

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE, LODGE 5 :
:
v. : Case No. PF-C-17-27-E
:
CITY OF PHILADELPHIA :

FINAL ORDER

The Fraternal Order of Police, Lodge 5 (FOP) filed timely exceptions with the Pennsylvania Labor Relations Board on January 22, 2019, challenging a Proposed Decision and Order (PDO) issued on December 31, 2018.¹ In the PDO, the Board's Hearing Examiner concluded that the City of Philadelphia (City) did not violate Section 6(1)(a) or (e) of the Pennsylvania Labor Relations Act (PLRA), as read in pari materia with Act 111 of 1968, when it implemented a tattoo policy. Pursuant to extensions of time granted by the Secretary of the Board, the FOP filed a brief in support of its exceptions on April 18, 2019. The City filed a response to the exceptions on February 11, 2019, and after an extension of time granted by the Secretary, its brief in opposition to the exceptions on July 22, 2019.

The facts of this case are summarized as follows. From 1988 to the summer of 2016, the City did not have a policy regulating or restricting tattoos for police officers applying for a position or during their tenure as officers for the City. During the summer of 2016, the Democratic National Convention was held at the Philadelphia Convention Center. During the Convention, a protestor posted on social media that they were offended by a bicycle patrol officer's tattoo, which depicted an eagle over the top of a German flag with the inscription "Fatherland". The social media posting likened the tattoo to a Nazi symbol. The Jewish community and other groups expressed disdain for the officer's tattoo and criticized Police Commissioner Richard Ross for permitting the officer to have such a tattoo. The news media covered the outcry over the officer's tattoo. The City's Mayor issued several statements to the media indicating that he was offended by the officer's tattoo and ordered an investigation regarding the tattoo. The officer was not disciplined because the City did not have a tattoo policy.²

The media coverage and public outcry over the officer's tattoo motivated the City to draft a tattoo policy. Captain Francis Healy, an attorney and the Special Legal Advisor to Police Commissioner Ross, began researching constitutional and free-speech law, as well as, the legal rights of public employees prior to drafting the tattoo policy. He premised the tattoo policy on existing case law in determining the limits that can be placed on government employees. Captain Healy adopted the definitions of the

¹ The FOP's exceptions filed on January 22, 2019 are timely because Sunday, January 20, 2019, the twentieth day following issuance of the Hearing Examiner's proposed decision, and Monday, January 21, 2019 (Dr. Martin Luther King, Jr. Day) are excluded from computation of the twenty-day period for filing exceptions. 34 Pa. Code § 95.100(b).

² However, the Department leadership, under former Police Commissioner Ramsey, had been discussing and planning a tattoo policy prior to the summer of 2016.

terms "offensive," "extremist," "indecent," "racist" and "sexist" from the rules and regulations of various branches of the military. He interviewed officers about concealer creams and body sleeves and learned that these products are readily available, not expensive or overly burdensome. Police Commissioner Ross determined that citizens are offended by tattoos on the face, scalp, head and neck regardless of content and, therefore, tattoos on those parts of the body needed to be covered.

The tattoo policy provides, in relevant part, as follows:

1. BACKGROUND

- A. The Philadelphia Police Department (PPD) has the responsibility of ensuring public safety and maintaining order and to achieve these goals the public must trust and respect its officers. Maintaining a professional and uniform police department is critical to advancing such public trust and respect.
- B. Tattoos and body modifications, as a form of personal expression, are frequently symbolic in nature. These symbols and modifications are often displayed without words, which typically convey precise thoughts and meanings. Consequently, a tattoo or body modification's symbolic nature allows a viewer to attribute any particular meaning to that symbol. As such, the meaning of a single symbol or modification can be easily misinterpreted.
- C. Misinterpretation of visible tattoos and other body modifications worn by police officers while on duty can cause members of the public to question an officer's allegiance to the safety and welfare of the community, as well as the Department's. This misinterpretation can damage the public's trust and respect that is necessary for the Department to ensure public safety and maintain order.

2. POLICY

- A. Maintaining a professional and uniform Police department is critical to advancing trust and respect.
- B. Visible tattoos and body art worn by employees, while on duty, can compromise public trust, respect and can easily be misinterpreted by the general public. Therefore, all employees, while on duty, are prohibited from having any:

1. Visible tattoos or body ar[t] on the head, face, neck or scalp. Any tattoos or body art on any of these areas will be covered by cosmetics or clothing.
2. Any visible tattoos or body art that is or are offensive, extremist, indecent, racist or sexist. Any such tattoo or body art will be covered by cosmetics or clothing.

EXCEPTION: Tattoos which are not immediately recognizable or discernible as tattoos that are used for cosmetic purposes only and do not conflict with Directive 6.7, "Uniforms and Equipment" are exempt from this policy (i.e., tattooed eyebrows, eyeliner)

3. DEFINITIONS

A. The following definitions shall apply to this Appendix:

1. Offensive Tattoos and Body Art - Any tattoo or body art depicting words, pictures, or symbols, which can be interpreted to advocate, promote, or support racial, gender, or ethnic hatred or intolerance. This shall also include any tattoos or body art that can be interpreted to advocate, promote, or support discrimination towards any race, national origin, gender, ethnicity, religion or sexual orientation.
2. Extremist Tattoos and Body Art - Any tattoo or body art affiliated with, depicting or symbolizing extremist's philosophies, organizations, or activities. Extremist philosophies, organizations and activities are those which can be interpreted to advocate, promote, and support hatred and/or violence towards any person or group of persons based on race, national origin, gender, ethnicity, religion or sexual orientation.
3. Indecent Tattoos or Body Art - Any tattoo or body art that can be interpreted as grossly indecent, lewd or sexual that shocks the moral sense because of their crude, vulgar, filthy, or disgusting nature or would be

inappropriate to be viewed by any minor child.

4. Racist Tattoos or Body Art - Any tattoos or body art that can be interpreted to advocate, promote or support degrading, demeaning or insulting any person or group of persons based on race, ethnicity or national origin.
5. Sexist Tattoos or Body Art - Any tattoos or body art that can be interpreted to advocate, promote or support degrading, demeaning or insulting any person or persons based upon gender, but that may not meet the same definition of "Indecent Tattoos or Body Art."

The tattoo policy does not preclude officers from obtaining tattoos, but requires officers to cover face, scalp, head and neck tattoos and offensive, extremist, indecent, racist and sexist tattoos. According to the City, offensive tattoos are a safety concern for officers because they can escalate a citizen contact situation. Further, offensive tattoos also undermine the public perception of the integrity and credibility of the officer and the City thereby losing the public's trust.

Under the policy, the officer's first line supervisor (the sergeant during roll call) is responsible for initially enforcing the policy. If the officer disagrees with the sergeant's determination that the tattoo is "offensive", the commanding officer will review the tattoo for a second opinion. If the commanding officer concurs with the sergeant that the tattoo should be covered, the officer may appeal to the Tattoo Review Board (TRB) for final review. The City intends to have Christine Coulter, the Deputy Commissioner for Labor Relations, the Executive Director of the Police Advisory Committee, and a member of the FOP serve on the TRB. The TRB will decide whether a tattoo is offensive by majority vote.

The tattoo policy is part of the Department's dress code wherein the Department regulates uniform clothing and appearance. The dress code regulates every detail about an officer's appearance with regard to the types and colors of acceptable trousers, coats, hats, socks, belts, protective vests, ties, shirts, boots, sweaters, pins and insignia. It regulates hairstyles and hair length as well as sideburns, mustaches and beards. For female officers, the dress code regulates cosmetics, hair and fingernail length and hair accessories. The dress code also dictates permitted and prohibited pins and emblems as well as their location on the uniform.

The officers are provided a uniform allowance for 6 long-sleeved and 6 short-sleeved shirts. The Department does not monitor how the officers spend their uniform allowance. The officers may use their uniform allowance to purchase cover-up garments or concealer creams to cover prohibited tattoos.

On February 7, 2017, Officer LeAnne Knorr, an officer assigned to the Department's Research and Planning Unit, issued an email to the FOP leadership notifying it of the new "Tattoo/Body Art Restrictions" policy. The policy was attached to the email with a tentative print date of March 1, 2017. On February 27, 2017, FOP Vice President John McGrody wrote to Deputy

Commissioner Coulter, requesting bargaining over the tattoo policy. The tattoo policy was distributed and implemented on March 15, 2017.

The FOP filed its Charge of Unfair Labor Practices on March 27, 2017, alleging that the City violated Section 6(1)(a) and (e) of the PLRA by unilaterally implementing a tattoo policy. On April 5, 2017, the Secretary of the Board issued a Complaint and Notice of Hearing. After two continuances, a hearing was held before the Board's Hearing Examiner on November 6, 2017, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Both parties filed post-hearing briefs.

In the PDO, the Hearing Examiner applied the balancing test set forth in Borough of Ellwood City v. PLRB, 998 A.2d 589 (Pa. 2010), and concluded that requiring the City to bargain over implementation of the tattoo policy would unduly infringe on its managerial interest in gaining the public's trust and respect through maintaining a professional and uniform police department. The Hearing Examiner further concluded that the requirement that officers cover all head, scalp, face, neck and offensive tattoos was not vague or overbroad because such requirement is a clear, targeted and objective criteria narrowly tailored to achieve the City's managerial goals. Accordingly, the Hearing Examiner held that the City did not violate Section 6(1)(a) or (e) of the PLRA, dismissed the Charge and rescinded the complaint.³

In its exceptions, the FOP argues that the Hearing Examiner erred in concluding that the City's tattoo policy is a managerial prerogative not subject to bargaining.⁴ The law is well-established that employers are not required to bargain over matters of inherent managerial policy. South Park Township Police Association v. PLRB, 789 A.2d 874 (Pa. Cmwlth. 2002), appeal denied, 806 A.2d 864 (Pa. 2002). Under the balancing test announced by the Pennsylvania Supreme Court to determine whether a particular subject is negotiable, it must first be found that the subject matter in dispute is rationally related to the terms and conditions of employment, or germane to the work environment; if so, the subject matter will nevertheless be found to be a managerial prerogative if collective bargaining over the topic would unduly infringe upon the public employer's essential managerial responsibilities. Borough of Ellwood City, supra.; City of Philadelphia v. International Association of Firefighters, Local 22, 999 A.2d 555 (Pa. 2010). In City of Philadelphia, the Pennsylvania Supreme Court opined 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

³ The Hearing Examiner additionally concluded that the FOP failed to allege an impact bargaining violation in its Charge or present any evidence that it had made such a request after implementation of the tattoo policy. The Hearing Examiner further determined that the tattoo policy did not change or create new disciplinary procedures. In its brief in support filed on April 18, 2019, the FOP specifically limited its exceptions to the Hearing Examiner's conclusions that the tattoo policy fell within the City's managerial authority and was not vague or overbroad. Therefore, the Hearing Examiner's decision concerning the FOP's impact bargaining and change in discipline claims are not before the Board.

⁴ The FOP does not challenge any of the Hearing Examiner's Findings of Fact in its exceptions. Therefore, the Hearing Examiner's findings are conclusive. FOP Lodge #5 v. City of Philadelphia, 34 PPER 22 n.3 (Final Order, 2003).

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." 999 A.2d at 569-570.

Here, the Hearing Examiner determined that the tattoo policy is rationally related to the officers' terms and conditions of employment because of the expense and inconvenience of covering prohibited tattoos. However, the Hearing Examiner held that requiring the City to bargain over the policy would unduly infringe on its essential managerial responsibilities stating, in relevant part, as follows:

The City, like any public employer, has a substantial and legitimate interest in maintaining the public's perception of integrity, fairness and equality in law enforcement and public services, especially in a city as culturally, ethnically, religiously and racially diverse as the City of Philadelphia. Indeed, these managerial interests are expressly embodied in the Tattoo Policy, which provides that "[t]he Philadelphia Police Department (PPD) has the responsibility of ensuring public safety and maintaining order and to achieve these goals the public must trust and respect its officers. Maintaining a professional and uniform police department is critical to advancing such public trust and respect." ... The City has an absolute managerial right to control the appearance of its officers when exposed to the public at large in a uniform manner that ensures trust. The Tattoo Policy is an Appendix to the Department's Dress Code because the uniform and consistent appearance of officers are Dress Code related. Requiring the City to bargain the Tattoo Policy in this case would unduly infringe on and hamstring the City's critical mission of ensuring that the public trusts the credibility and integrity of the officers and the Department.

(PDO at 11). The Board has held that a public employer has the managerial right to implement policies that promote the public's confidence and ensure integrity in the government. See Council 13, AFSCME v. PLRB (Code of Conduct), 479 A.2d 683 (Pa. Cmwlth. 1984); see also FOP Lodge No. 9 v. City of Reading, 29 PPER ¶ 29146 (Final Order, 1998). The City has an interest in its officers, as representatives of the City, having an appearance of providing fair, balanced and non-prejudicial law enforcement. Offensive tattoos undermine the public perception of the integrity and credibility of the officer and the City thereby losing the public's trust. On balance, under the test set forth in Ellwood City Borough, the Hearing Examiner did not err in concluding that bargaining over the tattoo policy would unduly infringe on the City's managerial provision of services to the public. See Pennsylvania Liquor Enforcement Association v. Commonwealth of Pennsylvania, Pennsylvania State Police, Bureau of Liquor Control Enforcement, 41 PPER 41 (Proposed Decision and Order, 2010) (tattoo policy intended to preserve public's perception of fair and balanced enforcement was within employer's managerial prerogative).

The FOP asserts that the tattoo policy does not achieve the City's stated purpose of maintaining public trust and respect because the City did not have a previous tattoo policy. The uncontested findings establish that the tattoo policy was a legitimate response to the negative public outcry covered by the media concerning a police officer's tattoo that was interpreted to be a Nazi symbol. People from the Jewish community, other groups, as well as, the City's Mayor expressed disdain for the officer's tattoo and criticized Police Commissioner Ross for permitting the officer to have such a tattoo. That one instance was sufficient to negatively impact the public's trust and respect in the City's officers necessitating the City to respond in order to gain that trust back.

The FOP further alleges that the Hearing Examiner erred in concluding that the tattoo policy is not overbroad and vague because the policy applies to all officers, regardless of whether they have contact with the public, and the definitions of prohibited tattoos do not clearly explain the types of tattoos that would violate the policy. In Abington Transportation Association v. Abington School District, 570 A.2d 108 (Pa. Cmwlth. 1990), the Board determined, and the Commonwealth Court agreed, that an employer's work rule constitutes a legitimate exercise of managerial policy if it is narrowly tailored in substance to meet with particularity only the employer's legitimate and necessary objectives, without being overly broad, vague or ambiguous.

The purpose of the City's tattoo policy is to gain the public's trust and respect in order for it to ensure public safety and maintain order. The policy states that "[m]aintaining a professional and uniform police department is critical to advancing trust and respect." (Joint Exhibit 1). The City's requirement that all tattoos on the head, face, neck and scalp be covered regardless of content is specific and narrowly tailored to projecting a professional appearance of its officers to the public. Indeed, the requirement to cover tattoos located in these visible areas is not unlike the City's restrictions in its dress code regulating the officers' hairstyles, hair length, hair accessories as well as sideburns, mustaches and beards. See Fraternal Order of Police Lodge #9 v. City of Reading, 26 PPER ¶ 26165 (Proposed Decision and Order, 1995) (dress code for police officers within employer's managerial prerogative); Fraternal Order of Police, Lodge No. 19 v. City of Chester, 22 PPER ¶ 22006 (Proposed Decision and Order, 1990) (same). Additionally, the application of the tattoo policy to all officers furthers the City's goal of maintaining a uniform police department.

The Board also finds that the definitions of what constitutes an offensive, extremist, indecent, racist or sexist tattoo is not vague or ambiguous. Indeed, the policy provides the officers with specific examples of what constitutes offensive, extremist, indecent, racist and sexist tattoos. Further, the tattoo policy does not preclude officers from obtaining tattoos, but merely requires officers to cover tattoos that could be deemed offensive to the public. Therefore, the Hearing Examiner properly concluded that the tattoo policy was not vague or overbroad.

After a thorough review of the exceptions and all matters of record, the Board finds that the Hearing Examiner properly concluded that the City did not violate its duty to bargain in good faith under Section 6(1)(a) or (e) of the PLRA. Accordingly, the Board shall dismiss the exceptions and make the Proposed Decision and Order 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 by the Fraternal Order of Police, Lodge 5 are hereby dismissed, and the December 31, 2018 Proposed Decision and Order 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, James M. Darby, Chairman and Albert Mezzaroba, Member, this fifteenth day of October, 2019. 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.

MEMBER ROBERT H. SHOOP, JR. DID NOT PARTICIPATE IN THE CONSIDERATION OR DECISION OF THIS CASE.