## COMMONWEALTH OF PENNSYLVANIA Pennsylvania Labor Relations Board

NEW BRITAIN TOWNSHIP POLICE BENEVOLENT
ASSOCIATION

:

v. : Case No. PF-C-00-124-E

:

NEW BRITAIN TOWNSHIP

#### FINAL ORDER

On January 8, 2002, New Britain Township (Township) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) to the Proposed Decision and Order (PDO), dated December 19, 2001. In the PDO, the Hearing Examiner concluded that the Township engaged in unfair labor practices in violation of Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA) and Act 111 by unilaterally appointing a hearing examiner to adjudicate claims under the Heart and Lung Act. On January 24, 2002, the New Britain Township Police Benevolent Association (Union) filed its brief in response to the Township's exceptions. After a thorough review of the exceptions, briefs and the record, the Board makes the following:

### AMENDED FINDINGS OF FACT

- 4. The parties stipulated and agreed that in response to Stine's request, the Township Board of Supervisors passed a resolution (Resolution No. 2000-30) on August 14, 2000, appointing Willan Franklyn Joseph, Esquire, as the Township's Heart and Lung hearing examiner. The Township had never previously appointed a Heart and Lung hearing examiner because Heart and Lung Act hearings had never been previously held in the Township. Stine resolved all disputes with the Township in an employment release and workers' compensation compromise and release settlement statement. Based upon that settlement, Stine withdrew his request for a Heart and Lung Act hearing. (Stipulations 2 and 3).
- 6. The parties stipulated and agreed that the collective bargaining agreement contains Article XII, paragraph 3, which states as follows:

Disabilities caused by occupation injuries will be handled in accordance with the Pennsylvania Workmen's Compensation Law and the Heart and Lung Act, when appropriate. The officer must report any work-related injury to the Township Office, within 24 hours of the injury. The Township shall continue to pay any officer injured in the line of duty, all pay as required by state law during the term of the temporary disability, and as defined within the Heart and Lung Act, with the employee turning over to the Township any Workers Compensation payments received by the Officer.

 $<sup>^{1}</sup>$  Act of June 28, 1935, P.L. No. 477, as amended, 53 P.S. §§ 637-638.

#### **DISCUSSION**

The parties stipulated to the following facts. On March 30, 1999, Joseph Stine, chief of police for the Township, was injured in a work-related motor vehicle accident. Consequently, the Township paid Heart and Lung Benefits to Chief Stine at various intervals. These benefits were suspended when Chief Stine returned to modified duty at full salary on May 22, 2000. Chief Stine signed an agreement suspending his Heart and Lung benefits when he returned to work. Chief Stine thereafter alleged that his medical condition again deteriorated. Accordingly, he claimed that he was no longer able to perform his modified duty assignment, and he requested reinstatement of his Heart and Lung benefits. The Township denied Chief Stine's request based upon a medical report opining that he could return to his full duties as police chief.

On July 17, 2000, Chief Stine requested a Heart and Lung Act hearing to determine whether he was entitled to a reinstatement of Heart and Lung Act benefits. The collective bargaining agreement (CBA) provides that "[d]isabilities caused by occupation injuries will be handled in accordance with the Pennsylvania Workmen's Compensation Law and the Heart and Lung Act, when appropriate." (F.F. 6; Exhibit B; Stipulation ¶ 8). In response to Stine's request, the Township Board of Supervisors passed a resolution (Resolution No. 2000-30) on August 14, 2000, appointing Willan Franklyn Joseph, Esquire, as the Township's Heart and Lung hearing examiner. The Township had never previously appointed a Heart and Lung hearing examiner because Heart and Lung Act hearings had never been previously held in the Township. Chief Stine resolved all disputes with the Township in an employment release and workers' compensation compromise and release settlement statement. Based upon that settlement, Chief Stine withdrew his request for a Heart and Lung Act hearing. The resolution appointing Willan Joseph as the Township's Heart and Lung hearing examiner remains in effect and, should there be any future requests for Heart and Lung Act hearings, the Township will use Mr. Joseph as the Heart and Lung hearing examiner.

In its exceptions, the Township objects to Findings of Fact Nos. 4 and 6, which contain typographical errors, which are sustained as reflected in the amended findings of fact above.

The remainder of the Township's exceptions object to the Hearing Examiner's analysis and conclusions that the unilateral designation of a hearing examiner to adjudicate entitlements to Heart and Lung benefits on behalf of the Township, is a mandatory subject of bargaining and that the Township committed an unfair labor practice by such action.

The Township argues that its appointment of a hearing examiner to adjudicate Heart and Lung benefits on behalf of the Township, where a Heart and Lung hearing involving a Township employe had never been held, is not a mandatory subject of bargaining and alternatively, does not constitute the requisite change in terms and conditions of employment. If a matter constitutes a mandatory subject of bargaining, a public employer may not act unilaterally regarding that subject under

Act 111. Plumstead Township v. PLRB, 713 A.2d 730 (Pa. Cmwlth. 1998). Section 1 of Act 111 establishes a list of subjects that are mandatorily negotiable and provides that public employers have a duty to bargain with their police personnel "concerning the terms and conditions of their employment, including compensation, hours, working conditions, retirement, pensions and other benefits." 43 P.S. § 217.1. The unilateral action at issue in this case does not involve one of the expressly bargainable items listed in Section 1 of Act 111. The Board, therefore, must apply the "rational relationship test to determine whether the appointment of a hearing examiner to adjudicate an employe's entitlement to Heart and Lung benefits constitutes a mandatory subject of bargaining. Plumstead, supra; Indiana Borough v. PLRB, 695 A.2d 470 (Pa. Cmwlth. (1997); Township of Upper Saucon v. PLRB, 620 A.2d 71 (Pa. Cmwlth. 1993). Accordingly, "under Act 111, a matter is deemed a mandatory subject of bargaining if it bears a rational relationship to the employees' duties." Plumstead, 713 A.2d at 733. However, not all subjects that are rationally related to employes' duties constitute mandatory subjects of bargaining. Id. at 735. A matter that may be considered essential for the proper and efficient functioning or administration of the public employer may be managerial prerogative and thus not bargainable. Id.; Frackville Borough Police Department v. Frackville Borough, 28 PPER ¶ 28095 (Final Order, 1997). However, "[f]or an issue to be deemed a managerial prerogative and, thus, not a mandatory subject of bargaining, a managerial policy concern must substantially outweigh any impact an issue will have on the employees." Id. (citing Indiana Borough v. PLRB, 695 A.2d 470 (Pa. Cmwlth. 1997)).

In AFSCME District Council 88, Local 2549 v. Northampton County, 25 PPER ¶ 25100 (Final Order, 1994), the Board stated that, under the Public Employe Relations Act (PERA) and the PLRA and Act 111, a public employer could not unilaterally adopt the five-physician rule permitted under the Pennsylvania Workers' Compensation Act (PWCA).<sup>2</sup> case, the Board stated that the fact that the PWCA "`grants the discretion to the employer to designate a panel of physicians for workers' compensation purposes does not exclude the possibility that the decision to exercise that discretion is influenced by the collective bargaining process.'" Northampton, 25 PPER at 257 (quoting Woodland Hills Sch. Dist., 22 PPER ¶ 22062 (Final Order, 1992)). Similarly, in County of Delaware v. PLRB, 735 A.2d 131 (Pa. Cmwlth. 1999), the employer changed its workers' compensation policy from requiring employes to choose an employer panel physician from a list of five and treat for thirty days to requiring employes to choose from a list of six and treat for ninety days in conformity with the 1996 amendments to the PWCA. The employer in County of Delaware argued that the length of treatment with an employer's panel physician was discretionary and therefore not a mandatory subject of bargaining. In reversing the court of common pleas and reinstating the Board's final order, the Commonwealth Court disagreed with the County and approved the hearing examiner's determination that the length of time required to treat with panel physicians to obtain workers' compensation benefits has a significant determinative impact on employe's medical status and health benefits, both of which have been previously determined to outweigh any unilateral action by employers and constitute a mandatory

<sup>&</sup>lt;sup>2</sup> Act of June 2, 1915, P.L. 736, <u>as amended</u>, 77 P.S. §§ 1-1041.4; 2501-2626.

subject of bargaining.  $\underline{\text{Id.}}$  The Court further held that statutory provisions in Section 450(a) of the PWCA, 77 P.S. § 1000.6, do not empower the employer to refuse to bargain altogether regarding the length of treatment time with a panel physician. Id.

The same section of the PWCA also provides that an employer and a union may bargain the use of impartial physicians. Under the County of Delaware rationale, the appointment of the individual physicians, who will be directly determining employes' entitlement to important medical benefits already determined to constitute a mandatory subject of bargaining, also significantly impacts employes' terms and conditions of employment thereby constituting a negotiable subject under the PLRA and Act 111. Section 450(a) of the PWCA, 77 P.S. § 1000.6, contemplates bargaining the appointment and use of impartial physicians as it does with the use of the physician panel system as a whole.

Conversely, in Frackville Borough, supra, the Board held that an employer could unilaterally change pension fund managers because even if that choice results in the fund performing poorly, the employer remains statutorily responsible for providing employes' with their benefits. In other words, the choice of fund manager or the performance of the pension fund cannot affect the benefits received by employes because the employer is statutorily designated as the fiduciary for the fund and is required to make up any losses or differences. Therefore, choice of fund manager constituted a managerial prerogative. However, Frackville is distinguishable from this case and the physician panel cases. The choice of pension fund manager in Frackville constituted a managerial prerogative precisely because the fund manager could not affect the pension benefits received by the employes whereas the employers' panel of physicians in County of Delaware, supra; Northampton, supra; Woodland Hills, supra; and Middletown Township, 24 PPER ¶ 24167 (Final Order, 1993), like the Township's adjudication of Heart and Lung Act benefits here, directly determines employes' entitlement to health and medical benefits resulting from work-related injuries.

Also, unlike <u>Frackville</u>, the Township's appointment of its own hearing examiner to determine benefit eligibility is not severable from the availability of the substantive benefits. An injured employe does not have the right to receive bargained for benefits until his entitlement is determined. If an employer could unilaterally decide who receives benefits, it could render nugatory previously bargained for benefits. Accordingly, the choice of forum for deciding eligibility has equal impact on employes' as the substantive benefits, where the forum is the vehicle for conveying those benefits to the employes. The Heart and Lung Act does not statutorily designate a forum to adjudicate entitlements to Heart and Lung benefits or provide a mechanism to determine a forum. Sidlow v. Township of Nether

the county, township or municipality, by which he is employed,

 $<sup>^{\</sup>rm 3}$  Section 1 of the Heart and Lung Act provides, in relevant part, as follows:

Any . . . policeman, fireman or park guard of any county, city, borough, town or township, who is injured in the performance of his duties . . . and by reason thereof is temporarily incapacitated from performing his duties, shall be paid by . . .

Providence, 621 A.2d 1105, 1107 (Pa. Cmwlth. 1993) (stating that the Heart and Lung Act "did not establish or identify any forum to adjudicate the question of what tribunal has the authority to grant or terminate Heart and Lung Act benefits."). Accordingly, the Sidlow Court recognized that it has sanctioned the use of several different fora "as having jurisdiction over Heart and Lung Act matters depending upon the identity of the employer." Id. Consequently, the Sidlow Court held that, unless the parties expressly agree to vest jurisdiction to adjudicate Heart and Lung claims in an arbitrator or other adjudicative body, the public employer is vested with jurisdiction to adjudicate the entitlement to Heart and Lung Act benefits pursuant to the Local Agency Law, where the public employer is a local government body making the decision to deny benefits. Id. at 1108.

In City of Pittsburgh v. Kisner, 746 A.2d 661 (Pa. Cmwlth. 2000), the Court stated that the claimant properly brought her Heart and Lung entitlement claim before an arbitrator, Id. at 663 n.2, although the jurisdiction of the arbitrator to adjudicate the claimant's entitlement to Heart and Lung benefits was not at issue. Also, in Kisner, the jurisdiction of this Board was not invoked to determine whether the choice of forum was a mandatory subject of bargaining. However, the Kisner Court recognized that jurisdiction can be vested in an arbitrator. Accordingly, the Commonwealth Court has held that the parties can indeed agree to vest jurisdiction in an arbitrator and that state law does not mandate that jurisdiction lie only with the Township or prohibit jurisdiction in another forum. Therefore, as in the physician panel cases under the PWCA, where the employers' discretionary authority to require employes to treat with their physician panels for a certain period of time does not relieve the employer of its statutory duty to bargain those issues with the exclusive bargaining representative of its employes, Sidlow and Kisner support the conclusion that the Township here is not relieved of its bargaining obligation merely because the case law holds that jurisdiction initially lies with the Township in the absence of an agreement to the contrary. Fundamentally, none of the relevant statutes or case law prohibits the Township from bargaining with the Union.

Upper Saucon requires the Board to consider the Township's interests to determine whether those interests "substantially outweigh the impact of unilaterally determining which forum, individual or entity will determine employes' entitlement to benefits. However, the Township has not, on this record, offered any evidence regarding the unilateral selection of a hearing examiner to conduct Heart and Lung Act hearings which "might be considered essential for the proper and efficient function of a police force", Plumstead, 713 A.2d at 735, to establish its burden of proving that it has interests that substantially outweigh the impact on employes. The forum, entity or

his full rate of salary, as fixed by ordinance or resolution, until the disability arising therefrom has ceased. All medical and hospital bills, incurred in connection with any such injury shall be paid by . . . such county, township or municipality.

<sup>53</sup> P.S. § 637.

<sup>&</sup>lt;sup>4</sup> 2 Pa. C.S. §§ 551-555, 751-754.

individual selected for adjudicating employes' entitlement to Heart and Lung Act benefits is rationally related to employes duties as a substantive benefit that is not severable from the underlying benefits, and the Township failed to meet its burden of establishing any managerial interests that substantially outweigh the impact on employes. Therefore, the forum constitutes a mandatory subject of bargaining. The Court and the Board have consistently held that an employer may not circumvent its statutory obligation to bargain mandatory subjects unless there is an explicit statutory prohibition. Here, there is no express case law or statutory mandate restricting the jurisdiction of adjudicating Heart and Lung benefits to the Township only or prohibiting the parties from agreeing to another forum. In fact, the Commonwealth Court has conversely held that an employer can agree to vest jurisdiction over adjudicating Heart and Lung benefits in a third party, Sidlow, supra, and, where the employer is involved in a collective bargaining relationship, it must bargain the selection of the procedure, individual or entity empowered to determine employes' entitlement to important medical benefits that significantly impact the employes' terms and conditions of employment. County of Delaware, supra. AFSCME, supra. When the law grants discretion to an employer to act, as here, it does not relieve that employer from its bargaining obligation unless bargaining the specific issue is also expressly prohibited by the law.  $\underline{\text{Id.}}$  As the Supreme Court stated in  $\underline{\text{PLRB}}$   $\underline{\text{v.}}$  State College Area Sch.  $\underline{\text{Dist.}}$ , 461 Pa. 494, 337 A.2d 262 (1975), "[t]he mere fact that a particular matter may be covered by legislation [or as here, case law,] does not remove it from collective bargaining." Id., 337 A.2d at 269.

The Township also argues that, where a Heart and Lung hearing involving a Township employe had never been held, the appointment of a hearing examiner as permitted by law does not constitute the requisite change in terms and conditions of employment. However, whether unilateral action effectuates a change in conditions of employment is not limited to an alteration, modification or amendment to an existing policy or benefit. If an action affects terms and conditions of employment, that action has indeed changed the terms and conditions of employment notwithstanding whether that specific action changes a policy already in place or institutes a new policy. Accordingly, the Board has held that unilaterally providing a benefit to employes, which were not previously provided, constitutes a unilateral change in conditions of employment because it undermines the bargaining representative. Dormont Borough Police Ass'n and Dormont Borough Desk/Fire Apparatus Officers v. Dormont Borough, 32 PPER ¶ 32100 (Final Order, 2001).

Here, the Township unilaterally instituted a policy whereby future hearings to determine an employe's entitlement to Heart and Lung Act benefits would be conducted by Mr. Joseph. By instituting this new policy, which governs benefits and the entitlement thereto, the Township changed the terms of the employment relationship. By adding a term of employment to the collection of terms comprising the parties' employment relationship, the Township changed the composition of that collection and the embodiment of what was formerly understood as the terms and conditions of employment. The existence of a change is not limited to those situations where a past practice was in place.

The Township argues in its brief that requiring it to bargain over selecting a forum to adjudicate entitlement to Heart and Lung Act benefits negates the policies of that statute because the benefits were designed for temporary injuries and delays inherent in bargaining would delay hearings beyond the temporary status of the injury, thereby effectively preventing employes from obtaining benefits they may otherwise be entitled to. The fallacy of this argument, however, is that it assumes that the Board's decision requires ad hoc bargaining over the selection of an adjudicative forum for every individual claim under the Heart and Lung Act. This decision does not require such an absurd result. The Township is required to bargain with the Union for a policy or mechanism that will be in place for future claims in a similar manner that parties bargained for a grievance arbitration mechanism to accommodate future grievances. When a hearing is requested, the bargained for mechanism will be available for invocation in the same manner that the Township attempted to have Mr. Joseph available for future hearings.

The Township also argues that its jurisdiction over conducting hearings to determine entitlement to Heart and Lung Act benefits is the "default method of providing due process." (Township's brief at 8 (citing Judge Pellegrini's concurrence in Sidlow, supra.)). The Township contends, therefore, that it could not be deemed to have relinquished this jurisdiction by merely agreeing to refer to the Heart and Lung Act in the CBA. The Board recognizes that the case law provides that under the Local Agency Law, the employer denying benefits is also the entity vested with jurisdiction to conduct a hearing to determine entitlement. The Board also recognizes that the language in the CBA does not evidence that either of the parties expressly and unmistakably bargained this issue as required. Upper Saucon, supra. A mere reference to Heart and Lung Act benefits does not satisfy the requirement that the parties clearly and unmistakably bargain an issue when the case law relies on another statute, i.e., the Local Agency Law, which is not mentioned in the CBA, to confer jurisdiction on local public employers to adjudicate such claims. However, although the case law permits the Township to conduct these hearings, the Township's discretion is mutually exclusive of whether the adjudicating entity, body or person constitutes a mandatory subject of bargaining. Had the Union not disputed the Township's jurisdiction in this case, the law certainly provides that the Township has jurisdiction to conduct these hearings. Notwithstanding the fact that the Township's jurisdiction is the "default" mechanism for adjudicating claims, the cases consistently hold that it is not the only mechanism or jurisdiction available, and none of those cases specifically analyze or answer the question of whether jurisdiction over these hearings constitutes a mandatory subject of bargaining, as the Board has done here.

The Township also submitted a written request for oral argument before the Board. In support of its request, the Township alleges that "[o]ral argument is appropriate in this case because the Hearing Examiner's Proposed Decision and Order changes the law in Pennsylvania regarding the procedures for determinations of eligibility for benefits under the Heart and Lung Act." (Employer's Request for Oral Argument). Although the precise issue regarding the negotiability of appointing a hearing examiner to determine entitlements to Heart and Lung Act benefits may be novel, the analysis under the rational relationship test and the determination of negotiability is routine. Further, the

Board finds that the parties have comprehensively researched the issues and well presented their positions in their briefs. Consequently, the Board fully understands the issues presented and the parties' positions without the need for oral argument. Accordingly, the Township's request for oral argument is denied.

After a thorough review of the exceptions, the Proposed Decision and Order and all matters of record, the Board concludes that the Township committed unfair labor practices in violation of Section 6(1)(a) and (e) of the PLRA and Act 111 and shall sustain the Proposed Decision and Order of the Hearing Examiner.

#### ORDER

In view of the foregoing and in order to effectuate the policies of the Pennsylvania Labor Relations Act and Act 111 of 1968, 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, in part, and sustained, in part; and that the Proposed Decision and Order as amended herein be and the same is hereby made absolute and final.

SEALED, DATED and MAILED pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, John Markle Jr., Chairman, and L. Dennis Martire, Member, this nineteenth day of March 2002. 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.

# COMMONWEALTH OF PENNSYLVANIA Pennsylvania Labor Relations Board

NEW BRITAIN TOWNSHIP POLICE BENEVOLENT

ASSOCIATION :

v. : Case No. PF-C-00-124-E

:

NEW BRITAIN TOWNSHIP

## AFFIDAVIT OF COMPLIANCE

New Britain Township hereby certifies that it has ceased and desisted from its violation of Section 6(1)(a) and (e) of the PLRA and Act 111; that it has rescinded Resolution No. 2000-30; that it has posted a true and correct copy of the proposed decision and order as directed therein; that it has posted a true and correct copy of the Final Order in the same manner; and that it has served a copy of the affidavit on the Association at its principal place of business.

	Signature/Date
-	Title

SWORN AND SUBSCRIBED to before me The day and year first aforesaid

Signature of Notary Public