COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

WILKES-BARRE TOWNSHIP POLICE BENEVOLENT ASSOCIATION	:	
v.	:	Case No. PF-C-03-155-E
WILKES-BARRE TOWNSHIP	:	

FINAL ORDER

Wilkes-Barre Township (Township) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) on September 30, 2004, to a Proposed Decision and Order issued September 17, 2004, in which the hearing examiner concluded that the Township violated Act 111 of 1968 (Act 111) and Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA) by unilaterally adopting a pension ordinance.[1] The Wilkes-Barre Township Police Benevolent Association (Association) filed a timely brief in response to the exceptions on October 19, 2004. After a thorough review of the record, the Board makes the following:

ADDITIONAL FINDINGS OF FACT

9. Article 23, Section 9 of the parties' collective bargaining agreement provides that "[t]he monthly pension payment benefit shall be set at fifty-five (55) percent of the Officer's average monthly gross salary of the last twelve (12) months of full time service."

10. Section 4 of Ordinance 2003-12 provides in relevant part that "monthly pension or retirement benefits…shall be computed at fifty-five percent (55%) of the monthly average compensation of such member during the last twelve (12) months of employment …." Section 2(b) defines "compensation" for a policeman hired prior to January 1, 2003 as "monies received by a participant in each and every month, including base pay, longevity pay, night differential overtime, and any other increments….Payments made for unused vacation time for the twelve (12) month period prior to retirement will be included in the calculation of compensation for pension calculation purposes …."

11. Article 23, Section 4 of the collective bargaining agreement provides that "should a Police Officer, before completing superannuation retirement age and service requires, but after having

[1] After the time for filing exceptions and supporting brief under the Board's rules had expired, 34 Pa. Code §§ 93.31; 95.98(a), the Board received an untimely request from the Township for an extension of time to file a brief in support of the exceptions, and received the Township's supporting brief on October 19, 2004. The Board requires that any request for an extension of time for the brief be made within the time for filing the brief. Therefore, in the absence of a timely request for an extension of time, the Township's brief is rejected as untimely, PSSU, Local #668 v. Department of Labor & Industry, 29 PPER ¶29196 (Final Order, 1998), and has not been reviewed or considered.

completed twelve (12) years of total service, for any reason cease to be employed as a Full Time Police Officer, he shall be paid a partial superannuation retirement allowance determined by applying the percentage of his years of service to the years of service which he would have rendered had he continued to work until his superannuation retirement date to the gross pension."

12. Section 8 of Ordinance No. 2003-12 provides, in relevant part, that "[u]pon reaching the date which would have been his superannuation retirement date if he had continued to be employed as a full-time police officer, he shall be paid a partial superannuation retirement allowance determined by applying the percentage his years of service bears to the years of service which he would have rendered had he continued to work until his superannuation retirement date to the gross pension."

13. Section 7b of Ordinance No. O-1987-2, which provides, in language identical to that in Article 23, Section 6 of the collective bargaining agreement, that "[e]ach police officer shall have the option of crediting to his pension a maximum of five (5) years of his prior active duty time in the united State Armed Services. The police officer shall do so by contributing to the Police Pension Fund for each of those years of active duty time he desires, the rate of his pension contribution on his date of hire. No military service time shall be used to determine longevity and/or seniority."

DISCUSSION

On December 22, 2003, the Association filed a Charge of Unfair Labor Practices with the Board alleging that on December 1, 2003, without the agreement of the Association, the Township enacted a pension ordinance that was contrary to the parties' collective bargaining agreement effective January 1, 2003 through December 31, 2007. Specifically, the Association alleged that the Township ordinance a) eliminated vesting rights; b) eliminated the ability to purchase non-intervening military service; c) set member contributions in excess of that agreed to in the collective bargaining agreement; and d) excluded unused personal and compensatory time, and limited the amount of unused vacation time from the employe's final salary for calculation of pension benefits.

The hearing examiner found that the December 1, 2003 ordinance had unlawfully increased the employe contribution rate from a maximum four percent (4%) in the collective bargaining agreement to a minimum of five percent (5%). The hearing examiner also found that the Township had unlawfully eliminated the purchase of non-intervening military service without bargaining with the Association. To remedy the Township's violation of Section 6(1)(a) and (e), the hearing examiner directed the Township to rescind the pension ordinance and restore the *status quo ante.*

The Township filed exceptions, arguing that the Board lacks authority under the PLRA to find an unfair labor practice and direct the rescission of a properly enacted ordinance. The case law is clear however that a local ordinance may not be used as a 'guise' to sidestep bargaining obligations under Act 111. International Association of

Firefighters, Local 1803, AFL-CIO v. City of Reading, 31 PPER ¶31057 (Final Order, 2000) (*quoting* Geistown v. PLRB, 679 A.2d 1330, 1333-34 (Pa. Cmwlth. 1996)). Moreover, Section 8(c) of the PLRA authorizes the Board to fashion a remedy that will effectuate the purposes of the PLRA. Plumstead Township v. PLRB, 713 A.2d 730 (Pa. Cmwlth. 1998). A reasonable remedy for the unlawfully enactment of an ordinance done in violation of a municipality's bargaining obligation under Section 6(1)(e) of the PLRA includes rescission of the ordinance and a directive to cease and desist refusing to bargain. Upper Chichester Township v. PLRB, 621 A.2d 1134 (Pa. Cmwlth. 1993), see also Appeal of Cumberland Valley School District, 483 Pa. 134, 394 A.2d 946 (1978)(holding that restoration of the *status quo ante* to remedy unilateral action is necessary to effectuate the purposes of collective bargaining). This exception is, therefore, dismissed.

The Township next contends that the hearing examiner's order, to rescind the December 1, 2003 pension ordinance, is improper as it directs the Township to commit an illegal act. In this vein, we note that the December 1, 2003 pension ordinance was enacted purportedly to comply with Act 600.[2] However, prior to the December 1, 2003 ordinance, the Township voluntarily agreed to a collective bargaining agreement covering employes' pension. The law is well established that "a provision to which the township voluntarily agreed during the bargaining process cannot now be objected to by the township on the basis of its illegality." Upper Chichester Township, 621 A.2d at 1135; see Frateral Order of Police v. Hickey, 499 Pa. 194, 452 A.2d 1005 (1982). As a matter of law and labor policy, the Township is bound by its prior agreement with the Association despite its alleged illegality, and therefore, this exception is dismissed.

To the extent that the amount of employe contributions to the pension fund is involved, a brief discussion of Borough of Elwood City v. Elwood City Police Department Wage and Policy Unit, 573 Pa. 353, 825 A.2d 617 (2003), and the 2002 amendments to Act 600 is warranted. At all times relevant, Act 600 provides that "[m]embers shall pay into the fund, monthly, an amount equal to not less than five per centum nor more than eight per centum of monthly compensation." 53 P.S. §772(a). In Ellwood City, after the union and borough had entered into a collective bargaining agreement requiring a zero percent employe contribution into the pension fund, the employer unilaterally imposed a 5.6% employe contribution pursuant to an annual actuarial study under Act 600. The union filed a grievance challenging the employe contribution, which proceeded through arbitration and appeals to the Pennsylvania Supreme Court. Citing a wealth of prior cases, the Supreme Court stressed the general rule that once the employer agreed to a term in a collective bargaining agreement, it may not later unilaterally alter that term on the claim that the law requires otherwise. *E.g.* Pittsburgh Joint Collective Bargaining Committee v. City of Pittsburgh, 481 Pa. 66, 391 A.2d 1318 (1978); Grottenthaler v. Pennsylvania State Police, 488 Pa. 19, 410 A.2d 806 (1980). Quoting from Pittsburgh Joint Bargaining Committee, the Supreme Court stated that

[2] Act of May 29, 1956 P.L. (1955) 1804, No. 205, *as amended*, 53 P.S. §§ 761-778.

> To permit an employer to enter into agreements and include terms such as grievance arbitration which raise the expectations of those concerned, and then to subsequently refuse to abide by those provisions on the basis of its lack of capacity would invite discord and distrust and create an atmosphere wherein a harmonious relationship would virtually be impossible to maintain.
>
> Good faith bargaining would require that questions as to the legality of the proposed terms of collective bargaining agreement should be resolved by the parties to the agreement as the bargaining stage.

Ellwood City, 573 Pa. at 360-361, 825 A.2d 621 (*quoting* Pittsburgh Joint Bargaining Committee, 481 Pa. at 74-75, 391 A.2d at 1322-23). The Supreme Court also noted the reasoning in Grottenthaler, that "[t]o permit the Commonwealth to ignore its [statutory] mandate with impunity in two successive bargaining contracts following the promulgation of Section 5955 [of the State Employees' Retirement Code], and then to assert it as a bar to a claim for recovery under the bargaining agreement would be manifestly unfair; the demoralizing effect of such a result on the relationship between employer and employee in the public sector is readily apparent." Ellwood City, 573 Pa. at 362, 825 A.2d at 622 (*quoting*, Grottenthaler, 488 Pa. at 26, 410 A.2d at 809).

However, at the time, an actuarial study under Chapter 3 of Act 205,[3] was required by Act 600 to eliminate or reduce the employes' pension contribution below five percent. 53 P.S. §772(c) (1996). Section 301 of Act 205 expressly stated that the requirement for the actuarial study would be applicable notwithstanding any agreement to the contrary. Although the general rule would not have allowed the Borough to alter the agreed upon contribution rate set forth in the collective bargaining agreement, the Supreme Court held that the legislature had mandated that regardless of any agreement to the contrary, the employe's pension contributions could not be reduced below five percent without an actuarial study authorizing the reduction or elimination of employe contributions. Thus, given the express statutory prerequisite that an actuarial study permit the elimination or reduction of employe contributions to the pension fund, the employer was permitted to unilaterally set the employe's contribution rate at 5.6% in accordance with Act 600, despite its prior agreement to a zero percent employe contribution rate in the collective bargaining agreement.

However, while Ellwood City was pending with the Supreme Court, the General Assembly amended Act 600 to eliminate the requirement of an actuarial study in order to reduce or eliminate employe contributions to the pension fund. 53 P.S. §772(c).[4] The holding of Ellwood City is based on the statutory prerequisite of an actuarial study under Chapter 3 of Act 205, to reduce employe contributions to the pension fund. With the General Assembly's elimination of that requirement, and no express

[3] Municipal Pension Plan Funding Standard and Recovery Act, Act of December 18, 1984, P.L. 1005, No. 205, *as amended*, 53 P.S. §§ 895.101 – 895.803.

[4] Act of April 17, 2002, P.L. 239, No. 30.

language negating collective bargaining agreements, the general rule applies that an employer cannot subsequently raise the illegality of a term it had voluntarily agreed to in a collective bargaining agreement. Hickey, supra; Pittsburgh Joint Bargaining Committee, supra; Grottenthaler, supra. Accordingly, after having agreed to a maximum four percent employe contribution in the collective bargaining agreement, the Township cannot now assert that it is required by Act 600 to impose a five to eight percent employe contribution to the pension fund.

The Township argues that it had a "sound arguable basis" in the collective bargaining agreement to support the December 1, 2003 ordinance, and therefore the hearing examiner erred in finding a violation of Section 6(1)(a) and (e) of the PLRA and directing it to rescind the entire ordinance. Under Section 1 of Act 111 the topic of pensions is a mandatory subject of bargaining, and may not be altered by the employer without first negotiating with the union. Plumstead Township v. PLRB, 713 A.2d 730 (Pa. Cmwlth. 1998). However, because interpretation of the collective bargaining agreement is generally a matter for grievance arbitration, the Board recognizes an affirmative defense to a claimed unilateral change. Under the "contractual privilege" or "sound arguable basis" defense, an employer may defend its actions in applying the contract terms by showing that it has a sound arguable basis for ascribing a particular meaning to contract language. Jersey Shore Area Education Association v. Jersey Shore Area School District, 18 PPER ¶18117 (Final Order, 1987); see also, Pennsylvania State Troopers Association v. PLRB, 804 A.2d 1291 (Pa. Cmwlth. 2002). However, a repudiation or alteration of the terms of the collective bargaining agreement is an unfair labor practice. Pennsylvania State Troopers Association v. PLRB, 761 A.2d 645 (Pa. Cmwlth. 2000); see also, Abington Transportation Association v. Abington School District, 19 PPER ¶19067 (Final Order, 1988), *affirmed*, 20 PPER ¶20064 (Common Pleas, 1989), and Fraternal Order of Police Lodge No. 5 v. City of Philadelphia, 31 PPER ¶31023 (Final Order, 1999) (holding that unilateral codification of work rules governing a mandatory subject of bargaining is an unfair labor practice).

Accordingly, as regards the defense of contractual privilege, the Board distinguishes between action which is application of the contract terms which has a sound arguable basis in the contract, and action by the employer which transcends the contract and constitutes an attempt to expand contractual terms through unilateral adoption of managerial policies which are not in response to a specific claim under the contract and have unit wide application. The Township here is not merely applying the contract language in calculating pension benefits or contributions for a particular employe, but is undertaking a unilateral effort to prescribe certain meaning to the contractual language applicable to all bargaining unit members, in violation of its bargaining obligations.

For example, Article 23, Sections 1 and 13 of the collective bargaining agreement, sets the maximum employe contribution into the pension fund at four percent (4%) of gross salary, while Ordinance 2003-12 imposes an employe contribution of "an amount equal to not less than five percent (5%) nor more than eight percent (8%) of compensation…" In addition, with regard to police officers hired before January 1, 2003, contributions and pension benefits under the contract

are based on the officer's full-time gross salary. While "gross salary" is undefined in the collective bargaining agreement, Section 2(b) of Ordinance No. 2003-12 unilaterally defines "compensation" and "salary" for a policeman hired prior to January 1, 2003, as "monies received by a participant in each and every month, including base pay, longevity pay, night differential overtime, and any other increments…." For purposes of pension benefits the ordinance provides that "payments made for unused vacation time for the twelve (12) month period prior to retirement will be included in the calculation of compensation for pension calculation purposes …." With regard to vesting rights, the collective bargaining agreement does not expressly provide when partial pension benefits begin, however, Ordinance 2003-12 requires that employe wait until his or her superannuation date.[5]

The Township's pension ordinance alters the maximum employe contributions to the pension fund, unilaterally defines "gross salary" in specific terms under "compensation" and "pension benefits", and unilaterally establishes vesting rights.[6] As such, the Township's pension ordinance seeks to unlawfully define the negotiated pension provisions in violation of its bargaining obligations under Section 6(1)(e) of the PLRA. After a thorough review of the exceptions and all matters of record, the Township has violated Act 111 and Section 6(1)(a) and (e) of the PLRA, by unilaterally altering the contractual pension provisions with regard to officers hired before January 1, 2003, without prior bargaining with the Association. An appropriate *status quo ante* remedy has been issued by the hearing examiner to remedy the Township's unfair labor practice and accordingly, the Board will dismiss the Township's exceptions.

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 to the Proposed Decision and Order are dismissed, and the Proposed Decision and Order of September 17, 2004, as amended herein, is hereby made absolute and final.

---

[5] With regard to non-intervening military time, because Ordinance 2003-12 only amended prior ordinances and did not address purchasing non-intervening military time, Section 7b of Ordinance No. O-1987-2, is therefore, still in effect. That section provides, in language identical to that in Article 23, Section 6 of the collective bargaining agreement, that "[e]ach police officer shall have the option of crediting to his pension a maximum of five (5) years of his prior active duty time in the united State Armed Services…." Because Section 7b was unaffected by Ordinance 2003-12 and is still in effect, there has been no elimination of the employe's ability to purchase non-intervening military service time as permitted in the contract.

[6] We also note that Ordinance No. 2003-12 effectuates other changes to employe pensions that are not apparent in the collective bargaining agreement, such as, a cost-of-living adjustment, intervening military service, and buy-back provisions.

SEALED, DATED and MAILED pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, and Anne E. Covey, Member, this sixteenth day of November, 2004. 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

WILKES-BARRE TOWNSHIP POLICE BENEVOLENT ASSOCIATION	:	
v.	:	Case No. PF-C-03-155-E
WILKES-BARRE TOWNSHIP	:	

AFFIDAVIT OF COMPLIANCE

Wilkes-Barre Township hereby certifies that it has ceased and desisted from its violations of Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act, as read with Act 111; that it has rescinded Ordinance No. 12 of 2003, that it has returned to the status quo that existed prior to the December 1, 2003 enactment of Ordinance No. 12 of 2003, that it has posted the Final Order and Proposed Decision and Order as directed; and that it has served an executed copy of this affidavit on the Wilkes-Barre Township Police Benevolent 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