COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

TEAMSTERS LOCAL #764	:	
	:	
v.	:	Case No. PERA-C-04-69-E
	:	
MILTON REGIONAL SEWER AUTHORITY[1]	:	

FINAL ORDER

The Milton Regional Sewer Authority (Authority) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on December 13, 2004, to a Proposed Decision and Order (PDO) issued November 23, 2004. In the PDO, the hearing examiner concluded that the Authority, a successor employer, violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA) by rescinding employe benefits that had been unilaterally imposed by the Authority, without first discussing their rescission with the employes' union, Teamsters, Local 764 (Teamsters). The Teamsters filed a responsive brief to the Authority's exceptions on January 4, 2005.

This case arises over the Authority's conduct following issuance of a Final Order at Case No. PERA-C-02-622-E. Teamsters Local 764 v. Milton Borough and Milton Regional Sewer Authority, 34 PPER 159 (Final Order, 2003). In that proceeding, the Board determined that the Authority, which had taken over operations of a wastewater treatment plant previously operated by Milton Borough, was a successor employer obligated to bargain with the Teamsters as the representative of the workforce retained by the Authority. The Board noted that under PERA, a successor public employer would not be permitted to impose initial terms and conditions of employment but would be required to maintain the *status quo* while it negotiated an initial contract with the union. The Board found as fact in the Final Order at Case No. PERA-C-02-622-E that the Authority issued an Employee Handbook in December 2002, that changed terms and conditions of employment, and concluded that the issuance of the handbook violated the Authority's bargaining obligation to the Teamsters. The Board, therefore, directed rescission of the handbook and restoration of the *status quo*. The Board did not, however, address wages, pensions or any other matters not raised in that proceeding.

Thereafter, the Authority advised its employes that, in order to comply with the Board's December 16, 2003 Final Order all wages, hours, and working conditions extant on December 31, 2002, would be reinstated. In addition to the terms of employment set forth in the Employe Handbook, those benefits rescinded included the forty-three cent wage increase for 2003, the defined benefit pension plan, the $5,000.00 increase in life insurance benefits and the long-term disability benefits that had been unilaterally imposed by the Authority effective January 1, 2003.

[1]The caption appears as amended by the hearing examiner.

The Teamsters filed the instant Charge of Unfair Practices alleging that the Authority violated its bargaining obligation under Section 1201(a)(1) and (5) of PERA by rescinding, *inter alia*, the 2003 wage increase, the defined benefit pension plan, the long-term disability and the increased life insurance benefits. The Authority defends its actions by asserting that it was merely complying with the Board's Final Order at Case No. PERA-C-02-622-E directing it to restore the *status quo*.

In this regard, the Authority argues that the hearing examiner erred in finding that the only challenged unilateral action before the Board in Case No. PERA-C-02-622-E was the issuance of the Employee Handbook. The Authority points out that the Teamsters' charge in Case No. PERA-C-02-622-E, filed on December 16, 2002, alleged the Authority's "direct dealing" with the employes regarding "*wages*, hours and terms and conditions" of employment, and that on exceptions, the Teamsters requested that the Authority be bound by the collective bargaining agreement in place with the Borough.

Although the charge in Case No. PERA-C-02-662-E alleged that the Authority was directly dealing with employes concerning wages, hours and working conditions, the only evidence presented to support its claim of "direct dealing" and unilateral action was the issuance of the Employee Handbook. (See Finding of Fact 9, 13, 14 and 15). Moreover, the Teamsters' request that the Authority be bound by the collective bargaining agreement with the Borough was made in connection with its assertion that the Authority was an alter ego -- a position rejected by the Board in its Final Order.[2] Thus, the only changes to the employes' terms and conditions of employment that were presented to the Board in Case No. PERA-C-02-622-E were those implemented through the Employee Handbook.

Nevertheless, the Authority disingenuously argues that by generally directing it to restore the *status quo*, the Board's final order required it to reinstate terms and conditions of employment, which were not raised and presented to the Board in the prior proceeding. The Board has previously rejected the notion that an employer may expand on a general direction of remedial relief in a Board order as a means of revoking a conferred benefit that had not been addressed by the Board. Fraternal Order of Police, Lodge #5 v. City of Philadelphia, 26 PPER ¶26157 at 364 (Final Order, 1995).[3]

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[2] An "alter ego" is bound by the collective bargaining agreement, not merely a duty to negotiate. Stardyne, Inc. v. NLRB, 41 F.3d 141 (3rd Cir. 1994).

[3] In City of Philadelphia, noting that "[n]owhere in the hearing examiner's … order is there any indication that the examiner intended that an affected employe must forfeit a promotion", City of Philadelphia, 26 PPER at 364, the Board appropriately rejected the employer's argument that in order to comply with a Board order directing reinstatement of police officers to their prior positions it was necessary to demote those police officers who had received a promotion subsequent to their unlawful transfer.

Here, because the Board's order at Case No. PERA-C-02-622-E did not address any of the Authority's actions other than the Employee Handbook, the scope of the remedial relief directed in the Board's Final Order could not have encompassed the increased wages, defined benefit pension plan, long-term disability and increased life insurance benefits, not raised in that proceeding. Section 1303 of PERA; Independent State Store Union v. Liquor Control Board, 22 PPER ¶ 22,009 (Final Order, 1990). Thus notably the affirmative relief directed in Case No. PERA-C-02-622-E, to "rescind the December 2002 Employee Handbook, and restore the *status quo ante*", was not set forth as two separately enumerated remedies, but was a single clause indicating that what was to be restored were those matters addressed in the Employee Handbook – remedying the unfair practice before the Board.

Moreover, even had the increased wages, defined benefit pension plan, long-term disability and increased life insurance benefits implemented by the Authority on January 1, 2003, been brought to the attention of the Board in Case No. PERA-C-02-622-E, the Board has long observed a cautious policy in fashioning relief in instances where an employer has bestowed a benefit on employes in violation of its bargaining obligation. See Philadelphia Housing Police Association v. Philadelphia Housing Authority, 22 PPER ¶ 22227 (Final Order, 1991); *affirmed sub nom,* Philadelphia Housing Authority v. Pennsylvania Labor Relations Board 620 A.2d 594 (Pa. Cmwlth. 1993); see also Pennsylvania Labor Relations Board v. Martha Company, 359 Pa. 347, 59 A.2d 166 (1948) (the remedy for an unfair practice is within the sound discretion of the Board). The employer's unilateral implementation of an employe benefit potentially places the union in an untenable position. If the union files an unfair practice to enforce the law it potentially risks a remedy that, in addition to penalizing the employes for the employer's unfair practice, casts the union in an unfavorable position with the employes in the bargaining unit it represents. Absent a remedy tailored to the circumstances, the union's only other course of action is to countenance the employer's unfair practice and file no charge of unfair practice because it resulted in a benefit to employes. Accordingly, in Philadelphia Housing Authority, the Board specifically addressed the matter at issue here.

> A final matter that requires discussion is the appropriate remedy for the Authority's unfair practice. The Authority will be directed to restore the *status quo ante*, except insofar as the employes have received wage and benefit improvements because of the Authority's unilateral implementation of its final offer. Where employes receive wage and benefit increases pursuant to unlawful unilateral action by an employer, the Board will not direct that the increases be rescinded because to do so would penalize the employes for the employer's unfair practice. Jefferson-Morgan School District, 9 PPER 9056 (Nisi Decision and Order, 1978); Lower Paxton Township, 9 PPER 9260 (Nisi Decision and Order, 1978); Mifflin County School District, 22 PPER 22065 (Final Order, 1991).

Philadelphia Housing Authority, 22 PPER at 523.

The Authority further excepts that the hearing examiner should not have found a unilateral change with regard to the employes' pension since it was never established that a defined benefit plan was made effective for the bargaining unit employes. However, there is substantial evidence in the record supporting the hearing examiner's finding that the Authority had implemented a defined benefit pension plan for the bargaining unit employes that was effective January 1, 2003. Pennsylvania Labor Relations Board v. Kaufman Department Stores, 345 Pa. 398, 29 A.2d 90 (1942) (substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion).

On October 3, 2002, the Authority issued a series of Recital and Resolutions, one providing:

> **WHEREAS,** the Milton Regional Sewer Authority (the "Authority"), having authorized the creation of a new retirement plan for the Authority employees under Act 205 (53 P.S. §895.101), now finds it necessary to acquire the professional services of an actuary and third party administration firm with regard to *the Act 205 Defined Benefit Plan created by the Authority effective the first day of January, 2003* (The "Plan")[.]

(Union Exhibit 1) (emphasis added). Another Recital and Resolution stated that "two (2) retirement plans shall be adopted by the Authority for its employees…" (Union Exhibit 1). Both resolutions granted authority to the Chairman and Secretary to execute the necessary documents to put them into effect, and accordingly, on January 1, 2003, the Secretary and Chairman of the Authority executed an Act 205 Retirement Plan, containing a defined pension benefit. (Union Exhibit 4, Section 3.02). Furthermore, an employe of the Authority, Roy Keiser, testified that in January 2003, at an employer sponsored meeting with the plan administrator, the employes were advised of the new pension plan and the calculation of the defined benefits payable under the new plan. (Finding of Fact No. 8).

The Authority's claim that it had never funded a pension plan for the bargaining unit employes does not defeat the finding that it, in fact, had implemented a defined benefit plan effective January 1, 2003. There is no dispute that the Authority had set aside money for the 2003 pension contribution in a certificate of deposit at a local bank. (Finding of Fact 25). The only question was into what Act 205 pension fund that money was to be dispersed[4] – the Borough's defined contribution plan[5] or the Authority's defined benefit plan. Because there is substantial record evidence that the Authority implemented a defined benefit pension plan effective January 1, 2003, the hearing examiner's finding will not be disturbed.

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[4] Under Act 205, an employer is required to pay into the pension fund by December 31, the amount necessary to cover its minimum obligation for the following year. 53 P.S. §895.302.

[5] At the time, legislation was pending, and has since passed, which would allow the Authority's employes to participate in the Borough's Act 205 pension.

After a thorough review of the exceptions, and all matters of record, the hearing examiner did not err in finding that the Board's final order in Case No. PERA-C-02-622-E did not direct the rescission of any terms and conditions of employment unaffected by the December 2002 Employee Handbook. Accordingly, the hearing examiner did not err in concluding that the Authority violated Section 1201(a)(1) and (5) of PERA by unilaterally rescinding the uncontested 2003 wage increase, the defined benefit pension plan, long-term disability and the increased life insurance benefits the Authority had implemented on January 1, 2003. Therefore, the Authority's exceptions will be dismissed, and the PDO made absolute and final.

ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employe Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed to the Proposed Decision and Order of November 23, 2004, are dismissed, and the PDO 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 fifteenth day of February, 2005. 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.

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AFFIDAVIT OF COMPLIANCE

The Milton Regional Sewer Authority hereby certifies that it has ceased and desisted from its violation of Section 1201(a)(1) and (5) of the Public Employe Relations Act; that it has reinstated the defined benefit pension plan, hourly wage, life insurance benefits and long-term disability benefits that were in effect in 2003 before issuance of the Board's final order in Case No. PERA-C-02-622-E retroactive to the date that these wages and benefits were reduced or rescinded; that it has made the bargaining unit members whole for any losses sustained as a result of the reduction or rescission of their wages or benefits, including but not limited to paying them back pay for the time period in which their wages were reduced from the 2003 hourly rate to the 2002 hourly rate; that it has posted a copy of the final order and proposed decision and order as directed; and that it has served a copy of this affidavit on the Union at its principal place of business.

_____
Signature/Date

_____
Title

SWORN AND SUBSCRIBED TO before me
the day and year first aforesaid.

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Signature of Notary Public