

PLRB Hearing Examiner Upholds a Unilaterally Implemented Vaccine Policy—But Questions Remain for Public Employers

In a Proposed Decision & Order, the Board's Hearing Examiner Ruled that Allegheny County had the managerial right to implement a COVID-19 Vaccine Policy, but the decision leaves the door open for disputes over future, similar vaccination policies.

By: Michael A. Palombo, Esq. and Jonathan F. Whalen, Esq.

Public employers in Pennsylvania have long been anticipating a ruling from the Pennsylvania Labor Relations Board on the potential bargaining obligations regarding COVID-19 vaccine policies or “mandates.” That day has come at last. On September 7, 2022, a Hearing Examiner for the Pennsylvania Labor Relations Board issued a decision ruling that Allegheny County acted within the scope of its managerial prerogatives when it unilaterally implemented a COVID-19 Vaccine Policy without prior bargaining. The County first promulgated the Policy in September 2021 at a time when “there were an alarming number of deaths in Allegheny County” stemming from COVID-19, and when “many County employees were getting sick with COVID-19.” The Policy required all new hires to be vaccinated against COVID-19, and required current employees to be vaccinated by December 1, 2021 or face termination. Significantly, over the course of 2020 and for much of 2021, the Police Department was evidently inundated with COVID-19 related infections, and, consequently, experienced significant “manpower concerns.” Following implementation of the Vaccine Policy, the Department “saw a sharp reduction” in the number of officers who missed time.

Though the Policy covered about 5,000 employees Countywide, the Decision was concerned with the unfair labor practice charges brought by the Allegheny County Police Association, who alleged that the County violated Act 111 and the Pennsylvania Labor Relations Act by unilaterally imposing the Vaccine Policy without bargaining. Of course, Act 111 employers commit an unfair labor practice if they refuse to bargain over “mandatory subjects of bargaining,” or unilaterally enact policies that constitute such “mandatory subjects.” On the other hand, Act 111 employers *are* permitted to act “unilaterally” with respect to their “managerial prerogatives.” As the Decision explained, however, some topics contain elements of both—they may “touch on some term or condition of employment” that is ordinarily bargainable, but they may also concern “some managerial prerogative.” In such instances, the Board analyzes whether bargaining over the topic would infringe on the public employer’s “essential managerial responsibilities.”

In this case, because the Policy required vaccination, a medical procedure involving an injection and potential side effects, the Hearing Examiner ruled that it could potentially impact bargainable subjects like “sick leave” and “insurance.” On the other hand, the Decision recognized that the County’s justifications for implementing the Policy reflected fundamental matters of managerial prerogative, including the protection of the public, and ensuring that “critical services” could be provided with “adequate staffing.” Due to the Policy’s dual nature, it was therefore analyzed to determine whether bargaining over it would infringe on these “essential managerial responsibilities.” According to the Hearing Examiner, the record convincingly demonstrated that the impact of COVID-19 on the public was “real” and “not conjectural,” and that the Policy itself would adequately serve the County’s goal of mitigating the effects of COVID-19 for employees who, by the nature of their jobs, “interact with the public.” Indeed, the Decision compared the threat of COVID-19 to the “analogous threat” presented by “smoking,” and thus, the Hearing Examiner found that the Policy addressed a “public evil which threatened all County citizens in public spaces.” The Hearing Examiner also

credited the County's concern that the Policy was necessary to ensure the health of its employees and their continued ability to provide critical services to the public.

Nonetheless, though the Hearing Examiner ruled that the County was privileged to unilaterally implement the Policy without bargaining, the decision was ultimately based on the particular facts of that case. Specifically, the Hearing Examiner ruled that requiring "bargaining over the Vaccine Policy" would have "unduly infring(ed) on the County's policy of ensuring that all employees were vaccinated by December 1, 2021." The Hearing Examiner placed great weight on the fact that "in choosing December 1, 2021, the County was relying on information from government health agencies" concerning "coming waves" and imminent "surge(s)" of COVID-19 infections that were expected "over the winter of 2021-2022." Thus, to require bargaining over the Policy prior to this December 1, 2021 deadline would have, in the Hearing Examiner's view, "completely frustrate(d) the timing of the Vaccine Policy" and would have prevented the County from realizing its twin goals of "protecting the health of its citizens" and "maintaining critical staffing...through a predicted and realized surge in COVID-19." Thus, because, in such circumstances, "bargaining over the Vaccine Policy" would have "unduly infring(ed) on the County's managerial responsibilities," the Hearing Examiner ruled it could be unilaterally implemented.

Put differently, then, this Decision does *not* stand for the proposition that public employers, in all cases, have the managerial right to unilaterally implement vaccine policies and/or mandates. Rather, this case was decided on particular facts, and the outcome in future "mandate" cases may be unpredictable and dependent on the present pandemic-related landscape—the number of cases, transmission rates, the forecast of pending surges, etc. Here, the County needed to implement the policy by December 1 in order to realize its goals, and prior bargaining would have frustrated this objective. In other cases, the Board may not find that the same level of urgency, one sufficient to obviate any bargaining obligation, exists.

It remains to be seen whether the Board will uphold this decision as exceptions have been filed and the Board may issue a Final Order that alters this analysis. It also remains to be seen how future cases under different facts will be decided. Both because the case is on appeal and because the decision was so clearly tied to the facts that existed at the time the mandate was implemented; great care should be taken to not overstate the impact of this decision and to move carefully when analyzing managerial prerogatives in this area. The lawyers at Campbell Durrant would welcome the opportunity to discuss the issues further and to answer questions you may have about this ruling and its impact.