point is that extra duty employment would be as --- my interpretation as I read it is that if a sworn member of the Department would handle an assignment not paid for by the Borough yet the Borough would either approve or sanction him being able to take police action and/or wearing a uniform.
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> …
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> And although we never had a problem with outside employment, we didn't --- there's no --- in the old policy, there's no revocation procedure for that, and we would submit the extra duty employment. In other words, making money outside the confines of the Department is very similar in nature to having a part-time job as a police officer in another jurisdiction other than maybe some of the liabilities and responsibilities that would still be cast on our department in this case but, again, looking at them as parallel situations where an officer is working hours outside of his normal eight-hour shift at [the Borough], whether he be paid by another jurisdiction wearing their uniform or being paid by a private entity wearing our uniform. That's not so much a contractual issue as a liability issue for the Borough.

(N.T. 54-56).

The issue of whether extra-duty employment is the same as outside employment under Article 34 of the CBA requires contract interpretation, and consequently is a matter reserved for an arbitrator, not the Board. **Parents Union, supra; Capitol Police Lodge No. 85, supra; Pennsylvania State Troopers Association v. PLRB**, 761 A.2d 645 (Pa. Cmwlth. 2000). Because the Association has failed to establish a clear repudiation of express provisions of a collective bargaining agreement, the Hearing Examiner erred in concluding that the Borough violated its duty to bargain under Section 6(1)(e) of the PLRA when it implemented General Order 1.7. Accordingly, the Borough's exception is sustained and the Hearing Examiner's conclusion is vacated.

The Borough further alleges that the Hearing Examiner erred in concluding that Officer Morris reasonably believed that the October 29, 2013 meeting could lead to discipline because he allegedly relied on information concerning the motivation of Sergeant Bennett and Chief Wheeler for conducting the meeting, which Officer Morris was not aware of at the time. However, the Borough's allegation fails because the Hearing Examiner relied on the testimony of Sergeant Bennett and Chief Wheeler to establish that the meeting was investigatory in nature and not to demonstrate whether Officer Morris had a reasonable belief that the meeting might result in discipline.

The Borough asserts that Officer Morris' testimony is not credible because it was misleading, vague and contradictory. It is the function of the hearing examiner, who is able to view the witnesses' testimony first-hand, to determine the credibility of the witnesses and weigh the probative value of the evidence presented at the hearing. **North Wales Borough Police Department v. North Wales Borough**, 38 PPER 181 (Final Order, 2007); **E.B. Jermyn Lodge No. 2 of the FOP v. City of Scranton**, 38 PPER 104 (Final Order, 2007). A hearing examiner may accept or reject the testimony of any witness in whole or in part. **Limerick Township Police Officers v. Limerick Township**, 36 PPER 125 (Final Order, 2005). The Board will not disturb a hearing examiner's credibility determinations absent the most compelling of circumstances. **City of Scranton, supra**. The Hearing Examiner stated that the Association met its burden to prove a **Weingarten** violation through the credible testimony of Officers Morris and Laudenslager. Because the Borough has failed to present compelling reasons to warrant reversal of the Hearing Examiner's credibility determination, the Board must reject the Borough's exception. **Id.**

The Borough also asserts that Chief Wheeler assured Officer Morris that the meeting would not result in discipline and, therefore, Officer Morris could not reasonably

believe that he was subject to discipline. An employe is entitled to assistance from a union representative in an investigatory interview upon request when the employe has a reasonable expectation that disciplinary action may result. **Pennsylvania State Troopers Association v. PLRB,** 71 A.3d 422 (Pa. Cmwlth. 2013). An employer may rebut an employe's claim of reasonable expectation of discipline by demonstrating that the employer assured the employe that no discipline would result from the meeting. However, where the assurances are less than convincing, the right to union representation still prevails. **Id.; FOP E.B. Jermyn Lodge 2 v. City of Scranton,** 40 PPER ¶ 136 (Final Order, 2009).

The uncontested findings of the Hearing Examiner show that Officer Morris asked Officer Laudenslager to act as his **Weingarten** representative at the meeting with Chief Wheeler because of Sergeant Bennett's tone and the fact that it was the first time that Officer Morris was summoned by a sergeant to a meeting with the Chief before he was on duty. Upon entering the Chief's office, Officer Morris saw Chief Wheeler sitting at his desk with his hands clasped behind his head and Sergeant Bennett standing next to him. Given these circumstances, Officer Morris had a reasonable belief that the meeting could lead to discipline and, therefore, he was entitled to have a union representative present at the meeting.

Although Chief Wheeler assured Officer Morris that the meeting would not result in discipline, his assurances were less than convincing. Indeed, after making such assurances to Officer Morris, Chief Wheeler proceeded to ask Officer Morris several questions about three different policies, whether he understood the policies and whether he agreed that Sergeant Bennett was his supervisor and that he had to take orders from Sergeant Bennett. Sergeant Bennett asked Officer Morris whether he was driving an unmarked vehicle. Chief Wheeler took notes during the meeting. The actions of Chief Wheeler and Sergeant Bennett during the meeting reinforced the belief of Officer Morris that the meeting could lead to discipline. As such, his right to a union representative remained and there was no need for him to make a subsequent request to have a union representative present at the meeting. **City of Scranton, supra.** As such, the Hearing Examiner properly concluded that the Borough violated Section 6(1)(a) of the PLRA.

After a thorough review of the exceptions, the briefs of the parties, and all matters of record, the Board shall sustain in part and dismiss in part the exceptions and affirm the Proposed Decision and Order as modified.

**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 by Middletown Borough are hereby sustained in part and dismissed in part, that the Order on page 14-15 concerning Special Order 3 and General Order 1.7 is vacated and the March 10, 2015 Proposed Decision and Order be and the same is hereby made absolute and final as modified.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, Robert H. Shoop, Jr., Member, and Albert Mezzaroba, Member, this eighteenth day of August, 2015. 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.

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

| | | |
|---|---|---|
| MIDDLETOWN BOROUGH POLICE OFFICERS ASSOCIATION | : | |
| v. | : | Case No. PF-C-13-109-E |
| MIDDLETOWN BOROUGH | : | |

**AFFIDAVIT OF COMPLIANCE**

Middletown Borough hereby certifies that it has ceased and desisted from its violations of Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act, that it has complied with and posted a copy of the Proposed Decision and Order and Final Order as directed and that it has served an executed copy of this affidavit on the Middletown Borough Police Officers 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