

## **Is Negotiating with the Union over a Major Public Policy Decision – Like Instituting a No-Knock Warrant – a Mandatory Subject of Bargaining?**

While police reform has been a hot topic over the last several years, including in labor relations, the no-knock warrant litigation pending in the Kentucky Supreme Court is something of which public employers across the country should be aware because of its potential impact to the negotiability of matters traditionally rooted in legislative policy. While the direct impact may only be felt in Kentucky initially, the ramifications of such a decision could reverberate throughout the country.

On June 24, 2021, the Lexington-Fayette Urban County Government in Kentucky passed an ordinance banning the use of no-knock warrants by the police. This was in apparent response to the tragic March 2020 death of Breonna Taylor in Louisville. In light of the new law, Lexington Police Department officers were required to knock and announce themselves, and to wait a reasonable amount of time thereafter, before entering the premises (instead of proceeding without knocking).

Almost immediately, the Fraternal Order of Police, Bluegrass Lodge #4 filed a lawsuit against the public employer, claiming – among other things – that the employer had a duty to bargain with the Union before passing such an ordinance, which it claimed related to police officers' health and safety. The Circuit Court originally dismissed the Union's lawsuit. While several issues were presented, as to the public employer's duty to bargain, the court held that that mandatory bargaining requirements under Kentucky State law did not include major public policy decisions, such as no-knock warrant related ordinances.

The Union appealed the decision. The Kentucky Court of Appeals reversed the lower court and remanded the case for further proceedings “to allow the parties to flesh out the merits of the arguments,” noting:

“The parties must have ample opportunity to explore discovery if desired and then present their arguments to the circuit court on what constitutes conditions of employment, effects of employment ....”

The case is currently pending in the Kentucky Supreme Court.

Your National PELRA has petitioned the Court for permission to file an *Amicus Curiae* brief to help educate the Kentucky Supreme Court from a more global perspective of the adverse consequences that would result from requiring a public employer to bargain over a no-knock warrant policy or the like. National PELRA's amicus brief does not touch on the fundamental policy question of whether no-knock warrants should or should not be used, but rather focuses on the mandatory or permissive nature of bargaining regarding such policies.

National PELRA explained that while some states across the country have mature bargaining relationships and laws that have developed from decisions establishing that public employers have no duty to collectively bargain over significant public policy decisions (such as

no-knock warrants), some states have little to no developed law in this regard. Of course, National PELRA represents employers in both camps. A decision in Kentucky concluding that there is a requirement to bargain over a major policy decision such as no-knock warrants may ultimately cause a domino effect not only in Kentucky, but throughout the country, particularly in areas with less mature collective bargaining laws and less well-developed case law.

Traditionally, and unless specifically excluded by statute, whether an issue is considered a mandatory subject of bargaining depends largely on whether it is a wage, hour, or term and condition of employment. Put simply, a no-knock warrant ordinance is certainly not a matter of wages or hours. Therefore, this issue may turn on whether a no-knock warrant is considered by the Kentucky Supreme Court to be a “condition of employment.” National PELRA argued that it is not a “condition of employment.” In fact, the legislative decision to ban no-knock warrants has little to do with things like leaves of absences, time off, scheduling, overtime, training, uniforms, grievance procedures, transfer policies, etc., which are commonly considered “conditions of employment.” Rather, no-knock warrants are matters of pure legislative policy that transcend just the employment relationship with police officers and clearly touch heavily on matters of public concern.

In this regard, National PELRA pointed the Kentucky Supreme Court to the U.S. Supreme Court decision in *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass*, 404 U.S. 157 (1971). There, the U.S. Supreme Court stated that the term “wages, hours, and other terms and conditions of employment” “establish[es] a limitation against which proposed topics must be measured” and that “the limitation includes only issues that settle an aspect of the relationship between the employer and employees.” The decision to ban no-knock warrants does not “settle an aspect of the relationship between” the public employer and the Union in this case. Indeed, it goes far beyond any labor management issue and clearly touches on issues of social and political justice and concern. Therefore, it necessarily means it cannot be a mandatory subject of bargaining.

Even if the Kentucky Supreme Court disagrees and concludes that no-knock warrants might relate to a “condition of employment,” National PELRA advocated that the Court should employ a balancing test to determine whether the issue is a mandatory subject of bargaining as such balancing tests have been adopted by labor boards and courts across the country to determine issues of negotiability. Balancing tests in this vein normally involve three questions:

(1) Does the issue involve a matter of wages, hours, or a term and condition of employment? If yes:

(2) Does the issue touch upon an issue of inherent managerial authority? If yes:

(3) Does the benefit of bargaining over the issue outweigh the burden?

If the first part of the test is answered in the affirmative by the Kentucky Supreme Court here, then the second part of such test should also clearly be established. As such, the Court’s decision

should then turn on whether the public employer's legislative interest in having the right to make the policy decision to institute a no-knock warrant ordinance, which implicates broad questions of public safety and welfare beyond the employment relationship with police, outweighs any labor related interest in bargaining over the issue. As National PELRA argued, "it is difficult to discern what the benefits of bargaining would be to labor relations." Indeed, no-knock warrants are matters of social concern within the community that span far beyond the labor-management relationship between a public employer and the labor union representing its employees.

If such a topic were deemed a mandatory subject of bargaining, the bounds may be endless with respect to what other matters of important legislative policy spanning far beyond labor management relationships may become mandatory subjects of bargaining. For instance, may the issue of whether using polygraph examinations to investigate criminal activity become mandatorily negotiable? What about use-of-force policies? Perhaps decisions about where to allocate public tax dollars?

As of November 2024, National PELRA continues to await news on the outcome of this important case. Related, there are no established dates for oral argument in this case.

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