PELRAS UPDATE
Public Employer Labor Relations Advisory Service

414 North Second Street ◊ Harrisburg, PA 17101 ◊ (800) 922-8063 ◊ PML.org

INSIDE THIS ISSUE:

Plan Ahead!

2020 PELRAS Annual Conference

March 18-20

Penn Stater Hotel and Conference Center

Nationwide Scrutiny of Police Officer Social Media Posts Raises Concerns for Pennsylvania Municipal Employers

by Bradley J. Betack, Esq.

Municipal police departments are facing intense scrutiny after a nationwide database was compiled, collecting thousands of violent and offensive social media posts by police officers, raising questions of credibility and bias of the officers and potential liability concerns for their municipal employers.

The database was created by a group of attorneys who discovered, in 2016, numerous postings on Facebook from several Philadelphia police officers, which supported and endorsed violence, racism and bigotry. As a result, the group created the database, known as the Plain View Project, for the intended purpose of identifying social media postings by current and former police officers which could "erode civilian trust and confidence in police," with the intended goal of having such related police departments "investigate and address" such postings.

The Project obtained published rosters of eight police departments around the country, including two Pennsylvania police departments (Philadelphia and York City).

Based upon a review of the eight police department rosters, the Project identified over 5,000 social media posts including racist, misogynist and Islamophobic memes ("death to Islam") and comments, as well as celebrations of officers who use excessive force, including messages like "It's a good day for a chokehold."

Upon release of the database, media attention and criticism was swift and the eight involved police departments faced intense scrutiny to address the social media postings by their officers. As a result of the release of the postings, the Philadelphia Police Department placed 72 officers on administrative leave, pending a full investigation from an outside law firm. Upon conclusion of the Philadelphia Police Department's investigation, 13 officers were terminated as a result of their social media activity. In addition, the Philadelphia Police Department has begun anti-bias and anti-racism training, and officers'

The PELRAS Update is a bimonthly publication of the Public Employer Labor Relations Advisory Service, a program of the Pennsylvania Municipal League. It is published in February, April, June, August, October, and December. PELRAS membership information requests and other inquiries should be directed to 800-922-8063.

social media accounts will be periodically audited in an effort to ensure that officers are complying with the department's social media policy.

However, the scrutiny resulting from the Plain View Project has not been limited to only the eight departments whose officers' social media activity was reviewed in the project. Media organizations all around the country, including several in the Commonwealth, are engaging in a review of social media activity of police officers employed in their specific communities. Once social media profiles are reviewed, if any questionable postings are found, these news organizations are contacting police departments employing such officers, seeking comment. In most circumstances, the Departments were unaware of the officers' social media activity prior to being alerted by the media, and in some circumstances, have no applicable policy setting forth guidelines on an officer's social media activity.

It is unlikely that such increased scrutiny of police officer and other public employee social media activity will lessen anytime soon, and municipal employers must be prepared, through implementation of social media policies and initiation of employee investigations, to respond when concerns are raised to determine if the employee has engaged in any improper conduct.

Municipal employers should work with labor counsel to draft social media policies, setting forth clear guidelines for their employees on what constitutes appropriate and inappropriate social media activities. While public employees have First Amendment protections to post on social media sites, and on other venues, as private citizens on matters of public concern, social media policies should make clear that speech that undermines the public trust and confidence required of them as public employees, is prohibited, as well as speech that violates the municipality's policies prohibiting discrimination and harassment. For example, racist or sexist social media comments tend to undermine the public trust and confidence required of public employees, and may violate municipal policies on discrimination and harassment even if made while off duty, and should be prohibited.

In addition to reviewing and updating policies, municipal employers should provide training to all employees on this issue of social media and must be prepared to initiate investigations when confronted with problematic social media activity, in order to determine whether such activity violates existing policies and warrants discipline.

Is the PA Supreme Court About to Make it Easier to Appeal Act 111 Arbitration Awards?

by Hobart Webster, Esq.

On July 3, 2019, the Pennsylvania Supreme Court granted Northern Berks Regional Police Commission's (the "Commission") Petition for Allowance of Appeal in *Northern Berks Reg'l Police Comm'n v. Berks County Fraternal Order of Police*, 196 A.3d 715 (Pa. Commw. 2018). The Commission appealed a Commonwealth Court decision overturning a Berks County Court of Common Pleas' order vacating an arbitration award that reinstated a police officer who had been terminated after permanently losing access to the Pennsylvania Justice Network ("JNET"), Commonwealth Law Enforcement Assistance Network ("CLEAN") and PennDOT's systems.

In *Northern Berks*, the Pennsylvania Supreme Court will address two questions:

1) Whether the Commonwealth Court erred in vacating and remanding the lower court's decision despite the fact there was no finding of error in the lower court's

opinion and because it relied upon hypothetical actions that could occur in the future, rather than on the record before it.

2) Whether the "*narrow certiorari*" scope of review used in Act 111 matters should encompass a public policy exception, or, in the alternative, whether the *narrow certiorari* scope of review set forth in *Pennsylvania State Police v. Pennsylvania State Troopers' Ass'n (Betancourt),* 540 Pa. 66, 656 A.2d 83 (1995) should be replaced by the "essence test" or JNOV/error of law test.

Currently, the standard of review for cases arising under Act 111, the Act governing collective bargaining by police and firefighters, is *narrow certiorari*, which is a very strict standard, and much narrower than the standard used to review arbitration awards for non-uniformed public employees. Under *narrow certiorari*, a court can only review questions pertaining to: (1) the jurisdiction of the arbitrator; (2) the regularity of the proceedings; (3) an excess of the arbitrator's powers; and (4) a deprivation of constitutional rights.

In *Northern Berks*, the Commission dismissed long-time officer, Charles Hobart, after learning that he kept a file folder in his desk containing (1) explicit pictures of females in different stages of undress, (2) photographs printed from the police information system, and (3) directions printed from MapQuest. After investigating the matter, the Commission discovered that Hobart used these pictures for personal sexual gratification, and that he exceeded his authorization for JNET and CLEAN. Because of these violations, Hobart's access to JNET, CLEAN, and an information system maintained by PennDOT, was permanently revoked. The union filed a grievance and the matter proceeded to arbitration.

The arbitrator determined that because another Commission officer had only received a four-day suspension for inappropriate JNET use, Hobart's discipline was disproportional. Even though the other officer's JNET access had not been *permanently* terminated, the arbitrator ordered the Commission to reinstate Hobart without back pay. The Commission then appealed to the Court of Common Pleas, which granted the appeal and vacated the arbitrator's award. The union appealed to the Commonwealth Court, which vacated the lower court's order, concluding that the Commission's claim that Hobart, if reinstated, would unlawfully gain primary or secondary access to JNET information for which he was permanently restricted, was too speculative.

On appeal to the Pennsylvania Supreme Court, the Court is being asked to expand the *narrow certiorari* standard of review to include a public policy exception that would allow courts to vacate Act 111 arbitration awards that violate a well-established, dominant public policy. In the alternative, the Court is being asked to replace the *narrow certiorari* standard of review with either the "essence test" (i.e. an arbitrator's award can be vacated where it is indisputably without foundation in the collective bargaining agreement, or fails to logically flow from the collective bargaining agreement), or a JNOV/error of law test (i.e. an arbitrator's award can be vacated if there is insufficient evidence to support the arbitrator's conclusions, or when the arbitrator does not correctly apply the law).

While it is possible that the Pennsylvania Supreme Court chose to hear this case in order to affirm the decision or merely to clarify a point of law, it is perhaps more likely that the Supreme Court disagrees with some portion of the Commonwealth Court's ruling. It is also possible that the Pennsylvania Supreme Court will choose only to address the first question presented on appeal (whether the Commonwealth Court relied upon hypotheticals, rather than on the record before it). If, however, the Pennsylvania Supreme Court chooses to address the second question and expand the scope of the review to include a public policy exception, or abandon *narrow certiorari* all together in favor of the "essence test," it will mark a dramatic shift in the Act 111 grievance arbitration landscape.