COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

TEAMSTERS LOCAL UNION 771	:	
	:	
	:	
v.	:	Case No. PERA-C-98-454-E
	:	
LANCASTER COUNTY	:	
	:	

FINAL ORDER

On September 10, 1999, Lancaster County (County) filed t imely exceptions and a supporting brief to a Proposed Decision and Order (PDO) entered on August 24, 1999. In the PDO, the hearing examiner concluded that the County violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA) by refusing to pick a partial arbitrator pursuant to Section 805 of PERA. In reaching his conclusion, the hearing examiner determined that whether certain issues raised by the Common Pleas Court as impinging upon its right to hire, fire and direct court personnel are arbitrable is a matter for the arbitration panel. Accordingly, the hearing examiner directed the County to immediately submit all issues in dispute to a panel of arbitrators as selected by the parties. On September 22, 1999, Teamsters Local Union 771 (Union) filed a brief in response to the County's exceptions.

After a thorough review of the exceptions and all matters of record, the Board makes the following:

ADDITIONAL FINDINGS OF FACT

8. In June 1998, the Union informed the Board that negotiatio ns between the County and the Union were at impasse and formally requested that the Board provide a panel of arbitrators so that the parties could proceed with interest arbitration for the 1998 calendar year and the 1999-2000 calendar years. (Joint Exhibits 12-17)

9. By letter dated July 2, 1998, the County informed the Board that the time limits of PERA for proceeding to interest arbitration for calendar year 1998 had not been met and therefore the County refused to proceed to arbitration for 1998. As to calendar years 1999-2000, the County stated that it was willing to arbitrate only those provisions that the parties could agree were bargainable. (Joint Exhibit 19)

DISCUSSION

The Union is an employe organization that represents a unit of full-time and regular part-time professional employes who are involved with and necessary to the functioning of the courts and are hired, fired and directed by the courts including but not limited to probation officers, hearing officers, enforcement officers, intake specialists, juvenile intake officers, juvenile institutional coordinators, house arrest officers IPP, impaired driver specialists, pre-trial services specialists, family therapists, and parole program coordinators. The unit excludes management level employes, supervisors, first level supervisors, confidential employes and guards as defined in PERA.

In January 1998 the Union and the County were bargaining for a new collective bargaining agreement. On January 26, 1998, the Union presented the County with a proposed contract at the first negotiating session. On February 10, 1998, the County received from the President Judge of the Court of Common Pleas of Lancaster County (the Court) a list of the sections in the Union's proposed agreement that the Court concluded would interfere with its right to hire, fire and direct personnel. At the February 18, 1998 bargaining session, the County presented the Union with its first counterproposal, which incorporated the Court's restrictions on the County's ability to bargain certain issues. On March 31, 1998, the County corresponded with the Union's attorney stating that the County would not bargain or arbitrate over those issues that the Court had identified as interfering with its right to hire, fire and direct court personnel.

In June 1998, the Union informed the Pennsylvania Labor Relations Board (Board) that negotiations between the County and the Union were at impasse and formally requested that the Board provide a panel of arbitrators so that the parties could proceed with interest arbitration for the 1998 calendar year and the 1999-2000 calendar years. By letter dated July 2, 1998, the County informed the Board that the time limits of PERA for proceeding to interest arbitration for calendar year 1998 had not been met and therefore the County refused to proceed to arbitration for 1998. [1] As to calendar years 1999-2000, the County stated that it was willing to arbitrate only those provisions that the parties could agree were bargainable. On or about July 21, 1998, the County received a list of arbitrators from the Board. On September 30, 1998, the Union asked the County to pick an arbitrator. However, the County neither appointed a partial arbitrator nor selected a neutral arbitrator. The Union then filed its unfair practice charge alleging the County's violation of PERA for its refusal to pick a partial arbitrator as required by Section 805 of PERA. On February 5, 1999, the parties agreed to go to interest arbitration for all issues over which the parties could not agree, except those issues objected to by the Court. The parties also agreed, however, to continue with this unfair practice charge before the Board with respect to those Union proposals that the Court had decided interfered with its right to hire, fire and direct court personnel.

The County has filed nine separately enumerated exceptions to the PDO. The exceptions, however, essentially consist of two primary arguments. First, the County excepts to the hearing examiner's conclusion that the Union's unfair practice charge was timely filed. Second, assuming the charge was timely filed, the County excepts to the conclusion that the County violated Section 1201(a)(1) and (5) of PERA by refusing to arbitrate or to select an arbitrator to arbitrate issues that the Court advised the County interfere with the Court's right to hire, fire and direct its personnel. The Board will address the County arguments in seriatim.

The County contends that it informed the Union as early as the February 18, 1998 negotiation session, wherein the County presented the Union with its first counterproposal, that it would neither bargain nor arbitrate over proposals the Court identified as interfering with its right to hire, fire and direct court employes. The County further asserts that it reiterated its position to the Union subsequently on March 31, 1998. Because the Union did not file its charge until October 8, 1998, the County

[1] The parties subsequently agreed to a contract for calendar year 1998.

argues the Union's charge here is untimely. However, the hearing examiner thoroughly addressed the timeliness issue in the PDO and the Board can find no reason to reverse that determination. The examiner concluded that the Union's charge alleged that the County failed to "appoint an arbitrator in order that a neutral arbitrator can be selected." The refusal by an employer to select an arbitrator once an impasse is reached is an unfair practice in violation of Section 1201(a)(1) and (5) of PERA. Office of Administration v. PLRB, 528 Pa. 472, 598 A.2d 1274 (1991); Borough of Nazareth v. PLRB, 534 Pa. 11, 626 A.2d 493(1993). Section 1505 of PERA requires that an unfair practice charge be filed within four months of the occurrence of the unfair practice. The unfair practice committed by the County here was its refusal to select an arbitrator under Section 805 of PERA, which occurred after the Union's request on September 30, 1998. Because the Union filed its charge on October 8, 1998, well within the four-month limitations period of PERA, the County's exceptions based on timeliness are dismissed.

The County continues to insist as it did before the examiner that the Union's charge is in reality a refusal to bargain charge dating back to February 1998. This argument, however, ignores the basis for the Union's charge here, which was a refusal to select an arbitrator rather than a refusal to bargain. Although a refusal to proceed to arbitration is itself a failure to bargain in good faith, the Union did not allege in its charge a refusal to bargain over those issues the Court identified as off-limits. Where the charge alleges an act that independently constitutes an unfair practice that occurred within the four-month period of its filing, this Board will assert jurisdiction. Athens Area School District, 23 PPER ¶ 23060 (Final Order, 1992). The cases cited by the County in support of its position, including Borough of Taylor, 16 PPER ¶ 16169 (Final Order, 1985) and Borough of Frackville, 14 PPER ¶ 14139 (Final Order, 1983), actually support the examiner's conclusion that the charge here was timely filed. Both cases support the proposition that the statute of limitations for an unfair practice charge begins to run from the date the unfair practice is committed. In Borough of Frackville, the charge was repudiation of an agreement, and in Borough of Taylor the charge was the same as the charge in this case - a refusal to select an arbitrator. In those cases, the Board respectively concluded that repeated repudiations of an agreement that follow the initial repudiation of that agreement and repeated refusals to arbitrate that follow the initial refusal to select an arbitrator do not make a continuing violation for purposes of the statute of limitations. The Union's charge here did not allege a continuing violation of a refusal to select an arbitrator as required by Section 805 of PERA. Moreover, in Borough of Taylor the employer had an affirmative duty under Section 4 of Act 111 to designate an arbitrator within five days from the date of the arbitration request but failed to do so. Once the employer failed to designate its arbitrator, the six-week limitations period for Act 111 charges began to run. The Union here filed its charge within four months after the County failed to designate an arbitrator. Therefore, the examiner's conclusion regarding timeliness in this case is consistent with Borough of Taylor.

The County makes a rather abstruse argument in exceptions 5 and 6 regarding its refusal to select an arbitrator. The County appears to be contending that the examiner erroneously determined that the County refused to select a neutral arbitrator before the Union even requested that the County select a partial arbitrator. A review of the evidence of record and the PDO, however, reveals that it is the County rather than the examiner

that is confused. The examiner did not conclude that the County violated PERA by refusing to select a neutral arbitrator once the Union made its request for the selection of an interest arbitration panel. Rather, the examiner concluded that the County refused to select a "partial arbitrator" pursuant to Section 805 of PERA (PDO at 2). After the parties each choose an arbitrator, the two arbitrators then select the third neutral member of the panel as provided in Section 806 of PERA. If one party refuses to pick an arbitrator, it cannot be gainsaid that a neutral arbitrator will not be selected. The examiner did not find otherwise and thus exceptions 5 and 6 are also dismissed.

The County next argues that it cannot be found guilty of an unfair labor practice by refusing to select an arbitrator to arbitrate issues that the Court has identified as interfering with its right to hire, fire and direct court personnel. However, the examiner dismissed this argument in the PDO relying upon Office of Administration, supra, wherein the Commonwealth declined to appoint an arbitrator and refused to proceed to arbitration pursuant to Section 805 of PERA because AFSCME failed to withdraw those bargaining demands that the Commonwealth deemed to be non-mandatory subjects of bargaining. In affirming the Board's finding that the Commonwealth violated Section 1201(a)(1) and (5) of PERA, the Supreme Court held that "Pennsylvania law and policy ... require[] that procedural and factual questions regarding the scope of matters to be resolved by arbitration are to be determined by the arbitrator." Office of Administration, 528 Pa. at 478, 598 A.2d at 1277. The Supreme Court further recognized that: "Should the arbitrator make an award concerning issues not properly subject to bargaining, such award would not be facially invalid. This Court has held that arbitration is not improper simply because the arbitrator might fashion an invalid award." Id. (citing PLRB v. Bald Eagle Area School District, 499 Pa. 62, 451 A.2d 671 (1982). Finally, and most important, the Supreme Court concluded that the aggrieved party's interests are not without protection. Any arbitration award is ultimately subject to review by the courts by way of a statutory right to appeal from the final arbitration award. Id.; 42 Pa. C.S.A. §§ 763(b) and 933(b).

The County contends that Office of Administration does not apply here because that case involved the Commonwealth as a public employer arguing that certain issues were not subject to arbitration because those issues were not mandatory subjects of bargaining under PERA. The County points out that management rights may be non-mandatory subjects of bargaining but it is permissible and lawful for the Commonwealth or any public employer to bargain those subjects. In this case, however, the issue according to the County is not whether the items the County refuses to arbitrate are mandatory or permissive subjects of bargaining under PERA; rather, the County believes the issue to be whether those items are within the judge's exclusive control based on constitutional separation of powers principles. Because the Court has identified certain items as interfering with the power of the judiciary, the County claims that it is not permitted to bargain over or arbitrate those items. The County therefore alleges that there are no remaining issues over which an interest arbitration panel, which is not a part of the judiciary, has the jurisdiction to decide.

Under the County's argument, there are three categories of bargaining under PERA: mandatory subjects of bargaining, permissive or non-mandatory subjects of bargaining and those subjects within the exclusive power and control of the judiciary. However, there is no support under Sections 701 and 702 of PERA for the County's argument. Whether a matter

is within the exclusive control of the judiciary is not an issue separate and apart from whether that matter involves a mandatory or non-mandatory subject of bargaining. If an issue is determined to be within the exclusive province of the judiciary, then that issue certainly can be considered a matter of managerial prerogative over which the public employer need not, but certainly may if it so chooses, bargain with the representative of its employes. The County's position here begs the question of who decides whether an issue is a mandatory subject of bargaining and therefore arbitrable under PERA. The Supreme Court has already provided the answer to that question in its decision in Office of Administration. The County contended before the hearing examiner that the Board decides what subjects are bargainable under PERA. However, the Union's charge here was not a refusal to bargain charge but a refusal to select an arbitrator under Section 805 of PERA. The Supreme Court has concluded that in situations where a party believes certain issues are beyond the realm of bargaining, and therefore beyond arbitration, that party cannot simply refuse to proceed to arbitration. Office of Administration. The question of the scope of arbitration is to be initially resolved by the arbitrator, with that decision subject to judicial review. East Pennsboro Area District v. PLRB, 467 A.2d 1356 (Pa. Cmwlth. 1983); Bald Eagle, supra; Lebanon County, 29 PPER ¶ 29108 (Final Order, 1998).

As the hearing examiner recognized, the County cannot avoid arbitration just because the arbitration panel might fashion an award that improperly includes subjects within the Court's exclusive constitutional control. Office of Administration. The Board itself made a similar argument in APSCUF v. PLRB, 373 A.2d 1175 (Pa. Cmwlth. 1977) that was rejected by Commonwealth Court. In the APSCUF case, the Board dismissed the union's charge because we determined that decisions as to what budget proposals must be made to comply with the State's legal obligations is a non-delegable matter vested exclusively in the office of the Governor and is therefore not a proper subject of arbitration. Commonwealth Court held that the Board erred in concluding that the issue was not arbitrable simply "because one of the possible remedies the arbitrator might fashion could infringe upon the decision-making authority of the Governor." APSCUF at 1179. Significantly, Commonwealth Court declined to consider the merits of the Board's argument that an arbitrator could not order the Governor to submit a higher budget request to the legislature. The Court noted that such an argument is an appropriate matter to be raised before a court upon review of the arbitrator's award, wherein the court could determine "whether or not the arbitrator had exceeded his authority or had infringed upon the Governor's authority." Id. at n.6.

The County is not precluded from raising its separation of powers objection before the arbitration panel or with the courts upon appellate review of the interest arbitration award. Appeals of interest arbitration awards under PERA are subject to narrow certiorari appellate review and the appellate court will review issues of illegality and constitutional questions. FOP, Lodge No. 5 v. City of Philadelphia, 725 A.2d 206 (Pa. Cmwlth. 1999). No matter how the County characterizes its argument here, this case presents a question of arbitrability, which is a jurisdictional issue that the Supreme Court has seen fit to leave to the initial determination by an arbitrator. The County's argument would permit a public employer's interpretation of what is bargainable and/or arbitrable to control, an argument specifically rejected in East Penn, supra.

Furthermore, if the Board were to adopt the County's argument here, the result would be a more limited scope of bargaining for county court employes, a notion specifically rejected by the Supreme Court in County of Lehigh v. PLRB, 507 Pa. 270, 489 A.2d 1325 (1985) and PLRB v. AFSCME, District Council 84, 515 Pa. 23, 526 A.2d 769 (1987). Indeed, in County of Lehigh the Court opined, "[i]f the rights given to county court employes under PERA are to have any efficacy, those employes must be permitted to bargain with the county commissioners concerning all of PERA's permissible subjects of collective bargaining." 507 Pa. at 279, 489 A.2d at 1330 (emphasis added). More recently, Commonwealth Court relied on this very same language in Troutman v. PLRB, 735 A.2d 192, (Pa. Cmwlth. 1999) to reverse the decision of the common pleas court, a decision which the County relies on to support its exceptions, and reinstated the Board's final order. In its final order, the Board relied on County of Lehigh and rejected the suggestion of a more limited scope of bargaining for row office employes. AFSCME, District Council 88 v. Berks County (Troutman), 29 PPER ¶ 29044 (Final Order, 1998). Thus, the County's reliance here on Troutman is misplaced. Accordingly, the County's exceptions must be dismissed. The County violated PERA and must now proceed to select its arbitrator and submit all issues to the arbitration panel.

After a thorough review of the exceptions and brief in support, the brief in response to exceptions and all matters of record, the Board shall dismiss the exceptions and make the proposed decision and order final.

ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employe Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed to the proposed decision and order in the above-captioned matter be and the same are hereby dismissed and the proposed decision and order be and the same is hereby made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania, pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, John Markle Jr., Chairman, and Members L. Dennis Martire and Edward G. Feehan, this nineteenth day of October, 1999. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within Order.