COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

CAPITOL POLICE LODGE 85, FRATERNAL ORDER OF POLICE	:	
v.	:	Case No. PF-C-03-79-E
COMMONWEALTH OF PENNSYLVANIA	:	

FINAL ORDER

On July 31, 2003 the Capitol Police Lodge 85, Fraternal Order of Police (FOP), filed a Charge of Unfair Labor Practices with the Pennsylvania Labor Relations Board (Board) alleging that the Commonwealth of Pennsylvania (Commonwealth) violated Act 111 of 1968 and Section 6(1)(a), (c) and (e) of the Pennsylvania Labor Relations Act (PLRA). The FOP alleged that the Commonwealth had unlawfully ceased paying longevity wage increases and unilaterally altered health care benefits following contract expiration and during the interest arbitration process.

The Secretary of the Board issued a letter on September 5, 2003, noting that under Fairview School District v. Unemployment Compensation Board of Review, 499 Pa. 539, 454 A.2d 517 (1982), the *status quo* following contract expiration does not include the continuation of annual seniority based wage increases. The Secretary also found that the allegations did not support claims for a change in the contractual health care benefits or for discrimination. Accordingly, the Secretary declined to issue a complaint and dismissed the charge.

On September 16, 2003, the FOP filed timely exceptions to the Secretary's decision declining to issue a complaint. In its exceptions, the FOP does not take issue with the Secretary's dismissal of its claims regarding the health care benefits, but does challenge, and allege additional facts to support its claim that the Commonwealth had unlawfully ceased paying the longevity wage increases following the expiration of the collective bargaining agreement. The FOP argues that by refusing to pay the longevity wage increases after contract expiration, the Commonwealth unlawfully altered the *status quo* in violation of Section 6(1)(e) of the PLRA.

By way of background, the Board has consistently supported the obligation of an employer to sustain the *status quo* during contract hiatus while the parties are engaged in negotiating a successor agreement. Appeal of Cumberland Valley School District, 483 Pa. 134, 394 A.2d 946 (1978) (holding that an employer may not withdraw the health care benefits provided in the expired contract inconsistent with the employer's bargaining position as a coercive bargaining tactic); Pennsylvania Labor Relations Board v. Williamsport Area School District, 486 Pa. 375, 406 A.2d 329 (1979) (holding that, during negotiations, an employer may not abandon the grievance mechanism in an expired contract); and Philadelphia Housing Authority v. Pennsylvania Labor Relations Board, 620 A.2d 594 (Pa. Cmwlth. 1993) (holding that employer may not implement its last offer absent impasse and a strike by the employes). Here, the issue presented is not whether the employer

must maintain the *status quo*, but how the *"status quo"* is defined. The FOP argues that the *status quo* should include an obligation on an employer to pay contractual longevity wage increases post contract expiration while negotiations and arbitration continue toward a successor contract. The Secretary disagreed, and found that the *status quo* did not include such increases determining that, while negotiations continue, pay and benefits remain the same as existed at contract expiration.

In Fairview School District v. Unemployment Compensation Board of Review, 454 A.2d at 520, the Pennsylvania Supreme Court defined the *status quo* for purposes of unemployment compensation as "the last actual, peaceable and lawful noncontested status which preceded the controversy." Relying on Maine's Supreme Court's decision in M.S.A.D. No. 43 Teachers' Association v. M.S.A.D. No. 43 Board of Directors, 432 A.2d 395 (Me. 1981),[1] the Supreme Court held that for purposes of unemployment compensation the *status quo* at contract expiration did not include automatic wage increases, and noted that "[t]o require the [employer] to pay stepped up salary increases beyond the specified years contained in the expired contract changes the existing relationship in the context of the terms and conditions subject to the very negotiations sought to be fostered." Id at 522. By relying on public sector collective bargaining law from another jurisdiction, we believe the Pennsylvania Supreme Court has provided this Board with some guidance in defining the *status quo* for purposes of the Pennsylvania public sector collective bargaining statutes.

This Board has previously looked to decisions of the courts under the unemployment compensation law for guidance in defining the *status quo*. See Palmyra Area Education Association, PSEA/NEA v. Palmyra Area School District, 26 PPER ¶ 26087 (Final Order, 1995), aff'd sub nom, Palmyra Area School District v. Pennsylvania Labor Relations Board, 27 PPER ¶ 27032 (Lebanon County Court of Common Pleas, 1995).[2] In South Butler County Education Association v. South Butler County School District, 29 PPER ¶ 29088 at 212 (Final Order, 1998), the Board acknowledged the Supreme Court's holding in Fairview School District noting that

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[1] The Maine Supreme Court adopted the rationale of Board of Cooperative Educational Services of Rockland County v. New York State Public Employment Relations Board, 363 N.E. 2d 1174, 1175 (N.Y. Ct. Appeals, 1977), in which a New York court held that "after the expiration of an employment agreement, it is not a violation of a public employer's duty to negotiate in good faith to discontinue during negotiations for a new agreement the payment of automatic annual salary increments…"

[2] Conversely, the Pennsylvania Supreme Court has looked to decisions under PERA in determining when there has been a change in the *status quo* for purposes of unemployment compensation. Norwin School District v. Belan, 510 PA. 255, 507 A.2d 373 (1986). The Supreme Court cited with approval its prior affirmance of the Board's holding in Pennsylvania Labor Relations Board v. Cumberland Valley School District, 6 PPER 211 (Final Order, 1975), aff'd sub nom, Appeal of Cumberland Valley School District, 483 Pa. 134, 394 A.2d 946 (1978), that a public employer may not unilaterally decrease wages and benefits provided in the expired agreement as a means of coercing employes to accept the employer's bargaining proposals.

> Although this Board has not ruled on the question of whether the provision of step increases after contract expiration constitutes a unilateral change in the *status quo*, the Supreme Court has ruled that for unemployment compensation purposes an employer's denial of incremental increases at the expiration of a contract based on longevity was not a violation of the "status quo." Fairview School District v. Unemployment Compensation Board of Review, 499 Pa. 539, 454 A.2d 517, 520 (1982).

We believe the holding of Fairview School District is sound labor policy under Act 111 and the PLRA, recognizing that payment of wage increases after contract expiration changes the existing relationship of matters presently under negotiation and/or arbitration.

Pennsylvania public sector labor laws are premised on the policy that wage and benefit disputes are best addressed through collective bargaining seeking a mutual agreement, or through arbitration where necessary. To require an employer to pay discretionary increases concerning the very matters under discussion between the parties undermines the bargaining process and defeats the policy of the collective bargaining laws. Merely because an employer has provided discretionary increases historically as a product of the bargaining process is not a guarantee that future similar increases can and will occur. This is particularly true during a subsequent period of contract hiatus where the parties are negotiating these wage terms for a successor agreement. Present economic factors and policy considerations can and should impact the bargaining process and guide the parties' positions at the bargaining table (rather than historic increases reflective of past economic influences and policy choices). Thus, we fundamentally disagree with the FOP's argument, as advanced in additional factual claims in support of the exceptions, that the Commonwealth's alleged past payment of longevity increases during a previous contract hiatus binds the Commonwealth to present and future similar increases regardless of economic circumstances or relevant policy considerations. Simply stated, the FOP fails to account for the fact that despite all the good reasons employes may merit longevity increases each year (even after contract expiration) economic realities and policy concerns may militate against such increases.

We therefore hold consistent with the Supreme Court's decision in Fairview School District, supra, that under Act 111 and the PLRA, longevity wage adjustments do not extend beyond the specified term of the contract, and the *status quo* as to wages are "frozen" at the time of contract expiration. Accordingly, unless the longevity wage increase provisions are extended by agreement, or otherwise expressly made applicable during contract negotiations, it is not an unfair labor practice for the employer to cease paying additional longevity wage increases following expiration of the collective bargaining agreement. Because maintaining the *status quo* meant that the wages "froze" as a matter of law following contract expiration, the Commonwealth did not violate Section 6(1)(e) of the PLRA by failing to pay longevity wage increases under the expired contract.[3]

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[3] In making this determination of whether to issue a complaint, the Board assumes all facts alleged to be true. Where those allegations do

The FOP cites to Amalgamated Transit Union, Local 85 v. Port Authority of Allegheny County, 17 PPER ¶ 17144 (PDO 1986), to support its position for continued longevity increases. However, we note that the Board is not bound by the hearing examiner's determination in Port Authority of Allegheny County that cost of living adjustments, post contract expiration, are necessarily part of the *status quo*.[4] See Commonwealth of Pennsylvania, Pennsylvania Emergency Management Agency v. Pennsylvania Labor Relations Board, 768 A.2d 1201 (Pa. Cmwlth. 2001).[5]

Further, Lehigh and Northampton Transportation Authority v. Amalgamated Transit Union, Local 956, 16 PPER ¶ 16061 (Final Order, 1985) and Amalgamated Transit Union, Local 1345 v. Berks Area Reading Transportation Authority, 16 PPER ¶ 16130 (Final Order, 1985) are distinguishable. Notably, the central issue in Lehigh and Northampton Transportation Authority and Berks Area Reading Transport Authority dealt with defining impasse under the Transportation Act, Act of November 27, 1967, P.L. 628, No. 288, 53 P.S. §39951.

In Berks Area Reading Transport Authority, while one of the charges filed dealt with the elimination of the cost-of-living increases during negotiations, the overall claim involved the employer's bargaining tactic of removing contract provisions, including refusing to continue monthly grievance meetings, as an arm twisting device to force the union to concede to the employer's bargaining position. In finding the unfair practice, the Board recognized that in Pennsylvania Labor Relations Board v. Williamsport Area School District, supra, and Appeal of Cumberland Valley School District, supra, the Board and the Supreme Court had previously stated that

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not demonstrate the existence of an unfair labor practice, the Board will not issue a complaint. Homer Center Education Association v. Homer Center School District, 30 PPER ¶ 30024 (Final Order, 1998); See Pennsylvania Social Services Local 668 v. Pennsylvania Labor Relations Board, 481 Pa. 81, 392 A.2d 256 (1978); and Pennsylvania State Troopers Association v. Pennsylvania Labor Relations Board, 809 A.2d 422 (Pa. Cmwlth. 2002).

[4] Moreover, in Port Authority of Allegheny County, prior to a final Board resolution, the parties settled their impasse (resolving the cost of living adjustments issues retroactively) thus mooting the then pending exceptions. We reserve judgment here as to whether cost of living adjustments (COLA) should be distinguished from longevity increases. Cost of living adjustments in general are intended to allow employes to maintain their *status quo* with indices such as the Consumer Price Index, which may move up or down and may negatively impact employe wages.

[5] Likewise, the Board is not bound by any discussion of the Board in Juniata Valley Tri-County Mental Health/Retardation Program, 13 PPER ¶ 13293 (Final Order, 1982), where a similar issue was addressed. That case occurred at a time when there was a vacancy on the Board, and the remaining two members reached opposite conclusions regarding implementation upon impasse and step wage increases following contract expiration.

deleting contract provisions not consistent with the Public Employe Relations Act (PERA), or even with a party's bargaining proposal, as a negotiating tactic violates good faith bargaining obligations.

The question in Lehigh and Northampton Transportation Authority was whether, during the bargaining process, the employer was permitted to unilaterally implement its last offer, which would have included eliminating the cost-of-living provisions under the expired contract. Finding that the parties were not at statutory impasse, the Board held that the employer's implementation of new terms and conditions of employment based on its last offer was unlawful. The question involved in Lehigh and Northampton Transportation Authority regarding impasse and employer implementation, has since been addressed by the Board and the Commonwealth Court in Philadelphia Housing Authority v. Pennsylvania Labor Relations Board, supra, wherein it was held that, under PERA, an employer may not implement a last offer unless there is an impasse in negotiations and a strike by the employes.

The facts presented here do not involve rescission of contractual benefits in the expired contract as a bargaining tactic, as involved Berks Area Reading Transport Authority, nor a unilateral implementation of a last offer as in Lehigh and Northampton Transportation Authority. Here, the issue placed squarely before the Board is to define the *status quo*, a question not presented in the Lehigh and Northampton Transportation Authority and Berks Area Reading Transport Authority cases.

The FOP also asserts that the Commonwealth's refusal to pay the longevity increases during this current contract hiatus is contrary to a long standing past practice. In this regard, the FOP alleges that historically the Commonwealth has paid longevity increases even during hiatus periods between contracts. The FOP contends that the Commonwealth is violating Section 6(1)(a) and (e) of the PLRA by unilaterally altering this past practice of paying longevity increases during contract hiatus.

In addition to the fact that current economic or policy concerns can militate against an employer being forever bound to wage increases merely because it has historically paid those increases (even during negotiations) -- a past practice analysis is simply inapplicable here on these alleged facts. There are four instances where past practices may be used in labor law. First, a past practice may clarify ambiguous contract language. Second, evidence of past practices may be used to implement contract language that establishes a general rule. Third, past practices may modify or amend apparently unambiguous contract language which has been arguably waived by the parties. Finally, a past practice may create or establish a separate enforceable condition of employment which cannot be derived from the express language of the collective bargaining agreement. County of Allegheny v. Allegheny County Prison Employees Independent Union, 476 Pa. 27, 381 A.2d 849 (1977).

The FOP contends that the practice of paying longevity wage increases during contract hiatus is a separate enforceable condition of employment. However, what the FOP is seeking is a post expiration continuation of the longevity pay increases that were set forth in the expired collective bargaining agreement (appended to the Charge of

Unfair Labor Practices).[6] Here, the payment of longevity wage increases during contract hiatus would be derived from the terms of the expired contract. The FOP's argument seeks to apply past practice analysis usually applicable to matters not addressed in a contract and during its term, to a matter specifically addressed in the contract after its expiration. As such, the FOP's claims fail to support the use of a past practice analysis to establish a separate enforceable condition of employment.

We also reject the FOP's assertion that the Commonwealth's decision not to pay the longevity wage increases after contract expiration was discriminatory in violation of Section 6(1)(c) of the PLRA. Although the FOP contends that the Commonwealth's decision was made only after the FOP had rejected a "pattern" contract and demanded arbitration, in the context of this charge, timing alone is not sufficient to raise an inference of union animus. AFSCME, Council 13 v. Department of Labor & Industry, 16 PPER ¶ 16020 (Final Order, 1984). Indeed, the allegations in the charge appear to reflect merely an attempt by the Commonwealth to assert a consistent bargaining position regarding the elimination of longevity increases in 2003 with other Commonwealth units with which it was bargaining. Accordingly, there are no other allegations set forth in the charge or exceptions warranting an inference of discriminatory motive to support a violation of Section 6(1)(c) of the PLRA.

After a thorough review of the exceptions and all matters of record, the Board finds that the FOP has not stated a cause of action for an unfair labor practice in violation of Act 111 and Section 6(1)(a), (c), or (e) of the PLRA. Accordingly, the Board will dismiss the exceptions, and sustain the Secretary's September 5, 2003 decision declining to issue a complaint and dismissing the charge.

ORDER

In view of the foregoing and in order to effectuate the policies of Act 111 of 1968 and the Pennsylvania Labor Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed by the Capital Police Lodge 85, Fraternal Order of Police are dismissed, and the September 5, 2003 decision of the Secretary dismissing the Charge of Unfair Labor Practices 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, L. Dennis Martire, Member, and Anne E. Covey, Member, this eighteenth day of November, 2003. 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.

[6] Our review of the contract discloses no agreement of the parties enforceable before the Board providing for future increases post contract expiration.