

IN THE MATTER OF ARBITRATION	)	
	)	
	)	
between	)	
	)	
THE CITY OF OKLAHOMA CITY, OKLAHOMA,	)	
	)	
"Employer" or "City"	)	OPINION AND AWARD
	)	
	)	OF
and	)	
	)	M. ZANE LUMBLEY,
	)	ARBITRATOR,
THE FRATERNAL ORDER OF POLICE,	)	NAA
LODGE 123	)	
	)	
	)	
"Union" or "FOP"	)	
	)	

Grievance: Body-worn Camera Program

FMCS Case No. 16-50120-6

Date Issued: June 14, 2016

OPINION

PROCEDURAL MATTERS

The Arbitrator was selected by mutual agreement of the parties pursuant to Article 8 of their 2015-2016 collective bargaining agreement (Employer Exhibit No. 1, hereinafter “Agreement”) and a hearing was conducted before the Arbitrator on February 25, 2016, in Oklahoma City, Oklahoma. The City of Oklahoma City, Oklahoma, (hereinafter “Employer” or “City”) was represented by Richard E. Mahoney, Esq., Assistant Municipal Counselor. The Fraternal Order of Police, Lodge 123 (hereinafter “Union” or “FOP”) was represented by James R. Moore, Esq., of the law firm of Moore & Leamon.

At the hearing, the parties presented documentary evidence and called witnesses who testified under oath administered by the Arbitrator. A court reporter was present and the Arbitrator received a verbatim transcript of the proceedings. The parties agreed to submit electronic post-hearing briefs and timely briefs were received by the Arbitrator on April 8, 2016. At the Arbitrator’s request, the parties waived the FMCS requirement that a decision be issued within sixty days of receipt of briefs.

ISSUE

The parties agreed on the following issue to be resolved:

1. Did the City violate the collective bargaining agreement when it implemented a body-worn camera program?
2. If so, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE AGREEMENT

The relevant provisions of the Agreement are:

ARTICLE 3 AUTHORITY AND TERM

Section 3.1 The Employer and the FOP have, by these presents, reduced to writing the Agreement entered into by the Employer and the FOP through the collective bargaining process as that term is defined in 11 OS 2001 Section 51-101, as amended.

Section 3.2 This Agreement shall be effective as of the 1st day of July, 2015 and shall remain in full force and effect through the 30th day of June, 2016 pursuant to the terms of 11 OS 51-101 et seq.

Section 3.3 The terms of this agreement, as well as bargaining and arbitration for the terms of a successor agreement shall be governed by the terms of the Fire and Police Arbitration Act, 11 OS 51-101 et seq.

. . .

ARTICLE 4 MANAGEMENT RIGHTS AND RESPONSIBILITIES

Section 4.2 The Employer expressly reserves the right to plan, direct, and control all operations relating to the Police Department, and to hire, discipline, suspend, or discharge any member of the Oklahoma City Police Department, subject to the provisions of this contract.

. . .

Section 4.4 Except as specifically modified by this Agreement, all the rights, powers and authority the Employer had prior to the signing of this Agreement are retained by the Employer and remain exclusively and without limitation within the rights of the Employer.

. . .

Section 4.6 All rules, regulations, procedures, working conditions, departmental rules and practices and manner of conducting the operation and administration of the Oklahoma City Police Department in effect on the execution date of this agreement shall be deemed a part of this agreement unless and except as modified or changed by the specific terms of this agreement. This agreement shall also supersede any personnel policies of the City which conflict with its terms. Except as stated above, only the terms and conditions of employment of those individuals covered by this agreement shall not be altered except by agreement of the parties.

BACKGROUND

The parties are signatory to the Agreement on behalf of a unit of the City's commissioned police officers up through the rank of Deputy Chief. The current Agreement was signed on January 19, 2016, and, as provided in Article 3 thereof, is effective from July 1, 2015, through June 30, 2016.

Until implementation of the program at issue here, the Employer did not utilize cameras, either body-worn or dashboard-mounted, to record interactions between officers and the public. In 2014 the parties began to discuss the components of a body-worn camera program. Although it is clear from the record that both parties were in favor of implementing such a program, they disagreed over certain of its provisions. Ultimately, the parties agreed on all terms of the program except the provision allowing random review of camera footage by a supervisor, a term interpreted by the parties to include an officer's immediate supervisor.

On September 1, 2015, notwithstanding the FOP's formal written objection filed with it on August 27, 2015, the City Council approved Policy 553.0 approving the use of body-worn cameras.¹ On the same date, City Manager Couch issued Report 695 announcing the decision to press ahead with the body-worn camera program and wear tests to begin the next day. Attached to Report 695 was newly-created Department Procedure 188.0 addressing procedures relevant to the program, including camera usage, training, storage, review and retention times.

The Union grieved the Employer's decision on September 8, 2016, contending that implementation of the program without agreement from the Union violated Articles 1

¹ All dates hereinafter are 2015 unless otherwise specified.

and 4 of the Agreement as well as the Oklahoma Fire and Police Arbitration Act, 11 O.S. § 51-101 *et seq* (hereinafter “FPAA”). By way of remedy, FOP requested the City “[c]ease and desist implementation of Policy 188.0 and the use of cameras to record job performance unless and until an agreement is reached on all the terms of said Policy.”² In denying the grievance on September 18, Chief City responded that the body-worn camera program was not a change in working conditions, that the cameras in question were “simply a tool that will provide objective recordings of events that officers encounter and that, “A supervisor’s viewing of officer performance on video is no different from a supervisor observing performance of an officer in person, which a supervisor can clearly do.”³

The FOP then appealed the grievance to Step 4 of the parties’ grievance procedure where City Manager Couch concurred with the Chief’s response on September 28. When the Union referred the dispute to arbitration, it ultimately came on for hearing before the undersigned.

DISCUSSION AND ANALYSIS

Position of the Union

The Union contends the City’s unilateral implementation of the body-worn camera program violated both Article 4.6 of the Agreement and the FPAA incorporated by reference in the Agreement. Thus it argues in the first place that no provision of the current Agreement, effective commencing July 1, 2015, while the camera program discussions were ongoing, was changed either to permit the use of cameras or to waive

² Joint Exhibit No. 2 at p. 1.

³ *Id.* at p. 2.

the right to bargain such changes. Secondly, the FOP asserts the FPAA, a statute that does not rely on the concept of impasse and unilateral implementation in the fashion of the NLRB since Oklahoma police officers are prohibited from striking, requires interest arbitration for unresolved bargaining issues and that did not occur here.

As concerns the question whether the use of body-worn cameras and the ability of immediate supervisors to perform random reviews of recorded footage of officers' performance of their duties constitute changes in represented employees' working conditions, the Union contends the technology in question and the permitted use thereof amounted to a quantum change in the working conditions of both the officers wearing the cameras as well as all other officers who might appear in the footage recorded by those cameras. According to the FOP, if much less intrusive policies such as those unilaterally implemented by the City in changing existing rules regarding exposed tattoos and timekeeping methods can be found by arbitrators to have amounted to changes in working conditions requiring bargaining, then surely the instant program must have been such a change.

Moreover, in the opinion of the Union, it did not waive its right to bargain over changes such as those at issue here either by signing the Agreement with the management rights language contained therein or by anything it did while discussing the body-worn camera program itself with the Employer. Nor, in the FOP's view, does City Ordinance § 43.4 conferring on the Chief the authority to draft policies for City Council approval regarding a number of working conditions for police officers passed before the FPAA became law supersede either the FPAA or any language contained in the present Agreement.

Accordingly, the Union argues the City should be ordered to cease and desist from implementation of any body-worn camera program unless and until bargaining has been completed.

Position of the Employer

The Employer asserts it had no obligation to secure agreement from the FOP before implementing the body-worn camera program because the decision to do so was a retained management right on which it had no obligation to bargain during the term of the Agreement. In that connection, the City notes that Article 4, Section 4.2 of the Agreement broadly reserves to management the right to plan, direct and control all operations relating to the Police Department, that Article 4, Section 4.4 of the Agreement notes that the City retains all rights, powers and authority it had prior to signing the Agreement and that Article 4, Section 4.6 of the Agreement incorporates into that accord all existing rules, regulations and practices in effect on the date of the execution of the Agreement until changed. Additionally, the Employer points out that, as the parties' stipulation at hearing provides, according to municipal ordinance in effect before the passage of the FPAA and before the date of first contract negotiations between these parties, the Chief had the authority to determine what equipment would be worn by police officers. Since that authority has not been modified by the specific terms of any collective bargaining agreement, the City believes the Chief continues to retain such authority.

The City also contends that the Union's arguments regarding the lack of evidence of a waiver by the FOP is misplaced because it requires a finding that the

prevailing rights language in Article 4, Section 4.6 of the Agreement and Section 51-111 of the FPAA mean that once existing practices become part of the parties' accord, they become mandatory subjects of bargaining and require an agreement with the FOP or a waiver from the FOP before new policies and practices can be implemented. In the Employer's view, that rationale is too broad to be supported by the FPAA since nothing in that Act gives the FOP the unfettered right to insist on particular terms and conditions of employment and then to arbitrate the City's failure to acquiesce to those terms.

Thus, according to the City, since the Chief has by municipal ordinance been accorded the right to determine what equipment will be worn and what tools will be used by police officers, the City has never bargained away that right and Union President George conceded that the Chief has, from time to time, implemented the use of new equipment as well as rules and procedures on their use without bargaining, there was no need for him to bargain an agreement with the Union here before implementing the body-worn camera program. Therefore, notwithstanding the City willingly, albeit unsuccessfully with respect to Procedure 188.50 providing, *inter alia*, that a supervisor may review body-worn camera recordings at any time, met with the FOP in an effort to reach agreement on all terms of the body-worn camera program, it asserts there is no requirement in the FPAA that either party agree to every proposal of the other before implementation.

Lastly, in the Employer's opinion, the requirement to carry and use body-worn cameras is not so burdensome or unreasonable as to constitute a material, significant and substantial change in working conditions such as would require it to reach agreement with the Union before implementing the program. Instead, the City argues

the body-worn camera program represents nothing more than the introduction of new technology aimed at increasing departmental efficiency and the program changes nothing about the ability of bargaining unit members to dispute and review discipline pursuant to the Agreement's existing grievance procedure if evidence obtained via the body-worn cameras were to be used in support of such discipline.

Accordingly, the Employer requests that the Arbitrator find it was not required to reach agreement with the FOP before implementation of the body-worn camera program and dismiss the grievance.

Decision of the Arbitrator

Having now had the opportunity to consider the entire record in this matter, including the arguments of the parties voiced at hearing and on brief as well as the arbitral and legal decisions cited, I have determined to agree with the Union that the City violated the collective bargaining agreement when it implemented a body-worn camera program. Although I have studied the entire record in this matter and considered each argument and authority cited, the discussion that follows will address only those considerations I found either controlling or necessary to make my decision clear.

Without question, Article 4, Section 4.2 of the Agreement reserves to the City "the right to plan, direct, and control all operations relating to the Police Department." As Article 4, Section 4.4 notes, that reservation includes "all the rights, powers and authority the Employer had prior to the signing of this Agreement." Article 4, Section 4.6 of the Agreement then goes on to provide, "All rules, regulations, procedures, working conditions, departmental rules and practices and manner of conducting the operation

and administration of the Oklahoma City Police Department in effect on the execution date of this agreement shall be deemed a part of this agreement unless and except as modified or changed by the specific terms of this agreement.” Because it is undisputed the Employer did not have a body-worn camera program in place when the Agreement was signed, it is clear that Section 4.6 cannot support the City’s decision here.

Therefore the question becomes whether the Employer nevertheless was privileged to implement such a program during the term of the Agreement over the Union’s objection because doing so fell within “the rights, powers and authority the Employer had prior to the signing of this Agreement . . . to plan, direct, and control all operations relating to the Police Department.” I do not believe it was.

The record leaves no doubt that, before the parties commenced their discussion of body-worn cameras in 2014, there was no reference to such a program in their historic collective bargaining agreements or in Department policy. Therefore, if the implementation of such a program were found to constitute more than a *de minimis* change in working conditions, unless it could be found to have been generally incorporated within the Employer’s retained authority to plan, direct and control Police Department operations, the bargaining and subsequent interest arbitration in the absence of agreement with the Union envisioned by the FPAA would have to occur before implementation.

Therefore, although I initially approached this dispute from a number of different directions, I believe the logical first step in deciding the controversy is to determine whether implementation of the body-worn camera program constituted a change in working conditions sufficient to create a bargaining obligation. I simply have no doubt

that it did. In so deciding, I agree completely with the Union that the use of body-worn cameras constitutes an enormous change in the working conditions of police officers. To be clear, however, it is not the entirety of the program that is in dispute; rather, it is a portion of Procedure 188.50 that proved to be the sticking point in the parties' negotiations. What Procedure 188.50 provides is:

188.50 Review of Recordings

An officer will be allowed to review his or her body-worn camera recordings or the portion of another officer's recording where that officer is captured:

1. To assist with an investigation and completion of reports;
2. Before making any statement or being interviewed, when the officer is the subject of an investigation. If the officer is the subject of an administrative investigation, he or she may have an employee representative/legal counsel present. If the officer is the subject of a criminal investigation, he or she may have legal counsel present; or
3. Prior to testifying in court.

An investigator shall review body-worn camera recordings related to and in furtherance of his or her assigned investigation(s).

A supervisor shall review body-worn camera recording(s) under the following circumstances:

1. Administrative/criminal investigations; or
2. Complaints of officer misconduct.

A supervisor may review body-worn camera recordings at any time.

Within Procedure 188.50, it was the very last sentence with which the FOP took issue, contending it would permit a supervisor to "ride" a particular officer or engage in a fishing expedition in an effort to find policy infractions committed by that officer. The Union stopped short of objecting to all random reviews, arguing instead that such reviews should not be performed by an officer's immediate supervisor because those reviews would tend to undermine the requisite trust between supervisors and officers.

The City is certainly correct, and the Union concedes, that the Chief and his

predecessors have long enjoyed the authority to decide what equipment and tools will be used by officers pursuant to municipal ordinance dating back to 1970 before the passage of the FPAA. That ordinance, at §43-4(b), states, in relevant part, that the Chief may make rules covering the “uniform and equipment to be worn or carried.”⁴ And it is undisputed that the present Chief has made changes over his 12-year tenure to uniforms and such equipment as handguns, rifles, tasers and mobile data computers used in police cars without bargaining. However, it is not the piece of equipment or even the list of uses of the equipment appearing in Procedure 188.50 to which the Union objects; it is merely the random review by immediate supervisors of the recordings made by the equipment in question to which it objects and that causes the FOP to claim the City cannot implement the body-worn camera program without either agreement or interest arbitration. Indeed, a review of the circumstances in which an officer is required by the program to activate his or her body-worn camera demonstrates the significance of the change involved. Thus, according to Procedure 188.30:

Each officer shall activate his or her body-worn camera in the following circumstances:

1. Voluntary contact (only in a public place or a place where the public and the officer have a right to be). If a voluntary contact is initiated in a location
- voluntary contact;
2. Prior to investigative detention, traffic stop, custodial arrest, or potential or actual use of force;
3. Prior to initiating any Code 3 response;
4. Upon receiving or responding to a Priority 1 or Priority 2 call;
5. While responding to or involved in any vehicle or foot pursuit;
6. When conducting a Standardized Field Sobriety Test (SFST) or Drug Recognition Expert (DRE) evaluation;
7. While transporting, guarding or coming into contact with any person who becomes agitated, combative, threatening or makes statements related to his or her arrest/protective custody; or
8. When directed by a supervisor.⁵

⁴ Joint Exhibit No. 6.

⁵ Joint Exhibit No. 5.

I am convinced the Union is correct that the impact on working conditions such a random-review capability has is substantial.

While I have considered the Employer's argument with respect to reasonableness and its concomitant citation of Elkouri and Elkouri, How Arbitration Works, BNA (7th Ed., 2012), for the proposition that a test of reasonableness is appropriate when interpreting collective bargaining agreements that cannot possibly foresee and cover all possible scenarios, that approach has application to an examination of plant rules and whether said rules are reasonably related to a legitimate object of management. While the question of reasonableness could also have been raised by the Union here, even if it had been, the mere resolution of the question whether the use of body-worn cameras is reasonable or burdensome cannot take the place of answering the question whether implementing a requirement that all the activities listed in Procedure 188.30 be visibly and audibly recorded, as Procedure 188.15 makes clear is the case, without including any limitation in Procedure 188.50 on the ability of immediate supervisors to review the footage for whatever purpose they desire is a change in working conditions.⁶

This view is reinforced in my opinion by the FOP-cited decisions of Arbitrators Hempe and Marcus, respectively, involving the City's unilateral determinations that any visible tattoos henceforth would be covered during work hours and that a new timekeeping system for certain employees would be implemented.⁷ In both cases,

⁶ The Union does not argue that attaching the cigarette-pack-size body-worn camera selected by the City to one's uniform and activating and deactivating it are burdensome tasks.

⁷ See, *City of Oklahoma City and Fraternal Order of Police, Lodge No. 123*, FMCS Case No. 06-55202-7 (Hempe, n.d.); *City of Oklahoma City and The Fraternal Order of Police, Lodge 123*, FMCS Case No. 02-51562-8 (Marcus, 2003).

although finding no reason to criticize the substance of the changes, the selected arbitrators found they constituted changes in working conditions that required bargaining. In my view, neither of those changes can be said to have had the impact on working conditions of the change at issue here that shines a bright light, both internally as well as potentially externally, on every interaction an officer has with citizens during his or her shift.⁸ While that can be a very good thing, even from the vantage point of an officer accused of misconduct, I believe it is inarguable that it changes the working conditions of Oklahoma City police officers.⁹

I also agree with the Union that, although the City clearly retained in Article 4, Section 4.2 the authority to plan, direct and control Police Department operations, there is no evidence that retention included the right to unilaterally implement a body-worn camera program containing the unrestricted right of supervisors to randomly review the audio and video footage required to be recorded during the course of an officer's official

⁸ As the Employer argues, the body-worn camera is not a hidden surveillance camera recording events without the wearing officer's knowledge. Rather, it stores video only commencing 30 seconds before an officer activates the camera and audio only from the point of activation. However, it certainly can record the activities of other officers in the vicinity without their knowledge and that substantially impacts the working conditions of those officers. Moreover, the fact that officers are already required to write reports with respect to the numerous circumstances the program dictates that body-worn cameras will be activated does not reduce the impact of this change in working conditions. Nor is this any less true simply because the footage recorded by the body-worn cameras likely will assist officers in the preparation of accurate reports. I am not convinced otherwise by the City's citation of several NLRB Division of Advice memoranda finding that the use of videotapes and changed timekeeping systems are either not mandatory subjects of bargaining and/or do not constitute unfair labor practices if instituted without bargaining. Indeed, this case is not susceptible to resolution pursuant to the impasse concept employed by the NLRB and that fact diminishes the relevance of NLRB's view in my opinion.

⁹ Indeed, in another situation involving a substantial impact on officers' working conditions not unlike the body-worn camera program, i.e. the unilateral implementation by the Employer of new "AVL" technology permitting the Department to track police vehicles on a computer screen while they were being driven by officers, after the Union filed an unfair labor practice the parties resolved the dispute before it was heard by entering into a memorandum of understanding prohibiting the random monitoring at issue. In that case, as here, the objectionable feature of the program from FOP's perspective was not the technology itself but the ability of supervisors to use selective monitoring aimed at potential criticism or discipline.

activities. Therefore, while the City is correct that the 10th Circuit Court of Appeals found in *Johnson v. Lodge #93 of the Fraternal Order of Police*, 393 F.3d 1096 (2004) that the State of Oklahoma has adopted the “contract coverage standard” set forth in *NLRB v. United States Postal Service*, 8 F.3d 832 (D.C. Cir. 1993), the mandated circumstances in which the camera must be activated here strikes me as a large body of an officer’s work that the body-worn camera program opens up to a completely different kind of scrutiny that cannot be said to have been envisioned as among the rights understood by the parties to have been retained by the City when the Agreement was signed.¹⁰

Nor does the record contain any evidence that the Union waived its right to negotiate over the program before it was implemented. To the contrary, FOP was continuing to negotiate with the Employer when the Chief decided, based on his view of the frequency with which officers’ use of authority is questioned as well as recent questions put to the City Council by members of the public as to when the use of cameras would be implemented in Oklahoma City, that it was time to implement the

¹⁰ In reaching this conclusion, I have placed no reliance on the decision of the Washington State Public Employment Relations Commission in *Mountlake Terrace Police Guild v. City of Mountlake Terrace*, Decision 11701-A (PECB, 2014), a distinguishable case involving a unilateral decision by an employer to use a previously installed public safety camera system for disciplinary purposes, a mandatory subject of bargaining, a decision cited to me on brief by the Union. Similarly, I am not persuaded otherwise by the Employer’s citation on brief of the decision of the District Court of Oklahoma County in *FOP, Lodge 146 v. State of Oklahoma, ex rel, Public Employees Relations Board and the City of Jenx, OK*, Case No.CV-2013-2382 (2014). In her Order, District Judge Parrish found, “Taking the totality of the situation, the unilateral use of a global positioning devise [sic] (GPS) and the data derived from such unilateral use by the Respondent (City of Jenx) in the grievance procedure outlined in Article 23 of the Collective Bargaining Agreement is not an unfair labor practice.” Employer Brief Exhibit No. 9 at p. 2. Thus the issue before Judge Parrish, like the issue present in *Mountlake Terrace*, *supra*, was distinguishable from the one before the undersigned. Although the two cases are themselves dissimilar since the former arose in the context of an employer’s use of existing technology in support of disciplinary proceedings and the latter arose when an employer installed new technology on an officer’s patrol car in an effort to determine if that officer had been abusing official time, neither appears to have involved the implementation of a new program with arguably unlimited force-wide uses impacting virtually all phases of officers’ interaction with members of the public.

program.¹¹ Moreover, as noted above, the City asserts that any inquiry into whether the FOP waived its right to negotiate would be the wrong approach in resolving this dispute in any event since the Employer contends that nothing in the FPAA gives the Union the unfettered right to insist on particular terms and conditions of employment.

Accordingly, I find that the City violated Article 4.6 of the Agreement when it implemented a body-worn camera program.

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AWARD

I. It is the Award of the Arbitrator that the City violated the collective bargaining agreement when it implemented a body-worn camera program.

¹¹ No bad faith on the part of City is alleged by the Union and none is found by the undersigned. In fact, the City continued to negotiate the subject of the body-worn camera program with the Union after implementation.

II. It is therefore Ordered that the City cease and desist from implementing the body-worn camera program until either it and the Union reach agreement on its terms or exhaust the procedures regarding unresolved bargaining issues mandated by 11 O.S. § 51-101 *et seq.*

III. The Arbitrator hereby reserves jurisdiction for ninety (90) calendar days from the date of this Award for the limited purpose of resolving any questions that may arise over the application or interpretation of the remedy set forth above.

/s/
M. Zane Lumbley, Arbitrator

June 14, 2016
Date