DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO Court Address: 1437 Bannock St., Denver, CO 80202	DATE FILED: December 19, 2016 1:18 PM CASE NUMBER: 2015CV33862
Plaintiff(s), **DENVER POLICE PROTECTIVE ASSOCIATION** And Defendant(s), **CITY AND COUNTY OF DENVER, COLORADO**	▲ COURT USE ONLY ▲ Case Number: 15CV33862 Ctrm: 275

ORDER RE: PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

THIS MATTER comes before the Court on the parties' cross motions for summary judgment. The Court, having reviewed the Motions, the Responses, the Replies, DPPA's Sur-Reply, the relevant legal authority, the court file, and being otherwise fully advised in the premises, HEREBY FINDS and ORDERS as follows:

FACTUAL BACKGROUND

Plaintiff Denver Police Protective Association ("DPPA") and Defendant City and County of Denver ("City") are parties to a Collective Bargaining Agreement ("CBA"). The Denver Home Rule Charter ("Charter") sets forth the rights and obligations of both parties with respect to collective bargaining. The Charter provides that "Police Officers shall have the right to bargain collectively with the city and to be represented by an employee organization in such negotiation." Charter § 9.8.3 (A).

The Charter distinguishes between "mandatory," "permissive," and "prohibited" subjects of bargaining. Mandatory subjects of bargaining include "compensation," "the number of hours in the work week," and "personal safety and health equipment." Charter § 9.8.3 (B) (i), (iii) and (v). Permissive subjects of bargaining include "Police Officer safety and health matters except as provided in 9.8.3(B)(v)." *Id.*, §9.8.3(D)(vii). The parties must bargain over mandatory topics, and may negotiate over permissive topics, if the parties agree to do so, and all such negotiations need to be in good faith. *Id.*, § 9.8.5(A).

The following facts are without any genuine dispute. In the summer of 2014, the City, through the Denver Police Department, implemented a six-month pilot project in which patrol

officers in District 6 used body cameras. In July 2015, the City promulgated its Body-Worn Camera Policy No. 111.11 ("BWC Policy"), requiring assignment of BWC systems "to officers and corporals in line assignments," including the Gang Unit and Traffic Operations, in all six of the Department's districts. BWC Policy, § (3). Within days of the issuance of the BWC Policy, Plaintiff demanded to bargain with the City over the Policy and implementation, arguing that it concerned mandatory subjects of bargaining. The Plaintiff had a meeting with a member of the City Attorney's Office in September regarding BWCs, and made a second demand to bargain over the issue in October, 2015. In a letter dated October 19, 2015, the City again refused to bargain, taking the position that the BWC Policy and implementation was not a mandatory subject of bargaining under the Charter. Denver Police Chief Robert White stated that officers would be required to wear the cameras off-duty when employed in safety or security-related jobs separate from their jobs as police officers. White Dep. 61:24-62:10, 63:6-11.

On November 3, 2015, Plaintiff filed this action, alleging that the City violated the Collective Bargaining Agreement in implementing the BWC Policy without bargaining in good faith with Plaintiff. Plaintiff seeks a declaration that the City breached its obligations under the Collective Bargaining Agreement and Charter, and that the City violated Plaintiff's rights with respect to the Charter. Plaintiff also requests equitable relief ordering the City to engage in bargaining.

Each party filed a Motion for Summary Judgment. Plaintiff argues that the implementation of the BWC Policy is a subject of mandatory bargaining because it falls under "compensation," "the number of hours in the workweek," and "personal safety and health equipment." Plaintiff argues that because the policy is a subject of mandatory bargaining, the City violated the duty to bargain in good faith as required by the Charter. The City argues that the BWC Policy does not fall under any of the categories requiring mandatory bargaining.

STANDARD OF REVIEW

Summary judgment is appropriate when the pleadings and supporting documents demonstrate that no issues of material fact exist and the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c); *Cotter Corp. v. American Empire Surplus Lines Ins. Co.,* 90 P.3d 814, 819 (Colo. 2004). The nonmoving party is entitled to the benefit of all favorable inferences that may be drawn from the undisputed facts, and all doubts as to the existence of a triable issue of fact must be resolved against the moving party. *Martini v. Smith,*42 P.3d 629, 632 (Colo.2002); *HealthONE v. Rodriguez ex rel. Rodriguez,* 50 P.3d 879, 887 (Colo.2002).

ANALYSIS

Because the foregoing facts are not in dispute, the disposition of both of the parties' Motions turns on whether the BWC Policy is an issue of "compensation," "the number of hours in the workweek," or "personal safety and health equipment," any one of which would make it a mandatory subject of bargaining under the Charter.

The Charter is a municipal ordinance. Interpretation of a municipal ordinance is a matter of law. *See e.g. Mountain States Media, LLC v. Adams County, Colorado,* 2009 WL 2169627, *5 (D. Colo. 2009); *Town of Erie v. Eason,* 18 P.3d 1271, 1274 (Colo. 2001). In interpreting a municipal ordinance, courts must give effect to the intent of the enacting body, which they do,

first, by looking to the plain language of the ordinance. *City of Colo. Springs v. Securcare Self Storage, Inc.*, 10 P.3d 1244, 1248-49 (Colo. 2000). "Courts must refrain from rendering judgments that are inconsistent with that intent." *City of Colo. Springs v. Securcare Self Storage, Inc.*, 10 P.3d at 1248. "To determine legislative intent, we therefore look first to the plain language of the ordinance." *Id.* at 1249. "If the statutory language is clear and unambiguous, the language should not be subjected to a strained or forced interpretation." *Id.* If the statutory language is susceptible to more than one reasonable interpretation, courts give "great deference to an agency's interpretation of a rule it is charged with enforcing if it has a reasonable basis in law and is warranted by the record." *Sierra Club v. Billingsley*, 166 P.3d 309, 312 (Colo. App. 2007).[1] The parties have not cited, and the court has not found any binding Colorado case law regarding interpretation of the mandatory and permissive subjects of bargaining under the Charter.[2]

A. The BWC Policy does not fall under "compensation" under the Charter.

Compensation is a mandatory subject of bargaining under the Charter. Charter § 9.8.3(B)(i). Compensation is defined in the Charter as "wages, salaries, and any other pay to Police Officers. By way of illustration, the term shall include longevity pay, hazardous duty pay, shift differential, acting pay, call back pay, overtime pay, and payments for unused leave at separation." Charter § 9.8.2(I).

The CBA contains twelve articles that are considered "compensation" as defined by the Charter. These twelve articles range from sick leave to overtime, from court time/jury duty to health and dental insurance. *See* CBA Arts. 9-12, 16-21, 25, 27. Here, Plaintiff argues that because the BWC Policy could have implications under the Fair Labor Standards Act ("FLSA"), like requiring police officers to work beyond their shift period, the policy is an issue of compensation and is thus a mandatory subject of bargaining. However, the City argues that

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[1] Agency interpretation of a municipal ordinance is normally given great deference if there is a reasonable basis in law and warranted by the record. *Sierra Club v. Billingsley*, 166 P.3d 309, 312. The DPD is the agency charged with enforcing rules governing Denver police officers, and therefore its interpretation of the Charter should be given at least some deference. However, in this case, the City is in the unique position of not only being the agency charged with enforcement, but also being a party to the CBA with the DPPA. Thus, the court is reluctant to give great deference to the DPD's interpretation because it has a vested interest in the outcome of that interpretation. *Cf. Colorado Common Cause v. Meyer*, 758 P.2d 153, 159 (Colo. 1988) (Rule requiring courts give deference to administrative interpretations of regulatory schemes is inapplicable when the construction of a statute by those charged with its administration has not been uniform).

[2] In its Reply brief, Plaintiff cites several cases arising under the National Labor Relations Act, 29 U.S.C. §§ 151-169, suggesting that such cases provide a "useful framework to analyze those situations that relate to, or substantially impact a mandatory subject of bargaining." Reply at 9. This court declines to do so for two reasons. First, the NLRA is inapplicable to local government entities such as Denver. *See* 29 CFR 471.4(a)(3). Second, and more importantly, Congress defined the areas of mandatory bargaining under the NLRA in deliberately imprecise language, i.e., "wages, hours, and other terms and conditions of employment," 29 U.S.C. §§ 158(d), 159(a), *see, First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 614-615, nn. 12 and 14 (1981), in marked contrast to the more precise language of the Denver Charter regarding mandatory subjects of bargaining.

although the use of body cameras might in certain circumstances cause officers to work overtime and earn overtime compensation, this does not make the BWC Policy itself "compensation" within the meaning of that term under the Charter. The court is persuaded by the City's argument.

Three principles of statutory construction lead the court to this conclusion. First, "when there is clear legislative intent, Courts must refrain from rendering judgments that are inconsistent with that intent." *Colo. Springs v. Securcare Self Storage, Inc.*, 10 P.3d at 1248. Second, "when the legislature speaks with exactitude, we must construe the statute to mean that the inclusion or specification of a particular set of conditions necessarily excludes others." *Lunsford v. W. States Life Ins.*, 908 P.2d 79, 84 (Colo. 1995). Finally, "under the canon of construction noscitur a sociis, 'a word is known by the company it keeps.' " *Currier v. Sutherland*, 218 P.3d 709, 717 (Colo. 2009) (Eid, J., concurring) (citing *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 694, 115 S.Ct. 2407 (1995); *see also Bedford v. Johnson*, 102 Colo. 203, 208, 78 P.2d 373, 376 (1938) (defining noscitur a sociis as "the meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it."); *Kumar v. Copper Mountain, Inc.*,2009 WL 4035612 *7 (D. Colo. 2009). Here, the Charter's definition of "compensation" makes no specific reference to policies like the BWC Policy, nor is the Policy the type of thing found in the definition's list. Rather, that definition is limited to "wages, salaries, and any other pay to Police Officers," and illustrates that definition by enumerating several different types of payments, including "longevity pay, hazardous duty pay, shift differential, acting pay, call back pay, overtime pay, and payments for unused leave at separation." Charter § 9.8.2 (I). In short, all are species of payments of money to police officers in exchange for their services. Had the City Council intended to include department policies potentially indirectly affecting officer compensation, like the BWC Policy, as an issue of "compensation," it could easily have done so in the list, but did not. Put another way, department policies arguably having such affects are not among the company the definition's words keep. Therefore, to extend the definition of "compensation" to reach the BWC Policy would be inconsistent with the City Council's intent. For these reasons, the court is not persuaded that the BWC Policy falls under "compensation" under the Charter.

B. The BWC Policy does not fall under "the number of hours in the workweek" under the Charter.

The Charter states that "the number of hours in the work week" is a mandatory subject of bargaining. Charter § 9.8.3 (B) (iii). Unlike "compensation," the Charter does not provide a separate definition for this subject of bargaining.

Here, Plaintiff argues that the use of body cameras falls under "the number of hours in the work week" and therefore must be bargained over as a mandatory subject because it "alters the number of hours in a work week." Plaintiff argues that because the use of the cameras may result in an officer working beyond the hours required absent the body cameras, the additional work may cause the officer to incur overtime which would result in an alteration of the work week. Plaintiff cites the requirement that off-duty officers working secondary jobs wear the cameras as an example of both modification of the work week terms and as affecting compensation. The City, on the other hand, argues that "the number of hours in the work week" has always meant setting the normal work cycle, not the specific tasks and duties that constitute a

police officer's work, and that the CBA already addresses "the number of hours in the work week." The City also argues that if the Plaintiff's interpretation of the Charter is correct, then every assignment, call, paperwork, or incident requiring an officer to perform extra work would be a mandatory subject of bargaining because all of those could potentially alter the work week. The court is persuaded by the City's argument.

The issue of the work week is covered by the CBA between the parties. Article 15 of the CBA, which covers the subject of hours in the work week, only addresses the number of hours in each twenty-eight day work period. For each twenty-eight day work period officers are entitled to eight days off. CBA Art. 15.1. The CBA has remained unchanged since 2005. CBA Art. 15 (2005-2014). The CBA has never included more than the setting of the normal work cycle as "the number of hours in the work week," nor has it ever included the type of work officers do that makes up the hours in the work week as part of that definition, *id.*, and the court will not apply a new definition now. These traditional understandings of the meaning of the phrase "the number of hours in the work week" are particularly significant because the conduct of the parties before any dispute arose between them is an indication of what they intended the contract to mean, CJI-Civ. 30:31, and by extension the Charter as well.

The court declines to subject the language of "the number of hours in the work week" to a "strained or forced interpretation." *See Boulder County Bd. of Equalization v. M.D.C. Constr. Co.*, 830 P.2d 975, 980 (Colo. 1992). As with the word "compensation," interpreting the phrase to include any policy that could potentially affect the number of hours an individual officer works during his or her shift would result in an absurdity: virtually every assignment, call, paperwork requirement, or incident requiring an officer to perform extra work would become a mandatory subject of bargaining if it had the indirect effect of changing the number of hours the officer actually works. Because the CBA provides a traditionally accepted definition, and a deviation from that definition would result in an absurdity, the court is not persuaded that the BWC Policy falls under "the number of hours in the work week."

C. The BWC Policy falls under "personal health and safety equipment" under the Charter.

"Personal safety and health equipment" is a mandatory subject of bargaining under the Charter. Charter § 9.8.3(B)(v). "Police officer safety and health matters except as provided in 9.8.3(v)" are permissive subjects of bargaining. *Id.*, § 9.8.3(D)(vii).

The Charter does not define "personal safety and health equipment." There is also no Colorado case law or other previous interpretations of the phrase for purposes of police officer collective bargaining. Further, the Charter does not state whether a piece of equipment must be used "solely" or "primarily" for officer safety, or whether a piece of equipment can be labeled "safety equipment" even though safety may not be its only or primary purpose.

Without direct guidance from the Charter, it is up to the court to interpret the meaning of "personal health and safety equipment." When considering that phrase together with the phrase, "police officer safety and health matters except as provided in 9.8.3(B)(v)," it is clear that the City Council intended to carve out a special category of safety-related matters involving equipment for mandatory bargaining, separate from the larger and more general concept of "safety and health matters," as to which bargaining is permissive. The Charter does not specify

whether a piece of equipment needs to be "primarily" or "exclusively" for safety in order to be a mandatory subject of bargaining.

In this context, the court regards it as particularly significant that the BWC Policy itself highlights a safety dimension to the use of body cameras in its "Purposes" section. Although the Policy makes clear that, in general, BWCs are intended to serve as additional means of documenting specific incidences in the field, the safety purpose is explicitly included among five "specific uses" of the BWCs. As the Policy states, "Specific uses of the BWC are: ...c. To mitigate potentially confrontational interactions with members of the public through the presence of BWC." BWC Policy, 111.11(1)c.[3] Other specific uses include, "To capture crimes in progress," "To document initial police responses," "To prevent and resolve complaints against police officers," and "To serve in training and performance feedback." Policy, §§ (1)a, (1)b, (1)d, and (1)e. Read together, the acknowledged safety purpose is no more and no less important than capturing crimes in progress and documenting police interactions with the public and response to crimes, and inextricably bound up with the evidence preservation purpose. This explicit acknowledgement of a safety dimension to BWCs is in line with recognized continuums of the appropriate use of force by police officers, which include the deterrent effect of a "command presence." *See Heaney v. Costigan*, 2012 WL 1378597 #2 (D. Colo. Apr. 20, 2012). One need only reflect upon the fact that motorists notoriously become scrupulously observant of speed limits and other traffic laws in those areas of a highway where a police patrol car is visible, to recognize the deterrent effect of a "command presence."

Additionally, the Denver Office of the Independent Monitor ("OIM") issued a policy highlight in March of 2015, before the BWC Policy was implemented. In it, the OIM stated that, "Officers and community members can make valuable contributions to the development of the DPD's [Body-Worn Camera] policy going forward." Policy Highlight, OIM, *The Denver Police Department's Body Worn Camera Pilot Project: A Focus on Policy and Lessons Learned* at 2, March 2015. This suggests that at least the OIM considered the use of body cameras to be a proper subject of police officer input, which can take the form of negotiating under the CBA.

The court concludes that BWCs are a unique piece of equipment with a significant safety dimension integral to their purpose, despite arguably being secondary to their evidence gathering purposes, and therefore qualify as "personal safety and health equipment" within the meaning of the Charter. Unlike other items of equipment such as police vehicles, the BWC Policy explicitly recognizes that body cameras are used "to mitigate potentially confrontational interactions with members of the public through [their] presence." Policy, (1)c. Though police vehicles may also have a safety dimension, the record does not contain any official policy acknowledging their safety purpose, relative to their transportation purpose. Since the court's interpretation of "personal safety equipment" is limited to equipment that has a safety purpose among other purposes, even if secondary, the interpretation does not result in an absurdity.

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[3] The safety aspect of the use of BWCs is also evident in § (4)d of the Policy, under the heading of "Officer Responsibilities," which provides as follows:

> Officers are encouraged to notify the public that the BWC is activated and recording. Under most circumstances, notification has shown to diffuse incidents. However, there may be times that this is impractical or that the notification could diminish lines of communication. Officer discretion should be utilized and generally favor notification over non-notification.

The City argues that one would not call a car "culinary equipment" by virtue of the fact that someone has figured out how to cook a meal on a car's engine: instead, a car is still considered equipment for transportation. The City also points out that the cameras are unlike equipment that one would typically think of as "safety equipment," pointing to bulletproof vests and firearms as examples. Both of these points amount to nothing more than arguments that a particular item of equipment must have safety as its "sole" or "primary" purpose before it falls within the Charter's intended meaning of "personal safety and health equipment." This court has concluded that an integral safety purpose, especially one recognized in an official policy's recitation of its purpose, is sufficient to qualify it as "personal safety and health equipment" for the purposes of the Charter.

The Plaintiff submitted an expert witness affidavit prepared by Chief Mark Dunston, who is the Chief of Police in Ocean Springs, Mississippi, who concluded that BWCs are a "safety issue," citing and attaching two studies. The 2012 study by the Police Foundation found that implementation of BWCs for police officers prevented escalation during police-public interactions. The study noted this applied both to abusive behavior towards police and unnecessary use-of-force by police. Affidavit of Chief Mark Dunston, at 3. A second study by the Journal of Experimental Criminology reported a 15% increase in officer assaults after the implementation of similar body cameras. *Id.*

The City raises two arguments involving Chief Dunston's expert opinion. First, the City asks how equipment that negatively impacts officer safety can be called "safety equipment." The City asserts that logically safety equipment must increase the safety of the officers. However, the researchers for the Journal of Experimental Criminology explained that the apparent rise in the level of officer assaults upon the implementation of a BWC policy could reflect that officers may be more willing to report assaults when they know there is dispositive evidence in their favor because of the presence of body cameras. *Id.* In any event, the court is not convinced that the fact that the presence of body cameras could conceivably negatively impact officer safety is sufficient to remove them from the meaning of "safety and health equipment" under the Charter. The presence of a gun on an officer may also conceivably increase the risk to that officer under certain circumstances, but the City acknowledges that firearms are nonetheless regarded as safety equipment under the Charter. Indeed, this duality of the possible effect of the presence of BWCs on officer safety is embedded in the BWC Policy itself. It notes that, "[u]nder most circumstances, notification [of the public that the BWC is activated and recording] has shown to diffuse incidents," but that "there may be times that. . . notification could diminish lines of communication." *Id.*, § (4)d.

The City also points out that Chief Dunston referred to the cameras as a "safety issue" rather than "equipment," arguing that, therefore, the cameras are a "permissive subject of bargaining" rather than a mandatory one, since "issue" is synonymous with "matter." The court does not find the City's argument compelling. Even assuming Chief Dunston was intending to refer to "safety issue" in the same sense as the Charter refers to "safety...matter" in §9.8.3(D)(vii), expert witness opinions are not binding as to legal issues, and the Charter is still subject to judicial interpretation.[4] *People v. Pahl,* 168 P.3d 169, 182 (Colo. App. 2006)("an expert may not usurp the function of the court by expressing an opinion on the applicable law or

[4] Therefore the court denies the City's Motion to Strike Plaintiff's Expert's Affidavit.

legal standards."). Chief Dunston analyzed the Policy, equipment, and studies and concluded the cameras have a significant impact on officer safety. Though he characterized the safety dimension as being an "issue," rather than "equipment," his expert testimony is not a legal conclusion categorizing the body cameras as a "safety matter" rather than "safety equipment" under the Charter.

Plaintiff cites *City and County of Denver v. Denver Firefighters, Local 858*, 320 P.3d 354 (Colo. 2014), as being supportive of its position. In *Firefighters*, the question was whether "discipline" was a mandatory subject of bargaining between the City and its firemen, when it was not listed along with other mandatory subjects in the Charter. The plaintiff there argued that because "terms and conditions of employment" was a mandatory topic of bargaining, and was undefined, it could conceivably encompass disciplinary rules, therefore "discipline" was a mandatory subject of bargaining. *Id.* at 358-58. The Colorado Supreme Court held that the City Council vested the City with the power to create disciplinary rules within a separate section of the Charter, and this authority was not subject to collective bargaining because "discipline" was not specifically listed among those mandatory subjects of bargaining.

Here, there does not appear to be a dispute that the DPD has at least some authority to require or authorize the use of certain equipment by its officers, and the dispositive legal issue is whether the Department may unilaterally draft and implement a policy regarding the use of BWCs without negotiating with Plaintiff. Unlike in *Firefighters*, Plaintiffs here rely upon an explicit subject of mandatory bargaining under the Charter, that being "personal safety and health equipment." Although that term is not further defined in the Charter, there can be no serious question that BWCs are "equipment." Further, on the record before the court, it is clear that the use of such cameras has a safety dimension or purpose, albeit one which may arguably be secondary to its evidence gathering and preservation purposes. As noted previously, the Policy itself acknowledges the safety use of "mitigat[ing] potentially confrontational interactions with members of the public" under the section labeled "Purpose," and discusses factors to be weighed by an individual officer in deciding whether to notify members of the public that the BWC "is activated and recording," including the cameras' twin capacities to "diffuse incidents," on the one hand, and "diminish lines of communication," on the other. BWC Policy, §§ (1)c and (4)d. Chief Dunston's affidavit and the attached studies generally confirm these aspects of body camera usage. Unlike in *Firefighters*, where the firemen asked the court to essentially supply the definition of "terms and conditions of employment," the Plaintiff here relies primarily upon the Department's own characterization of the purpose of BWCs, and the opinion of their expert, to argue that they constitute "personal health and safety equipment."

In summary, the court determines that because body-worn cameras are clearly related to effectuating police officer safety, even though that purpose may be secondary to evidence gathering and preservation, and because the cameras are indisputably "equipment," they constitute "personal safety and health equipment" for the purposes of mandatory bargaining under the Charter.

CONCLUSION

For the reasons set forth above, the court finds that there is no genuine issue of material fact, and that, as a matter of law, body cameras constitute "personal safety or health equipment"

within the meaning of Charter § 9.8.3(B)(v). Thus, the BWC Policy is a mandatory subject of bargaining.

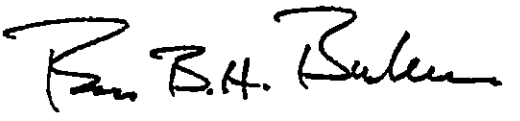
Accordingly, the court HEREBY GRANTS Plaintiff's Motion for Summary Judgment as to both its claim for declaratory judgment and equitable relief. The parties are ORDERED to engage in collective bargaining regarding the use of body-worn cameras by the Denver Police Department. The Defendant's Motion for Summary Judgment is HEREBY DENIED.

Pursuant to C.R.C.P. 58(a), JUDGMENT SHALL ENTER in favor of Plaintiff and against Defendant. In light of the fact that the BWC Policy has been in effect for approximately 18 months, and both parties will have gathered invaluable knowledge and experience which will inform their negotiations, the court HEREBY STAYS enforcement of this judgment during the time permitted for the filing of a notice of appeal. C.R.C.P. 62(a) & (b).

Plaintiff shall be awarded its costs.

DATED this 19th day of December, 2016.

BY THE COURT:



Ross B.H. Buchanan
Denver District Court Judge