

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

UPPER MERION TOWNSHIP :
POLICE DEPARTMENT :
 :
v. : Case No. PF-C-04-55-E
 :
UPPER MERION TOWNSHIP :

FINAL ORDER

Upper Merion Township Police Department (Union) filed exceptions with the Pennsylvania Labor Relations Board (Board) on May 25, 2004. The Union's exceptions challenge a May 6, 2004 decision of the Secretary of the Board (Secretary) declining to issue a complaint and dismissing its Charge of Unfair Practices filed on March 12, 2004, against the Upper Merion Township (Township) alleging that the Township violated Section 6(1)(a) and (e) of Act 111 of 1968 (Act 111) as read in *pari materia* with the Pennsylvania Labor Relations Act (PLRA).

In determining whether to issue a complaint, the Board assumes that all facts alleged are true. Pennsylvania Social Service Local 668 v. PLRB, 481 Pa. 81, 392 A.2d 256 (1978). Generally, a complaint will be issued unless the facts alleged in the charge could not support a cause of action for an unfair practice as defined by Act 111 and the PLRA. See Homer Center Education Association v. Homer Center School District, 30 PPER ¶ 30024 (Final Order, 1998)(stating an analogous standard under the Public Employee Relations Act). The Union alleges that it and the Township are parties to a collective bargaining agreement (agreement) effective from 2003 through 2008. The Union further alleges that Section 13b(2) of the agreement provides for a specific COLA benefit for employees who have been retired for twenty (20) or more years. The Union alleges that the collective bargaining agreement immediately preceding the current agreement included this benefit. The Union further asserts that since the inclusion of the benefit into the agreement, two retired employees qualified and received the COLA benefit. Retired police officer Joseph Dudas is scheduled to receive the benefit by June 2004. However, the Township's actuarial consultant and municipal pension specialists indicated that Dudas will not receive the benefit when due.

The law is well established that once a Union and a public employer negotiate and reach a collective bargaining agreement under the jurisdiction of Act 111 and the PLRA, the appropriate forum for resolution of allegations of contract violations is the parties' grievance procedure. Moon Township Police Officers Association v. Moon Township, 508 Pa 495, 498 A.2d 1305 (1985); City of Erie v. FOP, Haas Memorial Lodge No. 7, 29 PPER ¶ 29236 (Final Order, 1998). Additionally, Pennsylvania courts have entertained breach of contract claims brought by retirees against their former employers. See Booth v. Southern Fulton School District, 43 Pa D&C.4th 21 (Ct. of Common Pleas of Franklin-Fulton County 1998); Delia v. Riley Stoker Corp., 20 Pa D&C.3d 173 (Ct. of Common Pleas of Bucks County 1980). Therefore, no complaint will be issued to the extent that the Union's charge alleges a violation of the agreement.

In addition, the Board has no jurisdiction to act where the aggrieved individual is not an employe as defined by Section 3(d) of the PLRA. See 43 P.S. 211.3(d). Section 3(d) defines an "employe" as "any employe, and shall not be limited to the employes of a particular employer, unless the act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute..." Since this definition does not include retirees, the Board lacks jurisdiction to act where a retiree is aggrieved. See Township of Wilkins v. Wage and Policy Committee of the Wilkins Township Police Department, 696 A.2d 917 (Pa. Cmwlth. 1997)(holding that a municipality may not enter into an agreement over the rights of existing retirees, *because such individuals are no longer employees or members of the bargaining unit*)(emphasis added). The principle that retired employees are not members of

the bargaining unit is consistent with federal labor law, cited with approval in Commonwealth Court in Township of Wilkins v. Wage and Policy Committee of the Wilkins Township Police Department, *supra*. See Allied Chemical & Alkali Workers Local Union No. 1. Pittsburgh Plate Glass Co., 404 US 157, 181 n.20, 92 S. Ct. 383 (1971)("Since retirees are not members of the bargaining unit, the bargaining agent is under no statutory duty to represent them in negotiations with the employer."); Anderson v. Alpha Portland Industries Inc., 727 F.2d 177, 181 (8th Cir. 1984)("The union owes no duty of fair representation to retirees since the union's duty runs only to employees within the bargaining unit for whom the union acts as exclusive bargaining representative."). While the Union alleges that the alleged violation effects current members, the charge filed in this case only alleges actual harm to Dudas. Therefore, no complaint will be issued with regard to the failure to provide Dudas with the alleged COLA benefit.

The Union asserts that a complaint is warranted due to the Township's violation of a past practice. 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 that has been arguably waived by the parties. Finally, a past practice may create or establish a separate enforceable condition of employment that 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 Union fails to allege that (1) the contract language is ambiguous, (2) the contract language establishes a general rule, (3) the parties have waived the unambiguous contract language, or (4) the past practice establishes a separate enforceable condition of employment. Therefore, no complaint will be issued based on the Union's past practice theories.

After a thorough review of the exceptions and all matters of record, the Board will dismiss the exceptions and sustain the Secretary's decision declining to issue a complaint.

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 are dismissed and the Secretary's decision not to issue a complaint 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, L. Dennis Martire, Member, and Anne E. Covey, Member, this twenty-second day of June, 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.