

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

MONTGOMERY TOWNSHIP POLICE OFFICERS :
 :
 v. : Case No. PF-C-06-1-E
 :
 MONTGOMERY TOWNSHIP :

PROPOSED DECISION AND ORDER

On January 3, 2006, the Police Officers of Montgomery Township (Complainant) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair labor practices alleging that Montgomery Township (Township) violated sections 6(1)(a) and 6(1)(e) of the Pennsylvania Labor Relations Act (PLRA) by unilaterally imposing on its police officers a contribution rate of five per cent for their pension plan effective January 1, 2006. On February 9, 2006, the Secretary of the Board issued a complaint and notice of hearing assigning the charge to conciliation and directing that a hearing be held on April 20, 2006, if conciliation did not resolve the charge by then. The hearing was held as scheduled. Both parties were afforded a full opportunity to present evidence and to cross-examine witnesses. On June 19, 2006, the Township filed a brief. On June 23, 2006, the Complainant filed a brief.

The hearing examiner, on the basis of the evidence presented at the hearing and from all other matters of record, makes the following:

FINDINGS OF FACT

1. The Complainant is the exclusive representative of a bargaining unit that includes police officers employed by the Township. (N.T. 12-14, 17-18, 20, 52, 65; Exhibit A)

2. On August 9, 1995, the Township restated its pension plan for its police officers effective July 1, 1992. Section 3.01 of the pension plan as restated provides as follows:

"Each Active Participant shall make Required Contributions. These Contributions shall be made for each month in which he is an Active Participant.

The amount of each Contribution will be equal to 5% of his Compensation for the month but it may be reduced annually by resolution of the Township.

A Participant shall not make Required Contributions during any period he is receiving disability payments under the DISABILITY BENEFITS SECTION of Article V.

The Participant's Required Contribution Account is fully (100%) vested and nonforfeitable at all times.

If an actuarial study shows that the condition of the Plan is such that payments to the Plan by Active Participants may be reduced or eliminated, the Employer may, on an annual basis, by resolution, reduce or eliminate Required Contributions. If such payments are reduced or eliminated, Contributions by the Employer will not be required to keep the Plan actuarially sound."

(N.T. 34-35, 53-54, 56, 62; Union Exhibit 8)

4. For 1999 and 2000, the Township did not resolve to eliminate or reduce the contribution required of the police officers under the pension plan, and the police officers contributed five per cent of their pay to the pension plan. (N.T. 19, 38, 55-57)

5. For 2001, 2002, 2003, 2004 and 2005, the Township resolved to eliminate the contribution required of the police officers under the pension plan, and the police officers contributed zero per cent of their pay to the pension plan. (N.T. 19, 22, 38, 52-57; Township Exhibit 1)

6. On February 14, 2005, the parties executed a collective bargaining agreement effective from December 24, 2004, through December 20, 2007. The collective bargaining agreement does not include a provision changing the rate at which police officers are required to contribute to the pension plan. (N.T. 20-21, 79; Exhibit A)

7. Article 27 of the collective bargaining agreement provides as follows:

"Article 27. Other Provisions

All other matters previously in force and not changed by the terms of this contract shall remain in force."

(Exhibit A)

8. By letter dated November 23, 2005, a consulting actuary from Conrad Siegel Actuaries (Thomas L. Zimmerman) wrote to the Township's manager (John B. Nagel) as follows:

"Monica asked me to address in writing the need for police officers to contribute 5.0% of pay to the Pension Plan for 2006. The 2006 Minimum Municipal Obligation (MMO) has been determined based on the January 1, 2005, actuarial valuation. The 'financial requirement' from the 2006 MMO is \$438,032. Based on 34 full-time police officers and the 2005 State aid unit value, expected State aid for 2006 is approximately \$200,000. Thus, State aid will not cover about \$238,000 of the 2006 cost.

The most recent plan document in my files became effective July 1, 1992, and was signed in 1995. I am enclosing a copy. Section 3.01A (p. 15) states that 5.0% of pay member contributions may only be reduced or eliminated if contributions by the employer are not required. Since State aid will not be sufficient to meet the financial requirement of the plan, it appears that 5.0% of pay member contributions are required for 2006. The 2006 MMO estimates that such member contributions will amount to \$128,934. This means the Township will still have to contribute \$109,098, assuming that the 2006 State aid is \$200,000.

Please so not hesitate to contact me if there are any questions regarding this analysis."

(N.T. 51; Union Exhibit 4)

9. The board of supervisors did not pass a resolution to eliminate or reduce the contribution required of the police officers under the pension plan for 2006. (N.T. 53)

10. By memorandum dated December 2, 2005, the Township's manager (J. Nagel) wrote to four police officers (E. Davies, R. Lesinski, D. Mitchell and J. Reape) as follows:

"Please inform the bargaining unit that, at the November 28 meeting, the Board of Supervisors did not pass a Resolution, as they have done in the past several years, stating that the employee contribution for the Police Pension Fund has been eliminated.

Based on the attached letter from Conrad Siegel Actuaries and stated 2006 Minimum Municipal Obligation (MMO) findings, the Board has approved police pension plan contributions to be deducted at a rate of 5%, effective the first pay period of January 1, 2006.

Also attached is Resolution #6, dated November 8, 1976 which states, under Section 9, 'The monthly contributions of the participants may be reduced or eliminated if an actuarial study annually indicates that such reduction or elimination for that year will not adversely affect the actuarial soundness of the Fund. If the actuarial study so indicates, the reduction or elimination shall be affected by an annual resolution and it shall be effective for one year. No reduction or elimination shall be made if any contribution by Montgomery Township will be required to keep the pension fund actuarially sound.'"

(N.T. 17; Union Exhibit 3)

DISCUSSION

The Complainant has charged that the Township committed unfair labor practices under sections 6(1)(a) and 6(1)(e) of the PLRA by unilaterally imposing on its police officers a contribution rate of five per cent for their pension plan effective January 1, 2006. The Association contends that the Township's imposition of the five per cent contribution rate changed past practice with respect to a mandatory subject of bargaining. According to the Complainant, the past practice was that the police officers contributed zero per cent to the pension plan.

The Township contends that the charge should be dismissed because it was contractually privileged to impose the five per cent contribution rate, because its imposition of the five per cent contribution rate did not change past practice and because it had the managerial prerogative to impose the five per cent contribution rate. According to the Township, it has a sound arguable basis for interpreting article 27 of the parties' collective bargaining agreement to mean that it is authorized to impose the five per cent contribution rate if an actuarial study does not show that the condition of the pension plan is such that contributions by the police officers could be reduced or eliminated and if it does not pass a resolution to reduce or eliminate their contributions accordingly. According to the Township, the past practice was that the police officers contributed five per cent to the pension plan unless the Township resolved to eliminate their contribution pursuant to an actuarial study showing that their contributions were not required to maintain the soundness of the pension plan.

An employer commits unfair practices under sections 6(1)(a) and 6(1)(e) if it unilaterally changes a mandatory subject of bargaining. City of Jeanette v. PLRB, 890 A.2d 1154 (Pa. Cmwlth. 2006). If, however, the employer was contractually privileged to make the change, then it did not act unilaterally, and no violation of sections 6(1)(a) and 6(1)(e) may be found. Wilkes-Barre Township v. PLRB, 878 A.2d 977 (Pa. Cmwlth. 2005). Nor may any such violations be found if the employer did not change past practice, Ellwood City Wage and Policy Unit v. PLRB, 731 A.2d 670 (Pa. Cmwlth. 1999), or if the change was to a managerial prerogative rather than a mandatory subject of bargaining. South Park Township Police Association v. PLRB, 789 A.2d 874 (Pa. Cmwlth. 2002).

In City of Coatesville, 12 PPER ¶ 12247 (Final Order 1983), aff'd on another ground sub nom. City of Coatesville v. Commonwealth of Pennsylvania, PLRB, 465 A.2d 1073 (Pa. Cmwlth. 1983), the Board found that the rate at which police officers contribute to their pension plan is a mandatory subject of bargaining. As the hearing examiner explained in that case, pensions are among the matters expressly made mandatory subjects of bargaining under section 1 of Act 111. See also Wilkes-Barre Township, *supra*, where the court, citing section 1 of Act 111, opined that "it is beyond peradventure that pensions are a mandatory subject of collective bargaining. As such, an employer is barred from acting unilaterally in this area without satisfying the statutory resolution procedure." 878 A.2d at 983. Thus, if the Township unilaterally changed past practice when it imposed the five per cent contribution rate, then it committed unfair labor practices as charged.

In support of its contention that the charge should be dismissed because it had the managerial prerogative to impose the five per cent contribution rate, the Township relies on Borough of Morrisville v. Morrisville Borough Police Benevolent Association, 756 A.2d 709 (Pa. Cmwlth. 2000), appeal denied, 564 Pa. 738, 766 A.2d 1251 (2001), where the court held that the allocation of excess interest from the Pennsylvania Municipal Retirement Fund was a managerial prerogative of the municipalities involved. In so holding, the court explained that "the administration of pension funds is not a bargainable issue. Frackville Borough Police Department v. Pennsylvania Labor Relations Board, 701 A.2d 632 (Pa. Cmwlth. 1997), appeal denied, 551 Pa. 706, 712 A.2d 287 (1998)." 756 A.2d at 710. The issue of whether or not the contribution rate for a pension plan is a managerial prerogative or a mandatory subject of bargaining was not at issue in that case, however, so that case is inapposite for that reason alone. Moreover, inasmuch as the contributions of the police officers to the pension plan come directly from their pay, the rate at which they contribute hardly fits the description of an administrative matter as the court defined the term in that case. Notably, in Frackville Borough Police Department, which the court cited for the proposition that "the administrative matters of pension

funds is not a bargainable issue," 756 A.2d at 710, the record showed that the matter at issue--the selection of a manager for a pension plan--did not change the contribution rate for the police officers involved. The record shows otherwise here. Accordingly, the Township's contention is without merit.

The charge nevertheless must be dismissed because the record shows that the Township was contractually privileged to impose the five per cent contribution rate. As the court explained in Wilkes-Barre Township, *supra*, if an employer has a sound arguable basis for ascribing a particular meaning to a provision in a collective bargaining agreement and if it has acted in accordance with the terms of the agreement as so construed, then the employer satisfied its statutory obligation to bargain when it negotiated the collective bargaining agreement and cannot be found to have acted unilaterally. In such a case, any relief must be obtained by way of the filing of a grievance because only an arbitrator has jurisdiction to interpret the provisions of a collective bargaining agreement. Such is the case here.

As set forth in finding of fact 8, the record shows that article 27 of the parties' collective bargaining agreement provides that "[a]ll other matters previously in force and not changed by the terms of this contract shall remain in force." As set forth in finding of fact 2, the record shows that one matter previously in force was a pension plan providing at section 3.01 that "[e]ach Active Participant shall make Required Contributions," that "[t]he amount of each Contribution will be equal to 5% of his Compensation for the month but it may be reduced annually by resolution of the Township" and that "[i]f an actuarial study shows that the condition of the Plan is such that payments to the Plan by Active Participants may be reduced or eliminated, the Employer may, on an annual basis, by resolution, reduce or eliminate Required Contributions." As set forth in finding of fact 6, the record shows that the contribution rate under the pension plan was not changed by the collective bargaining agreement.

On that record, it is apparent that the Township has a sound arguable basis for interpreting article 27 to mean that it is authorized to impose the five per cent contribution rate if an actuarial study does not show that the condition of the pension plan is such that contributions by the police officers could be reduced or eliminated and if it does not pass a resolution to reduce or eliminate their contributions accordingly. Thus, if the record shows that the Township acted in accordance with that construction of article 27, then it was contractually privileged to impose the five per cent contribution rate.

As set forth in findings of fact 8-10, the record shows that the Township only imposed the five per cent contribution rate after its actuary indicated that the pension plan was not actuarially sound and after its board of supervisors did not pass a resolution to eliminate the required contribution from the police officers. On that record, it is apparent that the Township acted in accordance with the meaning it ascribed to article 27. Accordingly, the Township was contractually privileged to impose the five per cent contribution rate.

Support for the Township's contractual privilege defense may be found in Midland Borough, 26 PPER ¶ 26139 (Final Order 1995), where on a substantially similar record the Board dismissed a charge alleging that an employer committed unfair labor practices sections 6(1)(a) and 6(1)(e) of the PLRA by unilaterally imposing on its police officers a pension plan contribution rate of five per cent. In that case, the record showed that the parties had a collective bargaining agreement similarly providing that past practices would remain as is. The record also similarly showed that for years the employer waived contributions by police officers to their pension fund when an actuarial study supported the waiver. Noting that the employer only imposed the pension plan contribution rate after an actuary determined that an employee contribution was required, the Board reasoned that the employer had followed past practice and therefore was contractually privileged to impose the pension plan contribution rate as it did. Compare Prospect Park Borough, 27 PPER ¶ 27222 (Final Order 1996)(employer was not contractually privileged to impose on its police officers a contribution rate for a pension plan where it could not point to any language in the parties' collective bargaining agreement authorizing its imposition of the contribution rate).

In support of its contention that the Township unilaterally imposed the five per cent contribution rate, the Complainant submits that "the Collective Bargaining Agreement remains silent on the issue of contributions" (brief at 9). The Complainant overlooks, however, that article 27 of the collective bargaining agreement provides a basis for the Township's contractual privilege defense. The Complainant's contention is, therefore, without merit.

The charge also must be dismissed because the record does not show that the Township changed past practice when it imposed the five per cent contribution rate. In County of Allegheny v. Allegheny County Prison Employees Independent Union, 476 Pa. 27, 381 A.2d 849 (1977), the court defined a past practice as follows:

"A custom or practice is not something which arises simply because a given course of conduct has been pursued by Management or the employees on one or more occasions. A custom or practice is a usage evolved by men as a normal reaction to a recurring type of situation. It must be shown to be the *accepted* course of conduct characteristically repeated in response to the given set of underlying circumstances. This is not to say that the course of conduct must be *accepted* in the sense of both parties having agreed to it, but rather that it must be *accepted* in the sense of being regarded by the [parties] involved as the *normal* and *proper* response to the underlying circumstances presented."

476 Pa. at 34 n. 12, 381 A.2d at 852 n. 12 (emphasis in original). As set forth in findings of fact 3-4, the record shows that in the past the Township imposed a five per cent contribution rate unless it resolved to eliminate the contribution. The Township did not resolve to eliminate the contribution for 2006, so it did not change past practice when it imposed the five per cent contribution rate. Midland Borough, supra.

In support of its contention that the past practice was that the police officers contributed zero per cent to the pension fund, the Complainant points out that they contributed zero per cent to the pension fund from 2001 through 2005 and submits that such had to be the case after a 2002 amendment to the Police Pension Fund Act commonly known as Act 600. According to the Complainant, the amendment, which is commonly known as Act 30, in and of itself relieved the police officers of their obligation to contribute to the pension plan. The Complainant cites Waros v. Borough of Vandergrift, 637 A.2d 731 (Pa. Cmwlth. 1994), for the proposition that Act 30 was self-executing. The Complainant overlooks, however, that the police officers only contributed zero per cent to the pension fund when the Township resolved to eliminate their contribution and that in 1999 and 2000 the police officers contributed five per cent of their pay to the pension fund when the Township did not resolve to eliminate their contribution. Thus, there is no basis for finding that the past practice was that the police officers contributed zero per cent to the pension fund. The Complainant's contention is, therefore, without merit.

CONCLUSIONS

The hearing examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds:

1. The Township is an employer under section 3(c) of the PLRA.
2. The Complainant is a labor organization under section 3(f) of the PLRA.
3. The Board has jurisdiction over the parties.
4. The Township has not committed unfair labor practices under sections 6(1)(a) and 6(1)(e) of the PLRA.

ORDER

In view of the foregoing and in order to effectuate the policies of the PLRA, the hearing examiner

HEREBY ORDERS AND DIRECTS

that the complaint is rescinded and the charge dismissed.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty days of the date hereof, this order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this twelfth day of July 2006.

PENNSYLVANIA LABOR RELATIONS BOARD

Donald A. Wallace, Hearing Examiner

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July 12, 2006

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MONTGOMERY TOWNSHIP
Case No. PF-C-06-1-E

Enclosed is a copy of my proposed decision and order.

Sincerely,

DONALD A. WALLACE
Hearing Examiner

Enclosure

cc: Edward T. Davies
Montgomery Township
Joel S. Barras, Esquire