

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

ROGER GEHRING :
 :
 v. : Case No. PF-C-03-46-E
 :
 HAMBURG BOROUGH :

FINAL ORDER

On April 21, 2003, Roger Gehring filed a Charge of Unfair Labor Practices with the Pennsylvania Labor Relations Board (Board) alleging that Hamburg Borough (Borough) violated Act 111 and Section 6(1)(a) and (c) of the Pennsylvania Labor Relations Act (PLRA). In the Specification of Charges, Mr. Gehring alleges that on February 3, 2003 he was sworn in as a full-time probationary police officer for the Borough. Because of Mr. Gehring's previous part-time police work for the Borough, for which he received a commendation, the Hamburg Police Officers' Association filed a grievance on his behalf seeking an adjustment of his seniority to reflect his prior service. Mr. Gehring alleges that the Borough terminated his employment on April 15, 2003 because of the filing of this grievance.

Relying on Upper Makefield Township v. Pennsylvania Labor Relations Board, 562 Pa. 113, 753 A.2d 803 (2000) and Pennsylvania State Police v. Pennsylvania Labor Relations Board, ___ Pa. ___, 810 A.2d 1240 (2002), the Secretary of the Board noted that the courts have held that protections of the state labor laws do not apply until a police officer has successfully completed probation. Accordingly, because Mr. Gehring was on probation at the time of his discharge, the Secretary concluded that he was unable to allege a cause of action under Act 111 or the PLRA. Therefore, on June 5, 2003, the Secretary advised Mr. Gehring that no complaint would be issued by the Board.

On June 20, 2003, Mr. Gehring filed timely exceptions to the Secretary's determination arguing that the Secretary erred in failing to consider the Supreme Court's holding Township of Sugarloaf v. Bowling, 563 Pa. 237, 759 A.2d 913 (2000). Township of Sugarloaf involved the question of who decides arbitrability of a probationary police officer's grievance under the contract. Whereas here, we are concerned with the statutory unfair labor practice protections afforded a probationary police officer under Act 111 and the PLRA,¹ which was squarely addressed by the Supreme Court in Upper Makefield and Pennsylvania State Police.

In Upper Makefield Township Police Association v. Upper Makefield Township, 28 PPER ¶28182 (Final Order 1997), the Board was presented with allegations that the township was unlawfully refusing to submit the question of the arbitrability of a probationary police officer's dismissal to an arbitrator. The township claimed that the contract did not provide for arbitration, and therefore it was not required to submit the dispute to an arbitrator. The Board held that Act 111 and

¹ See Township of Sugarloaf, 759 A.2d at 916 n.5.

the PLRA mandate arbitration of contractual disputes, and thus the township's refusal to submit the question of arbitrability to an arbitrator, was an unfair labor practice for refusing to bargain in violation of Section 6(1)(e) of the PLRA.

The Commonwealth Court reversed holding that Act 111 did not statutorily mandate grievance arbitration, and noted that the parties' contract did not provide for arbitration of grievances. Upper Makefield Township v. Pennsylvania Labor Relations Board, 717 A.2d 598 (Pa. Cmwlth. 1998). The Board appealed, arguing before the Pennsylvania Supreme Court that grievance arbitration was mandatory under Act 111, and therefore a refusal to submit the question of arbitrability of the contract dispute to an arbitrator was an unfair labor practice. Without reaching the issue raised, the Pennsylvania Supreme Court decided that as a probationary trooper the complainant was not entitled to appeal his dismissal and was not protected under Act 111 or the PLRA. Upper Makefield Township v. Pennsylvania Labor Relations Board, 562 Pa. 113, 753 A.2d 803 (2000). Specifically, the Supreme Court noted

This is what distinguishes those police and firemen who come within the ambit of Act 111 protections and those who do not. Those officers covered by the umbrella of Act 111 have passed their probationary period satisfactorily and assume a status protected by the right to bargain collectively and to have their grievances heard.

Upper Makefield Township, 753 A.2d at 806.

The question of statutorily protected rights where probationary police officers are involved arose again before the Board in Pennsylvania State Troopers Association v. Commonwealth of Pennsylvania, 31 PPER ¶31021 (Final Order, 1999), where the Commonwealth had unilaterally ceased the past practice of providing "probationary trooper review panel" (PTRP) hearings² for probationary state troopers facing dismissal. The Board found that probationary troopers were "police" under Act 111 and members of the bargaining unit represented by the Association, and noted that while the Commonwealth was under no duty to bargain over the criteria or decision to dismiss a probationary trooper, the PTRP procedure utilized in dismissing the probationary trooper was a mandatory subject of bargaining. Accordingly, the Board found an unfair labor practice under Section 6(1)(e) of the PLRA where the Commonwealth unilaterally ceased the PTRP procedure without first bargaining with the Association.

On appeal, the Commonwealth Court again reversed. Pennsylvania State Police v. Pennsylvania Labor Relations Board, 764 A.2d 92 (Pa. Cmwlth. 2000). Without analysis of the PTRP procedure, the Commonwealth Court found that the Commonwealth had discretion to dismiss probationary troopers and thus the PTRP hearings were not subject to collective bargaining. Furthermore the Commonwealth Court noted that the Supreme Court has held in Upper Makefield that Act 111 does not

² Under this procedure, a probationary trooper could appear before the review panel and present his position prior to the decision by the State Police to dismiss or retain him, and granted no right to further challenge that decision. See Pipkin v. Pennsylvania State Police, 548 Pa. 1, 693 A.2d 190 (1997).

explicitly define police and firefighters to include probationary employees.

The Board appealed to the Supreme Court seeking reexamination of the rule articulated in Upper Makefield which purports to exclude probationary police officers from any coverage of collective bargaining laws simply because they lack civil service or tenure until they complete probation. The Board noted that rights under civil service or tenure laws are separate and apart from rights under public sector collective bargaining laws, a distinction long observed by the Supreme Court. Board of Education of the School District of Philadelphia v. Philadelphia Federation of Teachers, Local No. 3, AFT, AFL-CIO, 464 Pa. 92, 346 A.2d 35 (1975). However, the Supreme Court, *per curiam*, dismissed the Board's appeal. Pennsylvania State Police v. Pennsylvania Labor Relations Board, ___ Pa. ___, 810 A.2d 1240 (2002).³

Accordingly, the Board is constrained to hold that a probationary police officer, as a matter of law, does not "...come within the ambit of Act 111 protections." Upper Makefield, 753 A.2d at 806.⁴ As such, the Board is without jurisdiction to hear Mr. Gehring's claims of alleged discrimination, and the Secretary did not err in dismissing the charge.

ORDER

In view of the foregoing, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed by Roger Gehring are dismissed, and the Secretary's decision of June 5, 2003 dismissing the charge, 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, L. Dennis Martire, Member, and Anne E. Covey, Member, this nineteenth day of August, 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.

³ In a lengthy dissent, Justice Saylor adopted the Board's position recognizing that probationary police officers are employees or policemen under the collective bargaining laws despite not having a property interest (civil service or tenure) until completion of probation.

⁴ Act 111 is to be read *in pari materia* with the PLRA. Pennsylvania State Police, 764 A.2d at 94 n.5.