COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

CRESTWOOD EDUCATION ASSOCIATION	:	
	:	
v.	:	Case No. PERA-C-05-281-E
	:	
CRESTWOOD SCHOOL DISTRICT	:	

FINAL ORDER

On April 28, 2006, the Crestwood School District (District) timely filed exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) to the Proposed Decision and Order (PDO), dated April 10, 2006. In the PDO, the Hearing Examiner found that the District engaged in unfair practices in violation of Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA) by repudiating the early retirement incentives contained in the parties' expired collective bargaining agreement (CBA). The Board Secretary granted the request of the Crestwood Education Association (Union) for an extension to file a brief in opposition to the District's exceptions and established a filing date of June 15, 2006. The Board received the Union's brief on June 19, 2006 without the necessary indicia recognized by the Board that it was placed in the mail, or with another third-party carrier, by June 15, 2006. Accordingly, the Board will not consider the Union's response brief.

The facts relevant to the disposition of the District's exceptions are briefly stated as follows. The CBA was effective from September 1, 1994 through August 31, 2002. As of the date of the hearing in this case, i.e., January 31, 2006, the parties continued negotiations for a successor agreement and were operating under the terms of the expired CBA. Article XI of the CBA provided for an early retirement incentive including medical benefits and severance pay. The incentive specifically provided that retiring employes under the age of sixty-five would receive the same medical benefits as active employes under the CBA until the age of sixty-five or until those retirees otherwise become Medicare eligible. The early retirement severance pay incentives were included in a list beginning with a severance payout of 50% of the retiree's final year's salary beginning at 25 years of service, and decreasing incrementally to 10% of the retiree's final year's salary for 35 years of service. The CBA also provided a "Special Severance Incentive" whereby the retiree would receive 100% of his/her final year's salary after twenty years of service at the age of fifty-five.

By letter dated February 10, 2005, Ivan Hoyt informed the District of his intent to retire at the end of the 2004-2005 school year, contingent upon his receipt of the health insurance benefits and Special Severance Incentive set forth in Article XI of the CBA. By memo dated February 18, 2005, the District advised Hoyt that it had approved his request to retire at the end of the 2004-2005 school year. However, by memo dated April 15, 2005, the District advised Hoyt that it would not honor its agreement to provide medical benefits or severance pay. The District's memo also warned Hoyt that, if he planned to retire in the near future, he would be required to obtain medical benefits under COBRA[1] or other independent means. By letter dated June 9, 2005, Hoyt informed the District that he was rescinding his retirement due to the District's failure to honor the CBA. By memo dated June 29, 2005, the District advised Hoyt that it had approved his request to rescind his retirement.

In its memo of April 15, 2005 to Hoyt, the District cited the Third Circuit's decision in Erie County Retirees Association v. County of Erie, 220 F.3d 193 (3rd Cir. 2000) and the decision of the United States District Court for the Eastern District of Pennsylvania in AARP, et al. v. Equal Employment Opportunity Commission (AARP I), 383 F. Supp. 2d 705 (E.D. Pa. 2005) in support of its position. In County of Erie, the Third Circuit held that an employer's reduction in medical benefits for retirees who become

[1] "COBRA" is the common acronym referring to the Consolidated Omnibus Budget Reconciliation Act of 1985, which amended the Employee Retirement Income Security Act of 1974, which is commonly known as "ERISA".

Medicare eligible at sixty-five is discriminatory in violation of the Age Discrimination in Employment Act (ADEA),[2] unless the employer can satisfy its burden of proving that the benefits for older retirees are provided at the same cost or yield the same benefit under the safe harbor provisions of the ADEA. The District extended that holding to apply to the severance payouts for early retirement in the CBA.[3] In AARP I, Judge Brody of the District Court for the Eastern District of Pennsylvania issued an injunction preventing the publication of regulations proposed by the Equal Employment Opportunity Commission (EEOC) that would exempt employers from liability under the ADEA when reducing medical benefits for Medicare eligible retirees. The EEOC's position was, and remains, that, under Section 9 of the ADEA, it was authorized to promulgate regulations to relieve employers from liability where, as here, the regulations constitute a reasonable exemption that is "necessary and proper in the public interest." 29 U.S.C § 628. Judge Brody concluded that the EEOC was without authority to promulgate regulations to avoid the holding of County of Erie even though the EEOC was responding in the public interest to a surveyed threat from employers to eliminate coverage for all retirees.

On September 27, 2005, Judge Brody issued an opinion and order vacating the AARP I decision. AARP v. Equal Employment Opportunity Commission (AARP II), 390 F. Supp. 2d 437 (E.D. Pa. 2005). Thereafter, in October 2005, the District reinstated the special severance incentive and health insurance benefits set forth in Article XI of the CBA. By letter dated October 14, 2005, Hoyt informed the District of his intent to retire immediately. By letter dated October 21, 2005, the District advised Hoyt that it had approved his request for immediate retirement and subsequently gave Hoyt the special severance incentive. Lynn Hughes followed a similar retirement process as Ivan Hoyt, in which she submitted her letter of intent to retire, received confirmation that the District approved her retirement, received the April 15, 2005 letter from the District suspending the Special Severance Incentive and health benefits in Article XI, notified the District that she wished to rescind her retirement, and received confirmation that the District approved the rescission of her retirement.

Clare Myers retired from District employment in June 2005. Myers was also affected by the District's suspension of the early retirement incentives set forth in Article XI of the CBA. She paid for her health insurance coverage for September and October 2005 through COBRA, but she was subsequently reimbursed for these expenditures by the District subsequent to the issuance of AARP II and the District's reinstatement of Article XI. The District suspended the severance and health insurance benefits provided in Article XI of the CBA without bargaining with the Union.

In its exceptions, the District claims that the Examiner erred by failing to make the following findings: that the District acted in a good-faith attempt to comply with laws prohibiting age discrimination; that the early retirement provisions at issue were facially discriminatory between April 15, 2005 and September 27, 2005; and that the Union failed to demonstrate that the parties knew or should have known that the early retirement incentive provisions of the CBA were facially discriminatory when they were negotiated in 1994. However, these allegations of fact, regardless of their accuracy, would not change the outcome of this matter and, therefore, do not constitute necessary findings as required. Ambridge Area Educ. Ass'n v. Ambridge Area Sch. Dist., 28 PPER ¶ 28092 (Final Order, 1997).

The District also claims that the Examiner erred in relying on Pittsburgh Joint Collective Bargaining Committee v. City of Pittsburgh, 481 Pa. 66, 391 A.2d 1318 (1978) and its progeny. The District argues that, where there is a conflict between a collective bargaining agreement and federal policies prohibiting discrimination, federal courts have held that those statutory and constitutional rights cannot be waived in collective bargaining. The District contends that federal authority holds that collective bargaining agreements that violate federal law to eradicate discrimination in employment must be

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[2] 29 U.S.C. § 621 et seq.

[3] County of Erie did not address the status of severance payments under the ADEA or analyze them under the other safe harbors of the ADEA. Accordingly, the application of Erie County to conclude that severance payments in this case were illegal as justification for repudiating Article XI is questionable.

modified unilaterally if necessary to effectuate federal policies prohibiting discrimination. The District further argues that the City of Pittsburgh case and its progeny have been eroded by our Supreme Court in Borough of Ellwood City v. Ellwood City Police Department Wage and Policy Unit, 573 Pa. 353, 825 A.2d 617 (2003). The District contends that, in Ellwood City, our Supreme Court held that a state pension law prevailed over the provisions of a collective bargaining agreement, rather than holding the employer must honor an illegal provision as in City of Pittsburgh, supra.

However, the Board need not address whether the claimed illegal provisions of Article XI of the CBA are the type of illegality that may not be changed unilaterally under Pittsburgh, supra, or whether Article XI contravenes protected statutory rights of individuals which cannot be waived in a collective bargaining agreement. Rather this case presents the question of whether the employer commits an unfair practice when it, in the first instance, unilaterally declares illegal a mutually bargained for and agreed upon term of a collective bargaining agreement during contract hiatus where the case law upon which the employer relies is a single-judge trial court opinion subject to change on review pending appeal. The Board answers that question in the affirmative.

Section 703 of PERA prohibits the parties from implementing "a provision in a collective bargaining agreement if the implementation of that provision would be in violation of, or inconsistent with any statute or statutes enacted by the General Assembly of the Commonwealth of Pennsylvania." 43 P.S. § 1101.703. State statutes enacted by our General Assembly are final by virtue of the fact that the General Assembly is the highest legislative authority in the Commonwealth. Similarly, only the highest unappealed or unappealable binding court decisions are final for purposes of determining binding precedent. Although the CBA expired in August, 2002, there is no record evidence explaining why the District did not invoke the holding in Erie County between August, 2002 and April 2005, almost three years. However, as of April 15, 2005 when the District issued its memo to Hoyt refusing to apply Article XI of the CBA, which was precipitated by AARP I, the EEOC was contradicting County of Erie and seeking to exempt employers from liability under the ADEA for reducing medical benefits for retirees who become Medicare eligible, Judge Brody had enjoined the publication of the EEOC's regulations seeking to implement the exemption and Judge Brody's decision, a single-judge, district court decision, was under further review and therefore not final. Accordingly, the Board concludes that the District in this case did not possess the authority to unilaterally declare illegal the early retirement incentive provisions of Article XI and suspend the application of those provisions as a result of Judge Brody's opinion in AARP I. At best, the legality of the CBA's early retirement provisions, following AARP I, was in doubt. [4]

Also, the Crestwood School District is located in the Middle District of Pennsylvania, not the Eastern District. It is well settled that the decision of a single district judge is not binding on other judges in the same district, let alone judges in a different district. Starbuck v. San Francisco, 556 F.2d 450, 457 n. 13 (9th Cir. 1977) (the doctrine of stare decisis does not compel one district judge to follow a decision of another in the same district). Judge Brody's decision in AARP I was clearly not binding precedent on the District. Accordingly, given the pending ruling on the appeal and the non-binding nature of AARP I on Article XI, the District did not have the authority to unilaterally determine that the legal status of the early retirement provisions in the expired CBA had been finally determined such that it could unilaterally suspend the application of those provisions.

The District also claims that findings of fact numbers 19, 20 and 21 are in error. The District contends that the Examiner improperly used the term "rescinded" in Findings of Fact numbers 19 and 20. The District argues that it "refused to implement", (Exceptions ¶ 7), the early retirement provisions of the CBA; it did not "rescind" those provisions. However, the semantic challenge to the word choice employed in these findings does not invalidate the findings. Whether the District "rescinded", "refused to implement", repudiated or suspended the early retirement provisions in the CBA is of no moment. There is substantial competent evidence in the record to support the language of

[4] As of the date of this Final Order, the Third Circuit has not issued an opinion or ruled on the appeal.

the findings. These findings adequately convey that the District unilaterally refused to effectuate, apply, acknowledge or honor its promise to pay the early retirement incentives delineated in the CBA without adequate legal justification. Whether the District's unilateral action technically constitutes a "rescission", a repudiation or a "refusal to implement" does not affect the import of the findings which clearly and adequately describes the fact that the District unilaterally refused to apply or honor its obligations.[5]

The District also argues that Finding of Fact No. 20 is in error in providing "that the District acted solely on the advice of [its attorney]." (Exceptions ¶ 8). However, Finding of Fact No. 20 does not state that the District acted "solely" on the advice of its attorney in refusing to apply the early retirement incentive provisions and, after reviewing the Examiner's citations to the record, (N.T. 67-68), the Board concludes that Finding of Fact No. 20 and the language used therein is supported by substantial evidence and accurately describes the evidence of record. On cross examination, District Assistant Superintendent McLaughlin-Smith, when asked the reason for rescission of the retirement incentive replied only that it was on advice of counsel, and provided no other reason.

The District further contends that Finding of Fact No. 21 is irrelevant. Finding No. 21 provides the following:

> 21. The District never sought or obtained a court determination on the legality of the health insurance benefits and special severance incentive provided in Article XI of the CBA. (N.T. 59, 68-69).

(F.F. 21). Finding of Fact number 21 is relevant to contributively support the conclusion that the District did not have a reasonable basis to unilaterally declare that the early retirement provisions were illegal and therefore acted unlawfully in refusing to apply those provisions. Given the inconclusive posture of the trial court's decision in AARP I pending appeal, the disagreement among the federal circuit courts, the involvement of the EEOC and the lack of a court determination regarding the CBA provisions specifically at issue between the parties in this case, the District was without authority to unilaterally decide that its mutually agreed to early retirement provisions were illegal.

The District additionally maintains that the Examiner erred in concluding that it lacked a sound arguable basis in the CBA for unilaterally refusing to honor the early retirement provisions. The District argues that it "had a sound arguable basis for not implementing a term in the contract, the implementation of which would discriminate on the basis of age in violation of State and Federal law. A term of contract, including a labor contract, which is unlawfully discriminatory is unenforceable." (Exceptions ¶ 10). Initially, the District's argument in this regard is not in the nature of a sound arguable basis defense. Indeed, the sound arguable interpretation of the contract supports the employes. Rather, the District argues the impact of external law to negate the enforceability of the clear contract terms. Although the District's defense that the contract clause is unenforceable is cognizable, it is not grounded on "sound arguable bases" and must, as such, be rejected.

This argument rather is a claim that the retirement incentive violates Section 703 of PERA and thus is unenforceable. In addition to the above discussion regarding this claim, the District argues, contrary to the Examiner's conclusion, "[I]t is not well settled law that parties are bound to implement a term of a contract whose implementation would violate State and/or Federal law." (Exceptions ¶ 11). In this regard, the District argues that the cases cited by the Examiner, concluding that illegality does not authorize employers to unilaterally repudiate a bargained for and agreed upon contractual provision during the life of the agreement, are inapposite to the instant case where the illegality arose and was asserted after contract expiration during bargaining and

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[5] Black's Law Dictionary defines "rescission" as an act to abrogate, avoid or cancel. Black's Law Dictionary 1306 (6th ed. 1990). Black's also defines "repudiation" as an act to reject or disclaim a duty or obligation. Id. at 1303. A "refusal to implement" is a refusal to fulfill, perform or carry out a definite plan or procedure. Webster's Encyclopedic Unabridged Dictionary 961 (1996).

involves violations of federal anti-discrimination laws. These arguments, however, are also without merit because they are predicated upon the erroneous legal assumption that the early retirement provisions were either "unlawfully discriminatory" or "in violation of State and Federal Law". As previously determined herein, the interlocutory decision of a federal trial court subsequently reversed by the same judge in the same proceeding regarding the determination of whether the EEOC's regulations validating early retirement provisions violated the ADEA, was in a state of flux and did not constitute a sound arguable basis to justify the unilateral change in the status quo without bargaining with the Union. Accordingly, the Examiner properly concluded that the District violated Section 1201(a)(1) and (5) of PERA by unilaterally altering the status quo when it repudiated the early retirement incentive provisions of the CBA during contract hiatus based on an appealed single-judge trial court opinion from a different federal district court striking down proposed regulations from the EEOC, which the same trial court judge reversed six months later.

Although the Board concludes that the District engaged in unfair practices, the make-whole relief ordered by the Examiner is significantly limited. The Board has broad discretion and authority under PERA to fashion appropriate remedies for unfair practices under Section 1303. Appeal of Cumberland Valley Sch. Dist., 483 Pa. 134 394 A.2d 946 (1978). In PLRB v. Martha Co., 359 Pa. 347, 59 A.2d 166 (1948), our Supreme Court held that the Board has very broad discretion and flexibility to fashion appropriate relief to remedy the myriad factual permutations that may arise under the collective bargaining statutes and accordingly may limit affirmative relief to accurately achieve the purpose of the legislation. Id. at 168. This case is appropriate for the Board's exercising its authority to limit the affirmative relief on the unique facts of this case where the losses suffered were minimal. The record shows that at some point the District reversed course and applied Article XI, creating a discrete period of time where the employes may have suffered out of pocket loss.

The evidence regarding loss for Clare Myers, for example, was that she personally paid for COBRA to continue her medical benefits during the months of September and October of 2005. The District has reimbursed her for those expenditures. There is no evidence in the record regarding losses sustained by Lynne Hughes. Also, the Union proffered evidence that Ivan Hoyt may have been foreclosed from obtaining a higher interest rate on an investment fund because the District did not give him his severance pay until the District re-applied Article XI after AARP II in October of 2005. Hoyt arranged for that interest rate in early 2005 when he submitted his intent to retire. However, the Board concludes that fixing a specific interest rate of return on money invested in a fund into the indefinite future would be too speculative. International Brotherhood of Firemen and Oilers, Local 1201, v. PLRB, 33 PPER 33092 (Court of Common Pleas of Montgomery County, 2002)(opining that "damages are not recoverable if they are too speculative, vague or contingent and are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty"). The Board is unable to determine whether Mr. Hoyt would withdraw some or all of his money from the fund or even if that fund would exist in the near future. Indeed, Mr. Hoyt may withdraw his money for another fund offering higher interest rates in the near future.

The Examiner ordered interest in the nature of delay damages at the statutory rate of six percent per annum. The CBA provides that Hoyt, Myers, Hughes and any other affected employes were entitled to their severance pay by September 1, 2005. However, our Supreme Court has opined that severance pay for voluntary or involuntary separation from employment is in lieu of wages. Cugini v. Commonwealth of Pennsylvania, Unemployment Compensation Board of Review, 511 Pa. 264; 512 A.2d 1169 (1986). The affected employes who continued to work and collect their salaries, like Mr. Hoyt and Ms. Hughes, are therefore not entitled to delay damages. On this record, Ms. Myers retired during the time when the District was not recognizing the early retirement incentives and received neither severance pay nor salary. Therefore, she is entitled to delay damages in the nature of six percent per annum for not having use of her wages from September 1, 2005 until the time that she received her severance pay. Any other claimed make-whole relief for other employes is too speculative on this record to have a reasonable basis in law or fact. [6]

[6] To the extent that other employes retired and suffered out of pocket losses as a result of the District's unfair practice, they would be entitled to make-whole relief in a compliance hearing.

After a thorough review of the exceptions and all matters of record, the Board shall dismiss the exceptions and sustain the Proposed Decision and Order of the Hearing Examiner, as modified.

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 by the District to the Proposed Decision and Order in the above-captioned matter be and the same are hereby dismissed; and that the Proposed Decision and Order, as modified, is hereby made absolute and final.

IT IS FURTHER ORDERED AND DIRECTED

that the order set forth in the proposed decision and order shall be modified to direct that the District shall:

1. Cease and desist from interfering with restraining or coercing employes in the exercise of the rights guaranteed in Article IV of the Act.

2. Cease and desist from refusing to bargain collectively in good faith with an employe representative which is the exclusive representative of employes in the appropriate unit including but not limited to the discussion of grievances with the exclusive representative.

3. Take the following affirmative action which the Board finds necessary to effectuate the policies of PERA:

(a) Post a copy of this Final Order within five (5) days from the effective date hereof in a conspicuous place readily accessible to its employes and have the same remain so posted for a period of ten (10) consecutive days;

(b) Make whole Clare Myers and other employes, who retired and were denied both salary and severance by the District, by paying Ms. Myers, and those other retired employes, delay damages in the nature of six percent per annum for not having use of her wages from September 1, 2005 until the time that the District paid the retirement severance to Ms. Myers and the other affected bargaining unit employes;

(c) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this Final Order by completion and filing of the attached Affidavit of Compliance; and

(d) Serve a copy of the attached affidavit of compliance upon the Crestwood Education Association.

SEALED, DATED AND MAILED pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, Anne E. Covey, Member, James M. Darby, Member, this fifteenth day of August, 2006. 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.

MEMBER JAMES M. DARBY DID NOT PARTICIPATE IN THE CONSIDERATION OR DECISION IN THIS CASE.

However, speculation regarding hypothetical retirement decision making does not constitute actual economic loss to employes and is not directed in this order.

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

CRESTWOOD EDUCATION ASSOCIATION :
:
v. : Case No. PERA-C-05-281-E
:
CRESTWOOD SCHOOL DISTRICT :

AFFIDAVIT OF COMPLIANCE

The Crestwood School District hereby certifies that it has ceased and desisted from its violation of Section 1201(a)(1) and (5) of PERA; that it has made whole Clare Myers and other employes, who retired and were denied both salary and severance by the District, by paying Ms. Myers and those other retired employes delay damages in the nature of six percent per annum for not having use of her wages from September 1, 2005 until the time that the District paid the retirement severance to Ms. Myers and the other affected bargaining unit employes; that it has posted the Final Order as directed therein and the Proposed Decision and Order in the same manner; and that it has served a copy of this affidavit on the Crestwood Education 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