COMMONWEALTH OF PENNSYLVANIA Pennsylvania Labor Relations Board

YORK CITY EMPLOYEES' UNION

:

v. : Case No. PERA-C-05-354-E

CITY OF YORK

FINAL ORDER

The City of York (City) and the York City Employees' Union (Union) filed exceptions and supporting briefs with the Pennsylvania Labor Relations Board (Board) on June 19, 2006, challenging a May 30, 2006 Proposed Decision and Order (PDO) finding that the City violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA) by using a temporary employe to perform bargaining unit work, and directing the City to cease and desist from its unfair practice. The Union filed its response to the City's exceptions on June 28, 2006, and the City responded to the Union's exceptions on July 10, 2006.

The facts of this case are not in dispute. The Union represents a bargaining unit of City employes, which includes the position of parking meter service person, performed exclusively by Lori Simmons. (Findings of Fact 4 and 5). Ms. Simmons notified the City early in 2005 that she would need to take Family Medical Leave Act (FMLA) leave for ankle surgery. (Finding of Fact 6). Ms. Simmons continued to work until her surgery on June 3, 2005. (Finding of Fact 7). The week prior to her surgery Ms. Simmons trained Becky Schweitzer, a non-bargaining unit temporary employe, how to perform the parking meter service position. (Findings of Fact 10 and 12). During Ms. Schweitzer's training the City contacted the Union seeking consent to use temporary help while Ms. Simmons was on FMLA, which the Union denied. (Finding of Fact 14). Nonetheless, Ms. Schweitzer performed the parking meter service person position full-time while Ms. Simmons was on leave from June 3, 2005 through Labor Day, 2005. (Findings of Fact 9 - 11).

The City has filed exceptions to the Hearing Examiner's conclusion that it violated Section 1201(a)(1) and (5) of PERA by filling Ms. Simmons position with a temporary employe while she was on leave. Specifically, the City claims that the Examiner erred in dismissing its "sound arguable basis" defense to the bargaining violation.

In this regard, the City contends that Article 24 of the parties' collective bargaining agreement, covering job postings and vacancies, requires that there be a "bona fide vacancy" before the City is required to post the job notice for the bargaining unit employes to bid, and therefore it had a "sound arguable basis" for believing that temporarily filling a position while a bargaining unit employe was on leave was not a "vacancy" that must be posted. The City's exception, however, is premised on its misconception that the charge filed by the Union was premised exclusively on the failure to post the temporary "vacancy" as the parking meter service person. The Charge filed by the Union not only challenged the contractual posting requirements, but alleged that, "[a]t no time prior or subsequent to the removal of this bargaining unit work from the bargaining unit did the city ever negotiate with the Union concerning such a matter but, instead hired an individual outside the bargaining unit without any consultation, meetings, discussion, or negotiations with the Union." (Charge of Unfair Practices ¶12). The unilateral removal of bargaining unit work is the basis of the Examiner's conclusion that the City violated PERA, and we agree, as noted by the Examiner, that whether or not the City had a "sound arguable basis" for not posting the vacancy, has no relevancy to the question of whether it was contractually privileged to remove bargaining unit work by filling Ms. Simmons' position with a temporary non-bargaining unit employe.

In addressing the unilateral removal of bargaining unit work, the Pennsylvania Supreme Court has recognized that "[t]he assignment of overtime work to temporary service personnel will have an obvious effect on the workload and compensation of the regular employees, since the regular employees will be deprived of their customary priority in

seeking such work." Pennsylvania Labor relations Board v. Mars Area School District, 480 Pa. 295, 301, 389 A.2d 1073, 1076 (1978). The Board has likewise recognized that the unilateral transfer of bargaining unit work to temporary employes, outside the bargaining unit, is an unfair practice. Fraternal Order of Police, Lodge No. 19 v. City of Chester, 20 PPER ¶20099 (Final Order, 1989). There is no dispute that the City here utilized a non-bargaining unit temporary employe to perform the bargaining unit duties of parking meter service person while Ms. Simmons was on FMLA leave. Accordingly, the Examiner did not err in concluding that City violated Section 1201(a)(1) and (5) of PERA by unilaterally removing bargaining unit work, and the City's exception is dismissed.

The Union has also filed exceptions, arguing that the Examiner erred in declining to award "make whole" relief to the Union. Generally, whether to grant affirmative relief is a matter of Board discretion. Cumberland Valley School District, 483 Pa. 134, 394 A.2d 946 (1978); Pennsylvania Labor Relations Board v. Martha Company, 359 Pa. 347, 59 A.2d 166 (1948). The Examiner correctly noted the Board's policy that back pay awards are payable only to affected employes, not to unions, as the purpose of the Board's remedial relief is to make the employes whole for their loss. Lake Lehman Education Support Personnel Association v. Lake Lehman School District, 37 PPER 56 (Final Order, 2006). However, remedial relief cannot be fashioned based on speculation about employes' lost wages and benefits. City of Philadelphia v. Pennsylvania labor Relations Board, 759 A.2d 40 (Pa. Cmwlth. 2000). Here, the Examiner noted that the Union only presented testimony that Frank Fuller, a bargaining unit employe, was capable of performing the parking meter service person work, but presented no evidence of whether he would have taken the temporary assignment if available, whether he would have performed the duties in lieu of his regular job, or would have accepted the assignment as overtime. Accordingly the Examiner did not err in finding this evidence too speculative to formulate a back pay award.

Nevertheless, the Union argues on exceptions that the Examiner should have taken note that there would have been a "trickle down" effect created by the contractual job posting, bidding, and bumping rights that would have been applicable if the parking meter service position was filled by a bargaining unit member. In essence the Union's theory on exceptions raises even more speculation about back pay. What the Union is claiming is that a vacancy would have occurred in the bargaining unit position of whoever accepted the parking meter job, and therefore less senior employes would have been able to bid in that vacated position, and so forth down the line of seniority to the least senior person. As can readily be discerned, there is no basis for ascertaining whether anyone would have bid into any of the vacant positions, let alone what those positions would have been, or what the employes would have earned. Even under the Union's theory of back pay liability expressed in its exceptions, the employes' back pay is purely speculative, not to mention that, on the record presented, any calculation of back pay for the Board or employer here is nearly impossible. Accordingly, the Union's exception to the Hearing Examiner's relief is dismissed.

Accordingly, after a thorough review of the exceptions and all matters on this record the Hearing Examiner did not err in concluding that the City violated Section 1201(a)(1) and (5) of PERA by unilaterally removing bargaining unit work by hiring a non-bargaining unit temporary replacement for Ms. Simmons, and, based on the evidence presented, did not err in declining to award back pay relief to the Union. As such the City's exceptions are dismissed, as well as the exceptions filed by the Union, and the PDO is sustained.

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 exceptions filed by the City of York are hereby dismissed, the exceptions filed by the York City Employees' Union are dismissed, and the May 30, 2006 Proposed Decision and Order, be and hereby is made absolute and final.

SIGNED, SEALED, DATED and MAILED this nineteenth of September, 2006.

| PENNSYLVANIA LABOR RELATIONS | BOARI |
|------------------------------|-------|
| | |
| L. DENNIS MARTIRE, CHAIRMAN | |
| | |
| ANNE E. COVEY, MEMBER | |
| | |
| JAMES M. DARBY, MEMBER | |

COMMONWEALTH OF PENNSYLVANIA Pennsylvania Labor Relations Board

| YORK CITY EMPLOYEES' UNION v. | : : Case No. PERA-C-05-354-E |
|--|---|
| CITY OF YORK | · : |
| | AFFIDAVIT OF COMPLIANCE |
| The City of York 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 |
| posted a copy of the final or | der and proposed decision and order as directed; and that i |
| has served a copy of this aff | idavit on the Union at its principal place of business. |
| | |
| | |
| Signature/Date | |
| | |
| | |
| | Title |
| | |
| SWORN AND SUBSCRIBED TO befor the day and year first afores | |

Signature of Notary Public