

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

INTERNATIONAL ASSOCIATION OF :  
FIREFIGHTERS, LOCAL 1803, :  
AFL-CIO :  
 :  
v. :  
 : Case No. PF-C-97-114-E  
 :  
CITY OF READING :

**FINAL ORDER**

On June 15, 1999, the International Association of Firefighters, Local 1803, AFL-CIO (Union) timely filed exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) to the hearing examiner's proposed decision and order (PDO) entered on June 1, 1999. In the PDO, the hearing examiner dismissed the Union's charge of unfair labor practices filed pursuant to Act 111 and Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA) alleging that the City of Reading (City) violated its bargaining obligation by unilaterally creating a Board of Ethics and implementing a Code of Ethics (Code), including disciplinary penalties, without bargaining with the Union.

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

AMENDED AND ADDITIONAL FINDINGS OF FACT

6. Section 1201(a) of the City's home-rule charter contained general provisions relating to conflicts of interest. Section 1201(b) required the City Council to enact a code of ethics within one year of the effective date of the charter. This provision states that the "code of ethics shall adopt regulations implementing the conflict of interest provisions set forth above, shall provide for reasonable public disclosure of finances by officials with major decision-making authority over monetary expenditures and contractual matters, and insofar as permissible under state law, provide for fines and imprisonment for violations." (N.T. 61; Respondent Exhibit 1).

9. Prior to the enactment of Ordinance No. 17-96, the proposed Administrative Code was circulated to City Council members. (N.T. 63-66).

10. By cover letter, dated March 27, 1997, the City circulated a copy of the draft Code to the City's Mayor, Managing Director, City Council, and the presidents of the City's union locals, including Jonathon Gowombeck, president of the complainant Union herein. (N.T. 12, Complainant Exhibit 3).

17. Section 9 of the Code sets forth a range of penalties for employees found to have violated the Code. The penalties include public reprimand, personnel file notation, private reprimand, public censure, unlimited suspension, termination, referral to criminal authorities for criminal prosecution, summary criminal conviction with a fine up to \$300 and thirty

(30) days imprisonment, ineligibility for holding any office or position within the City for a period of up to five years, imposition of an administrative fine to cover the costs and expenses of investigating any violation, and any other penalties authorized by law. (N.T. 14, 96; Complainant Exhibit 5).

21. Article 6 of the parties' Collective Bargaining Agreement (CBA), which was in effect at the time of the events giving rise to the instant dispute, states the following:

Section 2: Management Rights

Except as otherwise specifically provided herein, the Management of the City of Reading and the direction of the work force, including but not limited to the right to hire, the right to discipline or discharge for proper cause, the right to decide job qualifications for hiring, the right to lay off for lack of work or funds, the right to abolish positions, the right to make rules and regulations governing conduct and safety, the right to determine schedules of work consistent with this Agreement, together with the right to determine methods, processes and manner of performing work, are vested exclusively in Management, all subject to the terms and provisions of this Agreement.

(Complainant's Exhibit 1).

22. Article 22, Section 1 of the CBA provides for the adoption of work rules by the City and states the following:

The City shall adopt rules for the operation of the Fire Service and the conduct of its employees, providing the rules do not conflict with the provisions of this Agreement or do not infringe upon the labor jurisdiction of any other Union. Work rules shall be standard in all stations and on all shifts as much as possible.

(Complainant's Exhibit 1).

23. Section 2(A) of the Code defines the powers and duties of the Board of Ethics. Accordingly, the Board of Ethics is empowered to perform the following functions:

1. Give advice as to the application of the ethics provisions of the Charter of the City of Reading and this Code of Ethics.
2. Receive and dispose of complaints of violations of the Charter and Code of Ethics.
3. Conduct investigations, hold hearings, subpoena witnesses and compel their attendance, administer oaths, take testimony, require evidence on any matter under investigation or any suggestions before the Board, make findings of fact and issue orders.

4. Conduct educational programs to promote ethical conduct of public officials, City employees and individuals and groups doing business with the City.
5. Adopt rules and regulations to administer, implement, enforce and interpret the Code of Ethics.

(Complainant Exhibit 5).

24. Section 3 of the Code recommends that City employes maintain certain positive attitudes and perceptions relating to public service. The five principles articulated in this section are suggestive rather than mandatory. (Complainant Exhibit 5).

25. Section 4 of the Code defines the following terms respectively: (A) Appearance of Impropriety; (B) Board; (C) Candidate; (D) Conflict of Interest; (E) Employee; (F) Material Interest; (G) Official; (H) Political Activity. (Complainant Exhibit 5).

26. Section 5 of the Code expands on conflicts of interest and emphasizes the significance of City personnel avoiding such conflicts. This section further provides that if a City official or employe has a financial interest in a proposed contract with the City, that officer or employe must disclose the interest and refrain from voting on the contract. A violation of this section shall render the contract voidable by the Board of Ethics. (Complainant Exhibit 5).

27. Section 6 of the Code of Ethics requires certain employes and officials with "decision making authority" to file a Statement of Financial Interests with the City Clerk. (Complainant Exhibit 5).

28. Section 7 of the Code of prohibits City employes and officials from disclosing non-public, confidential information regarding property, operations, policies or affairs of the City. (Complainant Exhibit 5).

29. Section 10 of the Code provides that any City employe or official can seek an advisory opinion from the Board of Ethics, which can be used as a defense in subsequent investigations and prosecutions. (Complainant Exhibit 5).

30. Section 11 of the Code sets forth the procedure for filing complaints and other pleadings with the Board of Ethics. This section also sets forth procedures for investigating and adjudicating alleged unethical conduct before the Board of Ethics. (Complainant Exhibit 5).

31. Under Section 11, the Board of Ethics has the power to initiate proceedings by its own action. The Board of Ethics is empowered to hold closed evidentiary hearings, unless a public hearing is specifically requested by the responding party; make findings of fact; and issue final orders. Additionally, this section establishes the various remedial powers of the Board of Ethics. (Complainant Exhibit 5).

32. Section 11 empowers the Board of Ethics to operate in a dual capacity; it confers on the Board of Ethics both prosecutorial and adjudicative powers. This section protects complainants, who provide information or testimony regarding the subject of a given investigation or

adjudication, from subsequent negative treatment regarding his employment. (Complainant Exhibit 5).

33. Section 12 of the Code provides that "records relating to an investigation are confidential until a final determination is made by the Board, except as may be required by due process." The final order is a public record and the identity of a complainant may be released if there has been an abuse or wrongful use of the system. (Complainant Exhibit 5).

34. Section 13 of the Code prohibits the wrongful use of the Board of Ethics, and defines the "Wrongful use of the Code of Ethics" as:

(1) Filing a frivolous complaint.

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(2) Publicly disclosing or causing to be disclosed that a complaint against a person has been filed with the Board of Ethics.

(Complainant Exhibit 5).

35. The Disciplinary Code that was negotiated by the Union and the City contains provisions requiring ethical conduct generally, and specifically addresses the following matters: intoxication, attention to duty, disobedience of orders, courtesy towards the public, safety, and personal appearance and hygiene. (Complainant Exhibit 2).

36. Article VIII of the Disciplinary Code provides for disciplinary measures to be imposed upon wayward firefighters and details various offenses and their concomitant penalties. (Complainant Exhibit 2).

#### DISCUSSION

On January 1, 1996, the City became a home-rule municipality. Section 601 of the City's home-rule charter required the City to enact a comprehensive administrative code detailing the organizational and administrative structure of the City government and its procedures. The charter also required that the City Council enact a City code of ethics by January 1, 1997. Pursuant to these two mandates, on June 24, 1996, the City enacted Ordinance No. 17-6, which adopted and established the City's Administrative Code. In section 10.02 of the Administrative Code, the City adopted the Pennsylvania Public Official and Public Employee Ethics Act, which served as an interim ethics code until August 1997. The interim ethics code, however, was not enforced during this time. On March 27, 1997, the City circulated a cover letter with a copy of the draft code of ethics to the presidents of the three union locals representing the public employees in the City. This letter informed the unions, including Mr. Gowombeck, the president of the complainant Union, that a public hearing would be held on April 1, 1997, to give interested parties an opportunity to provide input on the proposed draft code. Mr. Gowombeck did not attend that hearing. Mr. Gowombeck was provided with a final version of what would become the Code of Ethics on June 7, 1997. Prior to June 1997 and during subsequent negotiating sessions, Mr. Gowombeck lodged objections to the unilateral implementation of the Code. However, during this time, the City's personnel director informed Mr. Gowombeck that the Code would be implemented regardless of any opposition. On June 25, 1997, the Union filed a charge of

unfair labor practices alleging that the City violated its duty to bargain in good faith when it unilaterally implemented the Code in contravention of the parties' CBA. In August of 1997, the Code was formally adopted.

In its exceptions and supporting brief, the Union raises three issues. The Union argues that the City had a duty to bargain with the Union over the rules of conduct and the disciplinary provisions contained within the Code, prior to its formal adoption, for the following reasons: (1) rules of conduct and disciplinary provisions are subjects that were previously negotiated and new rules addressing the same subjects are inherently in conflict with the parties' agreement; (2) the new disciplinary provisions and penalties of the Code directly conflict with the CBA, which provides that all personnel actions shall be subject to the civil service laws; and (3) the impact of the disciplinary provisions of the Code on Union members' employment duties and conditions of employment render such provisions mandatory subjects of bargaining under the applicable case law.

## I

The Board will combine its analysis of the first two issues raised by the Union because they are closely related. The Union argues that the City had a duty to bargain with the Union over the terms of the Code pursuant to the express terms of their CBA. Specifically, the Union argues that the parties negotiated and bargained for the Disciplinary Code, which addresses the same subject matters as the Code. The preamble of the Disciplinary Code provides that disciplinary policies and procedures applicable to the bargaining unit are subject to change in accordance with the terms of the labor contract only. The parties' labor contract, argues the Union, provides that personnel actions shall be governed by the civil service provisions of the Third Class City Code. The Union accordingly argues that "[t]he City is now estopped from disavowing its express written agreement with Local 1803 regarding the procedures to govern the imposition of bargaining unit discipline." (Complainant's Exceptions and Supporting Brief at 2).

However, the record in this case supports the conclusion that the City did not, at any time, limit itself or its ability to direct the conduct of City firefighters in any way, as demonstrated by the full context of the Preamble to the negotiated Disciplinary Code, upon which the Union relies. The Preamble provides that the "[d]isciplinary action shall not be limited to the following categories listed in the Table of Contents, as they are meant to be a general guide." (Complainant Exhibit 2, Preamble). The Table of Contents of the Disciplinary Code specifically enumerates all of the provisions in the Disciplinary Code. The Preamble also provides that the Disciplinary Code's "policies and procedures have been established by Fire Chief Russell P. Mogel, 1<sup>st</sup> Deputy Chief Charles W. Schaeffer Jr., and the Director of Public Safety Mark J. Smolkowicz, and are subject to additions and/or changes at their discretion, in accordance with the terms and conditions of the Labor Contract." (Complainant Exhibit 2, Preamble) (emphasis added). The obvious import of these two provisions is that the Union expressly agreed that the City has the right, at its own, unilateral discretion, to alter, amend, supplement, or change the terms, conditions, policies, or procedures embodied within the Disciplinary Code as long as the City's changes were consistent with the CBA. Therefore, the City was not, at any time, limited by the subject matter or the scope of the specific terms of the Disciplinary Code and expressly preserved its managerial prerogative to direct the conduct of its firefighters.

The CBA contains a managerial rights clause, which provides the following:

Except as otherwise specifically provided herein, the Management of the City of Reading and the direction of the work force, including but not limited to the right to hire, the right to discipline or discharge for proper cause, the right to decide job qualifications for hiring, the right to lay off for lack of work or funds, the right to abolish positions, the right to make rules and regulations governing conduct and safety, the right to determine schedules of work consistent with this agreement, together with the right to determine methods, processes and manner of performing work, are vested exclusively in Management, all subject to the terms and provisions of this Agreement.

(Complainant Exhibit 1, Article 6, Section 2) (emphasis added). This provision of the CBA expressly permits the City to make unilateral changes or additions to the rules of conduct or disciplinary procedures enumerated in the Disciplinary Code. Pursuant to this provision, the Union expressly agreed that the City shall retain the unfettered right to unilaterally implement rules of conduct and discipline.

The CBA also contains a section entitled "Personnel Actions Subject to Civil Service." This provision states the following:

Rules of conduct not inconsistent herewith in effect at the date of this Agreement shall be continued. Management shall have the right to amend, supplement, or add to said rules during the term of the agreement. Such rules shall be reasonable and shall not be applied in a discriminatory manner. All personnel actions shall be subject to applicable Civil Service Laws and procedures.

(Complainant Exhibit 1, Article 6, Section 3) (emphasis added). This provision expressly preserves the City's right to amend, supplement, or add to rules of conduct provided such rules are not inconsistent with the CBA. The Union, however, argues that the last sentence of this section limits the City's right to unilaterally promulgate rules of ethics and impose rules of conduct with associated disciplinary procedures. Pursuant to this section, argues the Union, "all employee discipline will be exclusively governed by the civil service provisions of the Third Class City Code," and the City cannot unilaterally implement any changes because it bound itself to the provisions of the Civil Service Laws. (Complainant Exceptions and Supporting Brief at 3).

The Union cites two sections from the Firemen's Civil Service Act (Act)<sup>1</sup> to support its argument that the disciplinary policies and procedures for the Union members in the instant case are governed exclusively by the Civil Service Laws. Accordingly, argues the Union, the final sentence in Article 6 Section 3 of the CBA controls and limits the City's right to unilaterally implement changes in rules of ethics, conduct, or discipline. An examination of the statutory sections cited by the Union does not support the Union's

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<sup>1</sup> Act of May 31, 1933, P.L. 1108, 53 P.S. 39861, *et seq.* The Firemen's Civil Service Act removed firemen of the third class cities from the provisions of the Third Class City Code and established a separate civil service system for firemen. Brookman v. Johns, 405 A.2d 1081 (Pa. Cmwlth. 1979).

argument that the civil service laws limit the City's managerial prerogative to unilaterally implement rules of ethics, conduct or discipline in addition to those already in effect. The civil service laws provide minimum statutory rights and protections for civil service employees that are collateral to and independent of any collective bargaining agreement or statutory bargaining duty. The duty to bargain over a matter under Act 111 relates to its inclusion in Section 1 as a specific matter of negotiation or if not specifically addressed, application of the well-established rational relationship test. Township of Upper Saucon v. PLRB, 620 A.2d 71 (Pa. Cmwlth. 1993). That legislation other than Act 111 (Civil Service) addresses an issue which in turn is referenced in a collective bargaining agreement does not attach a statutory bargaining duty. Notwithstanding the fact that the CBA references the civil service laws as a limitation on imposing discipline, disciplinary measures are always subject to these laws because civil service employees have an independent statutory right to have their discipline reviewed by the Civil Service Commission.

Section 1 of the Act provides, in relevant part, that "no person shall be . . . demoted or discharged as a paid member of any fire department . . . in any manner or by any means other than those prescribed in this act." 53 P.S. §39861. Section 10 of the Act provides that "[n]o member of any fire department . . . subject to civil service within the terms of this act, shall be suspended for a period in excess of three days or removed, discharged, or reduced in rank or pay except for just cause." 53 P.S. § 39870. The remainder of this section provides for notice requirements and affords the employe subject to discipline an opportunity to demand a public hearing before the Civil Service Commission, at which time the burden is on the officer imposing discipline to justify his action. 53 P.S. §39870. Nothing in the civil service laws, and specifically the sections cited by the Union, conflicts with the City's action or prohibits the City from unilaterally promulgating a code of ethics with disciplinary provisions. Section 10 merely requires "just cause" for a suspension in excess of three days, a discharge or a reduction in rank. This section does not define the meaning or scope of "just cause". Additionally, this section provides the disciplined employe with a procedure and a forum to have his discipline reviewed by the Civil Service Commission. Accordingly, the term "just cause" is merely a standard by which the Commission will review the discipline. Finally, a reading of the Disciplinary Code, the CBA, and the Civil Service laws together, as suggested by the Union, reveals that the City and the Union agreed that the City has the right to unilaterally exercise its managerial prerogative to promulgate rules of conduct.

Also, Article 22, Section 1 of the CBA, entitled "Work Rules" is consistent with the aforementioned provisions of the CBA and provides the following:

The City shall adopt rules for the operation of the Fire Service and the conduct of its employees, providing the rules do not conflict with the provisions of this Agreement or do not infringe upon the labor jurisdiction of any other Union. Work rules shall be standard in all stations and on all shifts as much as possible.

(Complainant Exhibit 1, Article 22 Section 1). Again, the parties expressly anticipated and agreed that the City could unilaterally implement rules directing the conduct of its employe firefighters, provided that the rules

adopted are consistent with the parties' agreement. There is no ambiguity in any of these consistent and repetitive provisions. Although an employer is not required to bargain over permissive subjects or matters of inherent managerial policy, International Association of Firefighters v. City of Scranton, 429 A.2d 779 (Pa. Cmwlth. 1981), once an employer chooses to negotiate over such matters that employer is bound by its decision to regard those matters as negotiable for the duration of that agreement only. Fraternal Order of Police Jermyn Lodge No. 2 v. Hickey, 499 Pa. 194, 452 A.2d 1005 (1982); Scranton School Board v. Scranton Federation of Teachers, 365 A.2d 1339 (Pa. Cmwlth. 1976). However, an examination of the individual provisions of the Code in comparison to the individual provisions of the CBA and the Disciplinary Code reveals that there is no direct conflict with the parties' agreement. There is nothing in the Disciplinary Code, the parties' CBA, or the applicable civil service laws that is directly in conflict with the provisions of the Code or prevents the City from unilaterally implementing such a Code. Contrarily, the parties' negotiated agreement, including the Disciplinary Code and the Civil Service laws, expressly anticipated and permitted the City's unilateral implementation of such a Code.

Finally, the Union cites Delaware County Lodge No. 27 v. PLRB, 694 A.2d 1142 (Pa. Cmwlth. 1997), for the proposition that "once parties have reached an agreement to follow exclusive statutory procedures for imposing discipline, the Board is required to determine whether an employer's attempt to deviate from the agreed upon statutory procedures constitutes a violation of such procedures." (Complainant Exceptions and Supporting Brief at 4-5). This contention, however, is without merit because, as stated above, the "exclusive statutory procedures", to which the City bound itself, do not address, let alone limit, the City's ability to promulgate disciplinary rules to enforce rules of ethical conduct. As previously discussed herein, the civil service laws cited by the Union merely provide due process and a system of review for civil service employees who are the subject of certain types of discipline. Therefore, the civil service laws simply do not provide "exclusive statutory procedures for imposing discipline". Further, the Union's invitation to the Board to interpret the parties' agreement under these circumstances usurps the role of the grievance/arbitration procedure of the parties' CBA. Absent a repudiation of the CBA, not present here, allegations of violations of the parties' CBA should normally be raised through the contractual grievance procedure and not through the filing of charges of unfair labor practices.

## II

Under Section 1 of Act 111, police officers have the right to bargain collectively, through their duly elected and certified bargaining representative, with their public employer "concerning the terms and conditions of their employment, including compensation, hours, working conditions, retirement, pensions and other benefits." To determine whether an employer's rules of conduct and disciplinary procedures constitute mandatory subjects of bargaining, this Board must determine (1) whether the Union proved that the disciplinary provisions at issue are rationally related to employees' duties; and (2) if so, whether the employer proved that its interest in the integrity, efficiency and economic performance of its governmental function substantially outweighs any impact a given disciplinary provision will have on the employees' interest in employment duties and conditions. Upper Saucon, supra; Fairview Township Police Association v. Fairview Township, 31 PPER ¶ 31019 (Final Order, 1999). Generally, matters involving the direction of the work force are outside the scope of Section 1 of Act 111 and are non-negotiable. In PLRB v. Commonwealth, Governor Dick Thornburgh (Code of

Conduct), 13 PPER ¶ 13097 (Final Order, 1982), aff'd, 479 A.2d 683 (Pa. Cmwlth. 1984), this Board stated that "[t]he function of the public sector employer is framed by its duty to serve the public interest by the efficient and effective governance of all the people." Code of Conduct, 13 PPER at 172. The Board, in Code of Conduct, adopted the following language from the Connecticut State Labor Relations Board: "`matters of public policy necessarily become intertwined with the concept of managerial prerogative . . . . [T]he public employer who must carry out the mission of protecting the public is entitled to enforce this policy in a reasonable manner without consultation with the union.'" Code of Conduct, 13 PPER at 173 (quoting City of New Haven v. AFSCME, 3 NPER 07-12067 (Decision No. 1490, 1977)). In Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia, 29 PPER ¶ 29000 (Final Order 1997), this Board stated that "a public employer's managerial prerogative includes action to ensure integrity in public employment and to increase public confidence in government." Id. at 2.

Section 1 of the Code is the "Declaration of Policy", and it preliminarily articulates the overall purpose and scope of the Code. It also creates the Board of Ethics. This section states that "[t]he purpose of this Code is to establish ethical standards of conduct for all officials and employes of the City of Reading, its agencies and authorities, whether elected or appointed, paid or unpaid." This general statement of policy lies at the core of entrepreneurial control regarding matters of employe ethics, as a preliminary statement of general principles and establishment of a forum for administration of the Code. As such, the establishment of core general principles in the statement of Policy constitutes managerial prerogative because it substantially outweighs any effects on the duties of bargaining unit employes or issues that are negotiable under Section 1 of Act 111.

Section 2 establishes the general powers, duties and qualifications of members, operating procedures and the organizational structure of the Board of Ethics. These matters likewise lie at the core of entrepreneurial control of the administration of the Code and are clear matters of managerial prerogative.

Section 3 articulates "Principles of Public Service Ethics". Although these provisions rationally relate to conditions of employment, because they address the conduct and attitudes of bargaining unit members, the Board concludes that the City's interest in directing its workforce in a manner that preserves the integrity of its public service function substantially outweighs the employes' interests in the conditions of their employment. All five subsections of Section 3 begin with the phrase "Public servants should . . . ." (Emphasis added). Accordingly, these provisions are suggestive guidelines rather than mandatory and enforceable rules of conduct. The average conscientious employe will seek to follow these principles as a matter of course, but there are no ramifications for the non-compliant, and compliance would not require any adjustment for most firefighters.

Section 4 is the definition section. This section does not, by itself, have any relationship to employment duties or conditions. Rather, this section defines terms used in other sections that relate to employment. Section 5 requires public employes and officials to disclose any financial interest in an entity or contractor doing business with the City and provides that no City official or employe should be involved in activities that may be viewed as conflicting with his City employment. To properly execute Section 5, Section 6 requires certain yet-to-be-determined officials and employes to furnish a statement of financial interests for the preceding year, and Section

7 prevents the disclosure of confidential information. In Code of Conduct, supra, the Commonwealth Court affirmed this Board's conclusion that a code of conduct prohibiting conflicts of interest and requiring the submission of financial disclosure forms is within a public employer's managerial prerogative. In Code of Conduct, the Board stated that the "[c]ompletion of financial interest forms has little impact on employes beyond the information actually contained therein in terms of a working condition." Code of Conduct, 13 PPER at 175. Likewise, in our discretion, this Board concludes that the employe confidentiality provision of the Code in the instant matter has negligible impact on conditions of employment, which are substantially outweighed by the employer's interests.

Section 8, entitled "Prohibited Behaviors", provides the rules of conduct and prohibits the following: conflicts of interest; solicitation and acceptance of gifts; nepotism; employing City property and personnel for private use; and political activities while on City time. This section also protects whistle blowers from adverse employment consequences. As previously stated, a public employer has a managerial prerogative to implement rules of conduct because it has a significant interest in preserving the integrity of its public function and the public confidence in government. Code of Conduct, supra. A public employer is entitled to select the appropriate means for fulfilling its mission to serve the public. City of Philadelphia, supra. In the instant matter, the City's mission to serve the public is defined by providing a safe, effective, dependable and trustworthy firefighting staff and equipment. The City's ability and determination to effectuate its public service mission is a managerial prerogative that is not subject to bargaining. City of Philadelphia, supra. Although the rules of conduct in Section 8 of the Code have an effect on the conditions of employment in this case, the City's interests substantially outweigh those of the employes in the conditions of employment.

Section 10, entitled "Advisory Opinions" provides the following:

Public officials and city employees may request an advisory opinion from the Board of Ethics. An advisory opinion may be used as a defense in any subsequent investigation or prosecution, provided that the official or employee who sought the opinion acted on it in good faith and only to the extent material facts were not omitted or misstated in the request for the opinion.

(Complainant Exhibit 5, Section 10). The import of this provision is that an employe who questions an anticipated course of conduct can seek the advice of the Board of Ethics regarding the appropriateness of that proposed conduct under the Code, which can be used as a defense if there is any fallout from that conduct. Under this provision, the Board of Ethics is not initiating an investigation on its own motion nor is it imposing penalties for conduct. Accordingly, providing for an advisory opinion falls within City of Philadelphia, supra, where this Board concluded that, although rationally related to the employes' interests in their conditions of employment, the employer's interest in establishing an advisory commission, that made findings and recommendations regarding police conduct, substantially outweighed the impact on the employe police officers in that case. Therefore, the City does not have to bargain the effects of Section 10 of the Code.

Section 12 of the Code provides that Board of Ethics proceedings, records and investigations are confidential. Confidentiality is certainly rationally related to the conditions of employment for employes who are the subjects of investigations. A public employer has a significant interest in maintaining the privacy of its employes and protecting its employes from prejudice in the employment environment and from the public at large. This Board, therefore, concludes that the City's interests in promulgating this provision substantially outweighs any interest that employes may have in their conditions of employment by compromising the confidentiality and privacy of their co-workers who, for legitimate policy considerations, are encouraged to participate in promoting the proper behavior of the City's firefighting staff.

Section 13 prohibits the wrongful use of the Board of Ethics. The purpose of the Board of Ethics is to prevent and remedy the misconduct of public employes and to preserve the integrity of the government employer, the efficiency of its operation and, therefore, the public trust. The City, therefore, has a legitimate interest in ensuring that the Board of Ethics maintains its own integrity and serves its purpose to prevent corrupt behavior. The City has a significant interest in ensuring that the Board of Ethics is not used for witch-hunts and individual complainants with ill-founded, ulterior motives. Accordingly, the Board finds that the City's interests in Section 13 substantially outweigh the impact on employes' interests and the impact on employment conditions.

Therefore, we find that the hearing examiner correctly determined that the City committed no unfair practices in the imposition of Sections 1-8, 10, 12-13 of the Code of Ethics because those Sections pertain to matters of managerial prerogative under Act 111 and PLRA.

### III

The Board has previously applied the Act 111 balancing test to disciplinary measures sought to be imposed by public employers in the Act 111 context. The Board has consistently concluded that, although the adoption of disciplinary rules are a matter of inherent managerial prerogative, disciplinary provisions have a severable impact on the terms and conditions of employment and that impact is negotiable. In Fairview Township, supra, this Board stated that "[m]atters of employe discipline and disciplinary procedures in both the public and private sector are generally regarded as mandatory subjects of bargaining." Fairview Township, 31 PPER at 45; Electri-Flex Co. v. NLRB, 570 F.2d 1327 (7<sup>th</sup> Cir. 1978). In Fraternal Order of Police, Washington Lodge No. 17 v. City of Easton, 22 PPER ¶ 22033 (Proposed Decision and Order, 1990), the hearing examiner determined that the city committed an unfair labor practice by unilaterally implementing a range of discipline for police officers who failed to meet physical fitness standards. Under the Public Employe Relations Act (PERA), the Board has similarly determined that although an employer's decision to initiate employe drug testing can be a managerial prerogative, matters of employer discipline for violating the employer's drug policies and standards are negotiable terms and conditions of employment. Amalgamated Transit Union v. Cambria County Transit Authority, 21 PPER ¶ 21007 (Final Order, 1989). Although the examiner determined that the decision to discipline non-complying officers was a matter of managerial prerogative over which there was no duty to bargain, the examiner concluded that the effects of the disciplinary provisions on officers who failed to meet the standards imposed were negotiable and ordered the city to bargain over that impact.

Pursuant to Section 9, the Board of Ethics itself can impose almost any penalty. This section provides that a majority of the Board of Ethics can vote to impose any of the following penalties: public or private reprimand with a record in the employe's personnel file, public censure, suspension for any period of time the Board of Ethics deems appropriate, termination, referral to authorities for criminal prosecution, prosecution by the Board of Ethics for a summary criminal offense resulting in a fine of \$300.00 and or thirty (30) days imprisonment, ineligibility for holding any office or position with the City for five (5) years, and "[a]ny other additional penalties authorized by law." The Board of Ethics in this matter has broad discretion and authority to impose or recommend very serious and far-reaching additional penalties on bargaining unit members such as imprisonment, termination, substantial fines, unlimited suspensions within the sole discretion of the Board of Ethics, and a serious restriction on future employment rights. The fact that the Board of Ethics can impose such severe, far-reaching penalties on employes, in our view, renders the powers of the Board of Ethics and the obvious substantial negative impact on the terms and conditions of employment a mandatory subject of bargaining. Additionally, the above-quoted catchall provision gives the Board of Ethics substantial authority to impose undisclosed penalties. The vague and overbroad nature of this provision, as previously discussed, impacts very heavily upon the employes' interests because the City's interests are not clearly defined or published. Moreover, this Board has concluded that "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." Fairview Township, supra, at 46. Section 9 imposes a new system of discipline on bargaining unit members that is significantly more encompassing than the Disciplinary Code with respect to the range of conduct to which the penalties apply and with respect to the range of penalties that can be imposed.

Also, Section 11 provides rules for initiating and maintaining an investigation and other procedures before the Board of Ethics. Section 11(A) provides that the Board of Ethics "may initiate proceedings by its own action." This section is another component of the expansive authority, power, and jurisdiction of the Board of Ethics. Accordingly, the City's interest in enforcing its rules of conduct are outweighed by the impact of the unfettered power of the Board of Ethics to investigate bargaining unit members through this provision. Further, the Board has previously held that public employes have a statutory right to assistance of the bargaining representative during employer initiated investigatory interviews where there is a reasonable expectation of discipline for purposes of PERA, PLRB v. Conneaut School District, 12 PPER ¶ 12155 (Final Order, 1981) and Act 111, Township of Shaler, 11 PPER ¶ 11347 (Nisi Decision and Order, 1980). Also, Section 11, I., in addition to restitution remedies, contains a seemingly fixed five-year forfeiture of the right to City offices or positions following a decision by the Board of Ethics. Due to the potentially vague and overbroad application of the investigatory and prosecutorial provisions of Section 11, as well as the other dangers identified herein, it suffers from the same problems identified above regarding Section 9.

Accordingly, for those reasons, we find that Sections 9 and 11 of the Code contain matters which are mandatory subjects of bargaining and the city was required to negotiate with the Union prior to the imposition of these sections. We will amend the PDO accordingly.

After a thorough review of the exceptions and all matters of record, the Board shall dismiss the exceptions in part and sustain the exceptions in part.

#### CONCLUSIONS

CONCLUSIONS 1 through 3 of are affirmed and incorporated herein by reference.

CONCLUSION 4 is vacated and set aside.

5. That the City has not committed unfair practices in violation of Section 6(1)(a) and (e) of the PLRA and Act 111 by adoption of Sections 1-8, 10, 12-13 of the Code of Ethics.

6. That the City has committed unfair practices in violation of Section 6(1)(a) and (e) of the PLRA and Act 111 by adoption of Sections 9 and 11 of the Code of Ethics.

#### 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 in part and sustained in part; that the Order on page 5 of the Proposed Decision and Order be vacated and set aside; and,

#### IT IS HEREBY FURTHER ORDERED AND DIRECTED

that the City shall:

1. Cease and desist from interfering with, restraining or coercing employes in the exercise of the rights guaranteed in the PLRA and Act 111.

2. Cease and desist from refusing to bargain collectively with the representative of its employes.

3. Take the following affirmative action which the Board finds necessary to effectuate the policies of the PLRA and Act 111:

(a) Rescind the applicability of Sections 9 and 11 of the Code of Ethics to the bargaining unit by informing the Union in writing of said inapplicability;

(b) Make a written offer to negotiate with the Union over the terms of Sections 9 and 11 of the Code of Ethics applicable to the bargaining unit;

(c) Post a copy of this Final Order within five (5) days from the effective date hereof in a conspicuous place readily accessible to its employes and have the same remain so posted for a period of ten (10) consecutive days; and,

(d) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this decision and order by completion and filing of the attached affidavit of compliance.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania, pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, John Markle, Jr., Chairman, and L. Dennis Martire, Member, this sixteenth day of May, 2000. 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

INTERNATIONAL ASSOCIATION OF :  
FIREFIGHTERS, LOCAL 1803, :  
AFL-CIO :  
 :  
v. :  
 : Case No. PF-C-97-114-E  
 :  
CITY OF READING :

**AFFIDAVIT OF COMPLIANCE**

The City of Reading hereby certifies that it has ceased and desisted from its violation of Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act; that it has informed the Union in writing that the current provisions of Sections 9 and 11 of the Code of Ethics are inapplicable to the complainant bargaining unit; that it is has made a written offer to bargain with the Union over the matters addressed in sections 9 and 11 of the Code of Ethics; that it has posted the Board's Final Order as directed therein; and that it has served a copy of this affidavit on the Union.

\_\_\_\_\_  
Signature/Date

\_\_\_\_\_  
Title

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

\_\_\_\_\_  
Signature of Notary Public