

**BEFORE THE PERMANENT UMPIRE FOR THE
MONTGOMERY COUNTY POLICE LABOR RELATIONS LAW**

In the Matter of:

MONTGOMERY COUNTY, MARYLAND

Respondent

and

FRATERNAL ORDER OF POLICE,
MONTGOMERY COUNTY LODGE NO. 35

Charging Party

Prohibited Practice Charge

Date of Filing: January 20, 2016

Negotiability of Various Proposals
in Term Bargaining (Article 72)

Permanent Umpire: Ira F. Jaffe, Esq.

APPEARANCES:

For the FOP:

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For the County:

Heather A. Mulloy, Esq.
(Associate County Attorney)

OPINION

On January 20, 2016, at the conclusion of term bargaining for a successor to the FY2016 Agreement and prior to the scheduled start of mediation on January 29, 2016, the County declared certain portions of the Union's proposal for a new Article 72, Body Worn Cameras, non-negotiable. The Union then filed a Prohibited Practice Charge ("PPC") challenging that determination and seeking a finding that the proposals in question were negotiable under the Police Labor Relations Act ("PLRA") and a directive

that the County resume bargaining with respect to those matters.¹ A conference call was held with Counsel and agreement was reached to hold an informal expedited hearing on January 27, 2016.

At the informal hearing, there was significant discussion regarding the Montgomery County Police Department's proposed Body Worn Camera program ("BWC Program"), those areas of the BWC Program that would be significant to the mission of the Department, and the areas in which the BWC Program would result in significant and potentially adverse changes to the working conditions of bargaining unit officers. Given the importance of expeditiously obtaining a ruling as to negotiability of the particular proposals, nature of the issues, the Impartial Umpire agreed to issue his ruling in this matter no later than the morning of January 29, 2016.

The Bargaining History Regarding Body Worn Cameras (Proposed Article 72) and the PPC Regarding the Pilot BWC Program

In mid-2015, the County advised the Union that it was planning to implement a Pilot BWC Program. The Union requested bargaining regarding a number of aspects of that Pilot. The County replied that the Pilot was non-negotiable and implemented the BWC Pilot Program on June 8, 2015 (Function Code 430). The FOP filed a PPC on June 30, 2015 asserting that it enjoyed the right to bargain under the PLRA regarding a number of aspects of the Pilot and that the County's refusal to bargain as to those aspects and unilateral implementation of those aspects of the Pilot violated the PLRA.

¹ The PPC initially also complained about the County's declaration of non-negotiability regarding proposed Article 31, but that matter was resolved prior to the informal hearing when the County withdrew its declaration. The PPC also included a claim that the County's decision to assert non-negotiability at the conclusion of the pre-mediation bargaining sessions constituted bad faith bargaining. After discussion of that allegation at the hearing, the FOP agreed to withdraw that allegation without prejudice to its position that making such a declaration at the end of bargaining was a violation of the obligation to bargain in good faith under the PLRA. Based upon the withdrawal of those claims, no rulings are issued with respect to

On October 30, 2015, I issued an Opinion and Order that found that the County violated the obligation to bargain in good faith imposed by the PLRA by refusing to bargain in good faith with respect to those aspects of Function Code 430 that were the subject of an FOP demand to bargain on May 29, 2015. Those subjects covered by the FOP's May 29, 2015 demand to bargain were: 1) the wearing of body cameras; 2) the nature of the BWC equipment to be worn; 3) the uses of BWC recordings; 4) the use of BWC recordings for administrative discipline; and 5) the maintaining of BWC recordings. There were no specific proposals at issue because the County took the position that it would not negotiate regarding any aspect of Function Code 430. The PPC was the first to address the interplay of working conditions (as to which there is an obligation to bargain under the PLRA) and the impairment of management rights covered by Section 33-80(b) following the amendments to the PLRA that changed the provisions with respect to effects bargaining. After an extensive review of the prior cases of the Impartial Umpire/Labor Relations Administrators and the courts under the PLRA and the other County Labor Relations Acts, and jurisprudence arising under the National Labor Relations Act and under other public sector bargaining statutes, as well as the evidence of the intent of the County Council when it amended the PLRA, I held that:

The determination as to whether and to what extent a particular subject matter or proposal is subject to an obligation to bargain, upon request, under the PLRA, involves several determinations. The threshold determination concerns whether the subject matter or proposal falls within the broad categories of items set forth in Section 33-80(a)(1) through (7) of the PLRA. In substance, that question is whether the subject matter concerns wages, hours, or other terms and conditions of employment. Second, a determination must be made as to whether the subject matter or proposal with respect to the actions or proposed actions of the County may properly be deemed management rights as set forth in Section 33-80(b)(1) through (10) of the PLRA. Third, if the subject matter or proposal both falls within Section 33-80(a)(1) through (7), but would also limit in some meaningful way managerial prerogatives set forth in Section 33-80(b)(1) through (10) of the PLRA, it is necessary to balance the interest of employees and the FOP in the right to engage in bargaining over those issues, on the one hand, with the impact on the management rights in question, on the other, in order to determine whether requiring that

the items be bargained would "impair" those management rights to an extent that renders the matter non-negotiable.

(Decision at 41.)

It was recognized further that the refusal to bargain relative to the Pilot was asserted in the absence of specific proposals and that if a negotiability review addressed specific proposed contract language then the question of whether the proposal inappropriately impaired one or more management rights could be done in a more focused fashion.

The Negotiations over Article 72

The Parties refrained from providing detailed testimony at the January 27, 2016 hearing regarding statements made by Union and by County representatives in their bargaining sessions. Copies, however, of the proposals of the Union and the County with respect to Article 72 were introduced into evidence.

The FOP made its initial proposal for Article 72, Body-Worn Cameras, on November 13, 2015. The FOP restated its Article 72 proposal on November 24, 2015. No significant differences are discernable between those two proposals.

The County made its initial proposal with respect to Article 72 on December 14, 2015. The County made a revised Article 72 proposal on January 13, 2016, that did include a number of changes.

As previously noted, on January 20, 2016, the County declared a number of specific provisions in the Union's Article 72 proposal to be non-negotiable.

Unlike the objections in the BWC Pilot PPC, this case involves a declaration of non-negotiability with respect to specific proposed contract language. At the hearing in this matter, which was conducted on January 27, 2016, there was significant discussion

by all participants as to: 1) the reasons why the FOP asserted that the particular proposals were subject to a duty to bargain under the PLRA; 2) the reasons why the County maintained that the particular proposals would significantly impair one or more Section 33-80(b) employer rights and should, therefore, be found to be non-negotiable; and 3) the intent of the proposals in question. Several of the disputes regarding non-negotiability were resolved by either withdrawal of the proposal by the Union or an acknowledgement that the proposal was negotiable by the County. A number of significant areas of dispute, however, remain and require ruling. Given the fact that mediation is scheduled to begin on January 29, 2016, the Impartial Umpire committed to issue the ruling in this case by the morning of January 29, 2016, along with a brief explanation of the reasons for the particular negotiability determinations.

General Observations

Prior to addressing the specific proposals, however, some general observations are appropriate.

First, the rulings in this case relate to the negotiability or non-negotiability of specifically worded provisions. Thus, if the proposal is found to constitute a matter within the scope of Section 33-80(a) of the PLRA, the negotiability analysis focuses, of necessity, upon whether the particular proposals in question inappropriately impairs one or more Section 33-80(b) employer rights. A different proposal concerning that same general subject area that does not have the same degree of impairment may well be viewed differently under the PLRA in terms of its negotiability.

Second, the Parties both recognized that the entire BWC initiative is in its very early stages. The state of the applicable law in Maryland is far from settled and may

change significantly in the future. Just recently, on January 8, 2016, the Maryland Police Training Commission (“MPTC”), a subunit of the Maryland Department of Public Safety and Correctional Services, published a policy establishing minimum standards for the issuance and use of BWCs by law enforcement officers that addressed seventeen enumerated subjects set forth in §3-511 of the Maryland Public Safety Code with respect to BWC policies. Compliance with the minimum standards set forth in the MPTC policy is mandatory for police agencies, including the Department, in the state of Maryland. The MPTC on the same date published an extensive Body-worn Camera Procedural Reference Guide (“Guide”) that included commentary, reference materials, and recommendations with respect to a large number of the issues surrounding implementation of BWC programs and their impact on law enforcement efforts and upon law enforcement officers, including such matters as activation and termination of recordings, evidentiary recordings, non-evidentiary recordings, storage, tagging, review, and dissemination and release procedures (including redaction). The Guide includes recommendations by the MPTC and discussion of a number of issues as to which the MPTC declined to make specific recommendations at the time. The governing standards applicable to both voluntary disclosure on the part of the County and disclosure in response to an information request under the Maryland Public Information Act (“MPIA”) or other applicable law also remain unclear. Accordingly, it would not be surprising to find that the legal and programmatic landscapes change significantly in a number of respects in the upcoming months and years, including in ways that may affect issues of negotiability. To the extent that the County’s assertions of non-negotiability are grounded in an assertion that the particular proposal would inappropriately impair the

mission of the Department, it needs to be noted that certain aspects of the law enforcement mission of the Department relative to BWC recordings may not have been fully determined at this time.

Third, notwithstanding these and other limitations, it is clear that all of the disputed proposals involve matters that are of high import to the County and to the FOP and its members. The BWC Program will have as one of its effects a significant expansion of the activities of bargaining unit officers that will be recorded. There can be no serious question that this will represent a very material change in working conditions. Similarly, there can be no serious question that recording the law enforcement activities of many of the County's officers while they interact in various ways with members of the public will have great significance in terms of the manner in which the County accomplishes its law enforcement mission and in terms of how the County's Police Department may be viewed by the public at large.

Fourth, the focus in terms of the negotiability analysis is upon whether the particular challenged proposal is bargainable, not whether it should or should not be adopted. In essence, the analysis addresses whether, if adopted in the impasse process, the particular proposed language would exceed the bounds of what is a mandatory subject of bargaining under the PLRA.

Fifth, the FOP's November 24, 2015 Article 72 proposal is modeled to a large degree upon contractual language that has been bargained by the Parties in Article 66 of the Agreement, which relates to the Mobile Video Systems program of recording devices installed in Department vehicles (dash cams). The FOP asserted that, to the extent that similar language has been bargained without assertion of non-negotiability in Article 66,

it should be treated as binding (or at least highly instructive) relative to questions of non-negotiability concerning proposed Article 72. According to the FOP, "video is video," and to the extent that the provisions of Article 66 have not been shown to have caused any inappropriate impairment of employer rights or bar to the accomplishment of the Department's mission, there is no reason to believe that applications of the same provisions will do so in the context of BWCs. The County argues, to the contrary, that there are a number of reasons why Article 66 should be treated as irrelevant to the negotiability determinations in this case. Specifically, the County relies in this regard upon the following: 1) Article 66 was negotiated at a time when the PLRA provisions regarding effects bargaining were different than they are today; 2) Article 66 addresses recordings that take place in a different legal context than recordings on BWCs which are mobile in different ways; 3) the BWC initiative is taking place in the context of new Maryland laws that never applied to Mobile Video Systems recordings and different public expectations relative to the need for police activities to be recorded and the need for those recordings to be disclosed as public records of the activities of government agents; 4) the much greater scope of BWC recordings that will ultimately occur in terms of the percentage of affected officers and the greater range of police activities render the negotiated Article 66 provisions largely inapplicable to proposed Article 72 issues; and 5) the BWC program will involve a significantly larger investment of Department time and resources than the MVS program and, therefore, any contractual restrictions that inappropriately limit the Department's ability to fully utilize that investment should be viewed differently in the balancing test relative to negotiability set forth in the Opinion regarding the BWC Pilot for resolving claims of non-negotiability.

The fact that Article 66 of the Agreement contains language that mirrors some of the disputed language contained in the FOP's Article 72 proposal cannot be viewed as dispositive of the question of negotiability under the PLRA. The differences in the MVS program and the BWC program, changes in Maryland law regarding disclosures of recordings, changes in the PLRA, and other factors render it inappropriate to summarily find proposed Article 72 provisions negotiable simply on the basis that the County and the FOP agreed to the negotiation and continuation of Article 66 language without challenge to those provisions. The lack of demonstrated mission or operational impairments under Article 66, however, is entitled to some weight in gauging the claims of the Department relative to those matters. The precise weight to be given to that factor, however, will vary depending upon the particulars of the asserted impairment and consideration of the similarities and differences between the MVS program and the BWC program.

The Disputed Proposals

1) Article 72, Section A.3. of the FOP's November 24, 2015 Proposal provides:

(3). The employer shall determine in what units BWC will be implemented. The Employer will first seek volunteers to be assigned a BWC. If the number of volunteers exceeds the number of available cameras, assignment of BWC will be made among volunteers on the basis of seniority. If there is an insufficient number of volunteers, cameras shall be assigned on the basis of inverse seniority.

HOLDING: The first sentence of Section A.3. is negotiable. The remainder of Section A.3. is non-negotiable.

The first sentence is little more than a recognition of the County's right to determine the units in which BWC will be implemented. The discussion at the hearing made clear that the reference to units was not intended to limit the County's right to determine the shift, physical location, or activity for which BWCs could be used.

The requirement to use volunteers first and to use seniority if there were too few or too many volunteers as the mechanism for assigning BWCs to individual officers would inappropriately restrict the County's ability to appropriately deploy BWCs in situations where it was determined to be needed. By imposing an absolute requirement to assign BWCs first on a volunteer basis and secondarily on a reverse seniority basis if there were too many or too few volunteers in a particular unit, the proposal inappropriately and substantially restricts the County's ability to utilize its available Body Worn Cameras in situations where they would be needed most critically. Cited examples included, for example, a mission-driven need to assign a bilingual officer to particular work for which a BWC was deemed appropriate; an inability to assign a BWC to an officer who had suspected problems in his or her interactions with the public or certain members of the public; or assignment of BWCs to individual members of a SWAT team, breach team, entry team, or the like, all in light of the limited number of BWCs and the limited number of officers who will initially be trained in their deployment. Any concerns about favoritism or reprisal by supervision in the assignment of BWCs can be addressed by other proposals that have less impact on the Department's ability to maintain and improve the efficiency and effectiveness of operations, determine the means and personnel by which operations will be performed, and to direct and supervise employees. The proposal, as worded, would significantly restrict the Department's management right to place BWCs where believed most appropriate from a law enforcement perspective or force changes to be made in officer assignments solely to ensure that particular officers in a unit are volunteers or senior/junior such that they may be required to use a BWC.

This holding is not intended to raise questions about the negotiability of other contractual provisions that provide for assignments of various types of equipment or technology to be done on the basis of volunteers/seniority, including the assignment of MVS equipped vehicles to officers pursuant to Article 66. Rather, the holding is limited to the different issues that are implicated by assignments of BWCs to particular officers performing particular assigned duties.

2) Article 72, Section C.7. of the FOP's November 24, 2015 Proposal provides:

7. Employees shall not be required to activate body-worn cameras when engaged in conversations with individuals with whom the employee is in a privileged relationship (e.g., spouse, attorney, police peer counselor, labor representative, minister, etc.).

HOLDING: The proposal is non-negotiable.

Although phrased in terms of non-activation, the FOP explained that the proposal is intended to address both initial activation of BWCs and also the decision to terminate or suspend recording.

As phrased, the proposed Section C.7. language applies equally to both situations in which law enforcement activities are being recorded (e.g., at the scene of a disturbance or accident or shooting) and situations in which the officer is driving in his or her vehicle while en route to a call. The language applies equally to time sensitive conversations and to those that could easily be deferred to a later point in time when there is no requirement to have the BWC activated and recording. The language applies to all conversations with individuals with whom the employee is in a privileged relationship, regardless of whether or not the conversation is actually privileged. If adopted, it would grant the officer the ability to terminate recording even in situations in which the MPTC policy would appear to require that recording continue. The Union's concerns about the BWCs inappropriately capturing privileged communications or the use of any privileged

communications so captured certainly present negotiable concerns. A more narrowly tailored proposal, however, may both comply with law and prevent an inappropriate impairment of the Department's mission while also addressing the situation of BWC recordings that unintentionally capture confidential or privileged conversations. The MPTC Guide recognizes the possibility of accidental or unintentional recordings of matters that have no evidentiary value or official purpose and notes the possibility of those recordings being deleted after the fact. A proposal to limit or preclude reliance by the Department on such recordings and/or to limit or preclude their release may also address many of the stated concerns without inappropriately limiting the Department's right to have complete recordings of law enforcement events.

The hearing indicated that presently there is no bar on personal hands-free telephone conversations during time in the cruiser (including time while traveling to a call) that does not interfere with the officer's law enforcement responsibilities. To the extent that the Union's proposal would allow for officers to decline to activate the BWC after the initiation of a call for service or other activity that is investigative or enforcement in nature and under circumstances where there is no showing that activation was unsafe, impossible, or impractical, serious questions would be presented as to whether it would violate the BWC Policy minimum standards promulgated by the MPTC pursuant to §3-511 of the Public Safety Article.

3) Article 72, Section D.1. and D.2. of the FOP's November 24, 2015 Proposal provides:

1. Management shall have access to BWC recordings for any legitimate matters unrelated to employee performance or discipline, except as noted below in paragraph 2. All recordings will be used for official business only. The Employer shall not externally release any recordings unless required to do so by law.

2. The Employer may only use information contained in a BWC recording as a basis of discipline where the information was obtained after the Department reviewed a specific incident on a recording following:

a. an external complaint being filed concerning the incident (a non-police Department employee)

b. a pursuit;

c. uses of force arising out of the incident that result in injuries to anyone;

d. a collision involving a police vehicle;

e. a non-employee's claims of injury arising out of the incident; or

f. the Employer's reasonable basis to suspect that a recording would show an employee engaged in criminal wrongdoing or serious allegations of misconduct in violation of Department rules and regulations applicable to bargaining unit members. At the time of its review, the Employer shall enter the grounds for its reasonable basis in the log described in subsection 3, infra, or in a related case or investigative file.

Minor administrative infractions discovered during a review under sections 2(b)-(f) above will not result in disciplinary action. Disciplinary action under sections 2(b)-(f) above shall be limited to serious allegations of misconduct.

HOLDING: The proposal is negotiable in part and non-negotiable in part.

These sections were declared non-negotiable by their entirety by the County.

Although the language is modeled upon language contained in Article 66, the proposal raises four major questions of negotiability: 1) whether management may be denied access to BWC recordings for the purpose of performance or discipline except where there was a specific incident for which BWC recordings are reviewed based upon one or more specific triggering scenarios (detailed in Section 2 a. through f.); 2) whether discipline based on minor administrative infractions discovered during a review of BWC recordings following the triggers in Sections 2.b. through f. may be prohibited and, in such situations, limiting disciplinary action to only serious allegations of misconduct; 3) whether a proposal that recordings will be used only for official business is non-negotiable and whether management access will be limited to "legitimate matters"; and

4) whether all release of recordings may be prohibited except for those releases that are required by law.

These questions will be discussed seriatim.

The proposed ban on the use of recordings for performance evaluations is discussed below in connection with the FOP's Article 72, Section D.7. proposal and thus need not be discussed at this point. It is found non-negotiable for the reasons discussed later herein in connection with the Section D.7. proposal.

The proposed limits on the use of recordings to prove misconduct for disciplinary purposes exceed the limits of negotiability in several respects. To the extent that proposed Section D.1. precludes the Department from routinely searching through recordings for the express purpose of discovering one or more acts of misconduct upon which to then propose disciplinary action, the proposal is negotiable. The MPTC Guide at pages 62-63 contains advisory language providing that: "... a BWC recording shall NOT be used to ROUTINELY EVALUATE AN INDIVIDUAL'S PERFORMANCE OR TO ROUTINELY LOOK FOR VIOLATIONS OF POLICY/PROCEDURE and/or RULES/REGULATIONS IN ORDER TO INSTITUTE DISCIPLINARY ACTION." (Capitalization and underscoring as in original.) While it is not known if the County's own policy will include that advisory policy, the assertion that the Department has the unbridled discretion as the owner of the BWC recording to review it and use it as it deems fit, limited only by express limitations contained in law, is unpersuasive. Rather, to the extent that the matters implicate conditions of employment and to the extent that the proposals do not inappropriately impair employer rights, the exercise of managerial discretion relative to BWC policy and recordings is negotiable under the PLRA.

The proposal in Section D.1 and D.2 that bars use of BWC recordings “as a basis for discipline” in situations in which the County learns of officer misconduct by means of appropriate review of BWC recordings is non-negotiable since it would inappropriately impair the County’s right to supervise employees, to enforce rules and regulations not inconsistent with the PLRA or the Agreement, to direct and supervise employees, and to pursue the mission of the Department. Discipline for misconduct that is revealed and/or substantiated by a review of BWC recordings must still meet all applicable requirements contained in the Law Enforcement Officers Bill of Rights and the Agreement. To ban resort to disciplinary action where the reason that the BWC recording came to the attention of Department management was a reason other than those set forth in proposed Section D.2(a) through D.2(f) would inappropriately impair the Department’s mission and its rights to maintain and improve the efficiency and effectiveness of operations, to supervise and direct employees, and to enforce rules and regulations that are not inconsistent with the PLRA or the Agreement. For example, when reviewing a BWC recording of an officer for legitimate business reasons, it may come to the attention of the reviewing supervisor that another officer committed a serious infraction. The proposal would bar the Department from taking a disciplinary response to that misconduct since the reason that the BWC recording was accessed did not fall under any of the enumerated lettered subsections of proposed Section D. An absolute ban on the imposition of discipline for minor administrative infractions (without that term being defined and without regard to the circumstances) would similarly inappropriately impair the Department’s rights under Section 33-80(b)(1), (2), (5), and (8), to take appropriate disciplinary action subject to review in accord with the LEOBR and the Agreement.

The proposal that recordings will be used only for official business is negotiable as is limiting management access to legitimate matters. While the BWC recordings may be the property of the Department, they are compelled recordings of the actions of the bargaining unit officers. Use and release of recordings can cause significant harm to bargaining unit members including leading to civil and/or criminal liability, threats directed at officers and their families in situations in which the recorded behavior of officers provokes such responses on the part of others, and potentially subjecting members and others to unnecessary embarrassment. The MPTC Guide at page 64 contains advisory language that: "Under no circumstances are members with access to BWC recordings permitted to use, show, reproduce or release recordings for the purpose of ridicule or embarrassment of any officer or individual or for other non-law enforcement related purposes." Thus, while it is clear that the BWC recordings are the property of the Department, it is equally clear that the use of those recordings qualifies as a working condition that implicate bargainable subject matter under the PLRA. The limitations on that obligation to bargain arise when a particular bargaining proposal inappropriately impairs one or more of the employer rights recognized in Section 33-80(b) to a degree that outweighs the countervailing interests and rights of the bargaining unit and the FOP. No right to access or to use or to exercise discretion to release recordings for other than official business purposes has been demonstrated. For example, no employer right has been shown to exist to release or to sell BWC recordings for commercial gain or to do so in ways that serve no legitimate law enforcement purpose but may operate to unnecessarily embarrass one or more bargaining unit members.

The proposal that all release of recordings be prohibited except for those releases that are required by law is non-negotiable. The Parties recognize that certain releases are required by law, other releases are prohibited by law, and still other releases of recordings are neither legally required nor legally prohibited. It is this latter category of releases that the proposal would preclude in toto. The problem with such a blanket prohibition is that it would inappropriately impair the mission of the Department, the effectiveness of operations, and in certain circumstances the ability to carry out the Department's mission in emergency situations. As phrased, the proposal would prevent the Department from sharing recordings with other law enforcement agencies, from releasing recordings where it is believed that doing so would assist in the capture of a dangerous individual or the return of a victim or missing person or child or where the Department believes that release of recording information may quell public unrest or address what it believes to be inaccurate or unfair criticism of certain action by the Department or its officers. That is not to say that the general question of when and under what circumstances information may be released is not a bargainable matter. It is. There are legitimate and substantial interests on behalf of the FOP and its bargaining unit members in determining when and how information is to be released and no showing has been made that the discretion that is enjoyed by the Department under the MPIA and other applicable law to disclose or not to disclose BWC recorded information may not be the subject of collective bargaining under the PLRA given the fact that disclosures and non-disclosures of BWC recordings concern working conditions. With respect to certain disclosures, the interests of the bargaining unit members and the FOP are sufficiently strong and the law enforcement related need to be able to decide unilaterally whether disclosure will occur is sufficiently

weak or non-existent such that the procedures and standards for addressing such releases are negotiable matters. A proposal, however, such as the current proposed Section D.1. that would preclude all disclosures of recordings except where required to be made pursuant to law inappropriately impairs the legitimate law enforcement mission of the Department and its operations and must be found to be non-negotiable.

5) Article 72, Section D.5. of the FOP's November 24, 2015 Proposal provides:

No recording may be used for training purposes without the written consent of all employee(s) involved to include the employee whose BWC made the recording and any other employees who may be seen or heard on the recording. Such consent may be withdrawn in writing.

HOLDING: The proposal is negotiable in part and non-negotiable in part.

This proposal, while modeled upon language in Article 66, is different in that it purports to define the phrase "employee(s) involved" to include but any employees who may be seen or heard on the recording and the employee whose BWC made the recording. While it is possible that by redaction of faces or alteration of voices the Department may still use recordings deemed to be suitable tools for training absent consent by one or more officers who would be identifiable by image or voice on the original recording, the proposal would provide an absolute right on the part of the officer whose BWC made the recording to decline to consent to the use of the recording for training purposes and bar the Department from utilizing that recording for training, either in group or individual settings. As such, the portion of the proposal that vests the individual whose BWC with the ability to stymie the Department's ability to use the recording for training purposes inappropriately impairs the Department's rights and obligations regarding officer training. The interest of the officer whose BWC took the

video is relatively weak particularly if that officer is not identified in the training.² The ability of an officer to withdraw previously provided consent at any time, including after training materials have already been prepared, would also inappropriately impair the Department's ability to effectively maintain and improve the efficiency and effectiveness of operations and, in the case of certain trainings, to direct or supervise employees.

6) Article 72, Section D.7, of the FOP's November 24, 2015 Proposal provides:

No recording may be used for the purpose of performance evaluations.

HOLDING: The proposal is non-negotiable.

By providing for a blanket ban of BWC recordings for the purpose of performance evaluations, the proposal inappropriately impairs the Department's right to maintain and improve the effectiveness of operations. The ability to appropriately use BWC recordings as evidence of performance in connection with particular incidents does not mean that the Department is absolved from its obligations regarding fair evaluations of performance based upon the totality of inputs that bear upon evaluating officer performance or would be permitted to routinely scour BWC recordings and use those reviews as a primary basis for evaluating the performance of individual officers. The situation with respect to BWC recordings potentially is distinguishable from that presented with respect to MVS recordings. While there are significant limitations to BWC recordings such that it may be appropriate to bargain over and perhaps limit their

² Interestingly, the MPTC Guide contains advisory language for BWC policies that would provide for notice of intent to use a recording for training purposes and an opportunity to lodge any objections, with the final decision made by management based upon determining whether the training value outweighs the member's objection.

use in performance evaluations,³ BWC recordings may be expected to provide greater information regarding the actions on the job of officers than MVS recordings, based upon the different technologies, their deployment, and the situations in which they are likely to be activated. Under all of these circumstances and those noted earlier in the general observations section of this Opinion, I am persuaded that notwithstanding the provisions of Article 66, the proposed blanket ban on use of BWC recordings as evidence in performance evaluations inappropriately impairs employer rights under the PLRA and is, therefore, non-negotiable.

7) The Union withdrew its Article 72, Section D.11. proposed language rendering moot the dispute over the County's declaration of non-negotiability of that proposal.

8) Article 72, Section D.12. of the FOP's November 24, 2015 Proposal provides:

All external requests for copies of recordings, including subpoenas and summonses, will be reviewed by the County Attorney's Office. The County will notify the FOP of all such requests for BWC recordings/data involving unit members and solicit its opinion before determining whether the request will be granted or denied. If the County determines that a request cannot be denied under the MPIA, it will give the FOP an opportunity to file a reverse MPIA action and will not grant the original request until and unless a court orders that the recording/data be disclosed.

The County has objected to the negotiability of only the first sentence to proposed Section D.12.

HOLDING: The first sentence is non-negotiable to the extent that it specifies that all external requests for recordings will be reviewed by the County Attorney's office.

The proposal that all external requests for recordings, including subpoenas and summonses for recordings, be reviewed is negotiable. That proposal relates to the

³ The MPTC Guide notes at pages 8-10 the following limitations: 1) the camera doesn't follow officers' eyes or see as they see; 2) some important danger cues can't be recorded; 3) camera speed differs from the speed of life; 4) cameras may see better than the officer in low light; 5) an officer's body may block the view; 6) a BWC records only in two dimensions; 7) time stamping of recordings are gross and not sufficiently sophisticated; 8) one camera may not be enough in light of angles, ambient lighting, and other factors; 9) a camera encourages second guessing; and 10) a recording can never replace a fair, thorough, and impartial investigation.

procedures applicable to requests pursuant to the MPIA and implicates strong interests on the part of the FOP and bargaining unit members to ensure that only appropriate recordings are released, that requests for recordings are handled in a consistent fashion, and that any appropriate limitations that are conditions of such releases attach. The County's objection to negotiability relates solely to the requirement in the proposal that the review be conducted by the County Attorney's office. To specify that the County Attorney's office conduct these reviews would inappropriately impair the right of the County to determine the overall organizational structure, methods, processes, means, job classifications and personnel by which operations are to be conducted, particularly given the significant amounts of BWC recordings that will be produced and of the expected high volume of public requests for those recordings. Apart from proposing that reviews be appropriately complete and consonant with applicable standards, including those imposed by law and any imposed by provisions of the Agreement, and performed on a consistent basis, there has been no showing of countervailing interest in ensuring that the County Attorney's office perform the requisite reviews. It may well be that ultimately some or all of these reviews are done by or performed under the supervision of the County Attorney's office. A proposal that would eliminate the ability of the County to do otherwise, however, inappropriately impairs employer rights under Section 33-80(b)(1) and (4) of the PLRA.

9) The County withdrew its negotiability objection with respect to Article 72, Section D.13., of the FOP's November 25, 2015 proposal, rendering moot the challenge to that declaration of non-negotiability.

10) Article 72, Section D.14, of the FOP's November 24, 2015 Proposal provides:

Except as required by law, no recording of an employee injury, death, or other action shall be released for publication of any kind without the prior express written consent of the unit member. Consent may be withdrawn by the unit member in writing. A copy of each written consent and withdrawal of consent shall be sent by the Employer to FOP 35.

HOLDING: The proposal is non-negotiable.

While there are understandable and arguably compelling privacy reasons that might support non-disclosure of such recordings, in limited cases there may be countervailing law enforcement mission-related exigencies that might require the disclosure of such recording (including redacted recording information). The potential need for such disclosure based upon County decisions to do so in such situations as a disclosure of a recording or portion of a recording to assist in the return of a missing child or other victim of a crime on its own or to apprise the public of the image of a dangerous or violent person would be precluded. The proposal as worded would operate as a blanket ban of both disclosures to the public and disclosures to other law enforcement agencies other than as required by law. It is the absolute nature of the proposal's wording that supports the finding of non-negotiability as an inappropriate impairment of the Department's mission, including taking actions to carry out that mission in emergency situations. The Department recognized that the release of recordings of officer death or injury should not occur absent compelling law enforcement related reasons to release the recording or in situations where the release of those recordings are required by law.

The proposal that consent be obtained prior to releasing recordings of "other action" was acknowledged by the FOP to be another way of precluding the release of all BWC recordings that are not required by law and as to which written consent to release has not been secured. That portion of the proposal must be found non-negotiable for the

same reasons that a similar limitation, albeit differently phrased, was found to be non-negotiable in the FOP's Article 72, Section D.1., proposal.

11) Article 72, Section D.15. of the FOP's November 24, 2015 Proposal provides:

Neither this agreement nor any use of BWC or BWC recordings shall be construed as a waiver of any constitutional, statutory, civil, or other right by any unit member.

HOLDING: The proposal is negotiable.


The language, which mirrors language in Article 66, clarifies that the provisions of Article 72 and the use of BWC or BWC recordings do not waive the legal rights, including constitutional, statutory, civil, or any other legal rights of the bargaining unit members. This provision is plainly a working condition and there has been no showing that including such a provision would inappropriately impair the County's employer rights in any fashion.

12) The Union withdrew its proposed Article 72, Section D.17., based upon the agreement of the Union and the County that the withdrawal did not change whatever rights the County otherwise had (if any) to discipline employees for a violation of Article 72. This action rendered moot the challenge to the County's declaration that this proposal was non-negotiable.

ORDER

The County's declaration of non-negotiability with respect to certain provisions in the FOP's November 25, 2015 Article 72 Proposal is sustained in part and overturned in part to the extent noted in the foregoing Opinion. The County is directed to withdraw its assertion of non-negotiability and to bargain with respect to those FOP proposals found to be negotiable under the Police Labor Relations Act.

January 29, 2016

A handwritten signature in black ink, appearing to read "Ira F. Jaffe", is written over a horizontal line.

Ira F. Jaffe, Esq.
Permanent Umpire