COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

MCADOO POLICE ASSOCIATION	:	
	:	
v.	:	Case No. PF-C-05-148-E
	:	
MCADOO BOROUGH	:	

PROPOSED DECISION AND ORDER

On October 25, 2005, the McAdoo Police Association (Association) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair labor practices alleging that McAdoo Borough (Borough) had violated sections 6(1)(a) and 6(1)(e) of the Pennsylvania Labor Relations Act (PLRA) by refusing to pay the neutral arbitrator in an Act 111 interest arbitration. On November 29, 2005, 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 January 20, 2006, if conciliation did not resolve the charge by then. The hearing examiner thereafter twice continued the hearing, once upon the request of the Association without objection by the Borough and once upon the request of the Borough without objection by the Association. On April 3, 2006, the hearing was held. Both parties were afforded a full opportunity to present evidence and to cross-examine witnesses. On April 14, 2006, the Borough filed a brief. On May 3, 2006, the Association 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. On August 30, 2001, the Board certified the Association as the exclusive representative of a bargaining unit comprised of police officers employed by the Borough. (Case No. PF-R-01-74-E)

2. By letter dated September 3, 2004, Chief Russell A. Palmer informed the Borough of the Association's "intention to proceed to binding arbitration for the contract year beginning January 1, 2005," and selection of Sean T. Welby as its arbitrator. (Complainant Exhibit 1)

3. By letter dated October 7, 2004, the Borough's attorney (Joseph Semasek) informed Mr. Welby that Nicholas Quinn would be the Borough's arbitrator. (Complainant Exhibit 6)

4. By letter dated October 18, 2004, the American Arbitration Association (AAA) issued a list of three neutral arbitrators from which the parties were to choose a neutral arbitrator to act as the chair of a board of arbitration to resolve their impasse in collective bargaining. Attached to the letter were the biographies of the neutral arbitrators, including their rates of compensation and their fees if scheduled arbitrations were cancelled. (Complainant Exhibit 11)

5. By letter dated October 19, 2004, Mr. Quinn struck one of the neutral arbitrators from the list. (Complainant Exhibit 12)

6. By letter dated November 5, 2004, Mr. Welby struck another of the neutral arbitrators from the list. (Complainant Exhibit 13)

7. By letter dated November 30, 2004, AAA appointed the third neutral arbitrator on the list as the chair of the board of arbitration. (Complainant Exhibit 14)

8. By letter dated February 8, 2005, the neutral arbitrator scheduled an arbitration for May 18, 2005. (Complainant Exhibit 21)

9. By letter dated May 16, 2005, Mr. Semasek asked the neutral arbitrator to continue the arbitration. (Complainant Exhibit 22)

10. On May 16, 2005, the neutral arbitrator continued the arbitration. (N.T. 42)

11. By letter dated May 26, 2005, the neutral arbitrator rescheduled the arbitration to August 8, 2005. (Complainant Exhibit 23)

12. By letter dated August 5, 2005, Mr. Semasek asked the neutral arbitrator to continue the arbitration. (Complainant Exhibit 26)

13. On August 5, 2005, the neutral arbitrator continued the arbitration. (N.T. 45-47)

14. By letter dated August 22, 2005, the neutral arbitrator rescheduled the arbitration to September 23, 2005. (Complainant Exhibit 28)

15. By letter dated September 21, 2005, Mr. Semasek informed the neutral arbitrator that the parties had reached a collective bargaining agreement. (Complainant Exhibit 30)

16. By letter dated September 27, 2005, the neutral arbitrator issued a bill for $3,345.00 for his cancellation fees and expenses. (Complainant Exhibit 32)

17. The Borough did not pay the neutral arbitrator's bill. (N.T. 8, 54)

18. The Association paid the neutral arbitrator's bill. (N.T. 57)

DISCUSSION

The Association has charged that the Borough committed unfair labor practices under sections 6(1)(a) and 6(1)(e) of the PLRA by refusing to pay the neutral arbitrator in an Act 111 interest arbitration. The Association contends that the Borough independently violated section 6(1)(a) because its refusal to pay the neutral arbitrator coerced employes in the exercise of their right under the PLRA to arbitrate collective bargaining impasses under Act 111. The Association contends that the Borough derivatively violated section 6(1)(a) and violated section 6(1)(e) because its refusal to pay the neutral arbitrator contravened the impasse resolution procedures set forth in Act 111.

The Borough contends that the charge should be dismissed because the Association is not an aggrieved party. In the Borough's view, only AAA has standing to prosecute the charge. The Borough also contends that the charge should be dismissed for lack of proof that it refused to pay the neutral arbitrator's bill. The Borough further contends that the charge should be dismissed because the neutral arbitrator's bill was unreasonable.

In County of Lehigh v. PLRB, 24 PPER ¶ 24062 (Court of Common Pleas of Lehigh County 1993), the court held that an employe organization seeking to represent employes had standing to file a charge under analogous provisions of the Public Employe Relations Act (PERA). The same result a fortiori obtains here because, as set forth in finding of fact 1, the Association already represents the Borough's police officers. See also Perkiomen Township, 14 PPER ¶ 14259 (Final Order 1983)(the exclusive representative of a bargaining unit had standing to file a charge under sections 6(1)(a) and 6(1)(e)). The Borough's contention that the charge should be dismissed because the Association is not an aggrieved party is, therefore, without merit.

In Millvale Borough, 36 PPER 147 (Final Order 2005), the Board explained that an employer commits an independent violation of section 6(1)(a) if it engages in conduct that under the totality of circumstances would have a tendency to coerce employes in the exercise of their rights under the PLRA. The Association contends that the Borough did just that by refusing to pay the neutral arbitrator's bill. On a substantially similar record in Commonwealth of Pennsylvania, Department of Corrections, Pittsburgh SCI, 35 PPER 97 (Final Order 2004), however, the Board dismissed a charge alleging that an employer coerced employes in the exercise of their right under the PERA to change their exclusive representative. In that case, the employer argued to an arbitrator that its

back pay liability for a grievance should be limited in view of a delay in the processing of the grievance occasioned by a change in the exclusive representative of the employes. Noting that it was common knowledge that arbitrations are adversarial and that there was no assurance that another arbitrator would accept the same argument in a subsequent case, the Board opined that a reasonable employe would not be less likely to exercise their right to change their exclusive representative simply because the employer in seeking to limit its back pay liability in that case referenced their exercise of that right. Likewise, in the instant case, it is doubtful that the Borough's police officers would forego their right to arbitrate collective bargaining impasses under Act 111 in the future simply because the Borough refused to pay the arbitrator in this case. Thus, it is apparent that the Borough has not committed an independent violation of section 6(1)(a).

The Association contends that the Borough's refusal to pay the neutral arbitrator's bill is coercive nonetheless because no arbitrator, much less one of any caliber, will accept an appointment to chair a board of arbitration involving the Borough in the future if there is any doubt about their getting paid, thus making the employes' right to arbitrate their collective bargaining impasses under Act 111 illusory. The Association points out that it presented testimony to that effect by an experienced labor lawyer (Mr. Welby) (N.T. 55-56). Mr. Welby's testimony was speculative, however, in that it related to what might happen in the future; it did not include any examples of neutral arbitrators refusing to accept appointments to boards of arbitration under like circumstances in the past. Any finding of an unfair labor practice must be supported by substantial evidence. Commonwealth of Pennsylvania, PLRB v. Fabrication Specialists, Inc., 477 Pa. 23, 383 A.2d 802 (1978). Speculation is not substantial evidence. Haverford Township, 27 PPER ¶ 27130 (Final Order 1996), reversed and remanded on other grounds sub nom. Delaware County Lodge No. 27, FOP v. PLRB, 694 A.2d 1142 (Pa. Cmwlth. 1997)(employes' belief that they were subject to a ticket quota was speculative). Thus, the Association's contention is not supported by substantial evidence.

In Borough of Nazareth v. PLRB, 534 Pa. 11, 626 A.2d 493 (1993), the court held that an employer commits unfair labor practices under sections 6(1)(a) and 6(1)(e) if it refuses to comply with the impasse resolution procedures set forth in Act 111.[1] As set forth in section 4 of Act 111, the impasse resolution procedures in Act 111 include a provision for the appointment of a board of arbitration chaired by a neutral arbitrator if the parties reach an impasse in negotiations for a collective bargaining agreement. As set forth in section 8 of Act 111, those impasse resolution procedures also include a provision that the compensation of the neutral arbitrator "shall be paid by the political subdivision[.]" As set forth in finding of fact 7, the record shows that AAA appointed the neutral arbitrator to chair a board of arbitration to resolve an impasse in the parties' negotiations for a collective bargaining agreement. As set forth in findings of fact 16-17, the record also shows the neutral arbitrator issued a bill that the Borough refused to pay. Thus, the Borough refused to comply with the impasse resolution procedures set forth in Act 111. Accordingly, it is apparent that the Borough committed unfair labor practices under sections 6(1)(a) and 6(1)(e).

The Borough contends that the charge should be dismissed for lack of proof that it refused to pay the neutral arbitrator's bill. According to the Borough, the Association did not present substantial evidence that the Borough ever knew that the neutral arbitrator charged a cancellation fee or that the Borough ever received a bill from the neutral arbitrator. The Borough points out that the only witness presented by the Association (Mr. Welby) was its arbitrator. As set forth in its brief at 1, the Borough submits that in view of Mr. Welby's status in that regard his testimony should be "completely disregarded" because of a conflict of interest on his part.[2] The Borough also submits that a letter from AAA indicating that the neutral arbitrator charged a cancellation fee (Complainant Exhibit 11) and a letter from the neutral arbitrator

[1] In such a case, the violation of section 6(1)(a) is derivative. Springfield Township, 28 PPER ¶ 28164 (Final Order 1997)(a derivative violation of section 6(1)(a) occurs whenever an employer commits any other unfair labor practice).

[2] Although not dispositive, it is noted that a conflict of interest is not among the reasons for disqualifying a witness from testifying, Pa.R.E. 601, so the Borough's contention that Mr. Welby's testimony should be "completely disregarded" is without merit.

including his bill (Complainant Exhibit 32) were inadmissible hearsay and do not prove that it received them in any event.[3] Whether or not the Borough ever knew that the neutral arbitrator charged a cancellation fee is irrelevant, however, to deciding whether or not the Borough refused to pay the neutral arbitrator's bill. Moreover, the Borough overlooks that its own attorney admitted at the hearing that it refused to pay the neutral arbitrator's bill on the ground that is was unreasonable (N.T. 8). Implicit in that admission is an acknowledgement that the Borough received the neutral arbitrator's bill. Thus, the Borough's contention is without merit.

The Borough also contends that the charge should be dismissed because the neutral arbitrator's bill was unreasonable. In support of its contention, the Borough points out that the neutral arbitrator never held a hearing because the parties eventually negotiated a collective bargaining agreement on their own and submits that the Borough "is a very small, poor Borough" (brief at 2). The record does not show that the neutral arbitrator's bill was unreasonable or that the Borough is too small or poor to pay it, however, so the Borough's contention must be dismissed for lack of proof.

CONCLUSIONS

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

1. The Borough is an employer under section 3(c) of the PLRA.

2. The Association is a labor organization under section 3(f) of the PLRA.

3. The Board has jurisdiction over the parties.

4. The Borough has 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 Borough shall:

1. Cease and desist from interfering with, restraining or coercing employes in the exercise of the rights guaranteed in the PLRA.

2. Cease and desist from refusing to bargain with the representative of its employes.

3. Take the following affirmative action which the hearing examiner finds necessary to effectuate the policies of the PLRA:

(a) Reimburse the Association $3,345.00 for paying the neutral arbitrator's bill;

(b) Post a copy of this decision and 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; and

(c) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this decision and order by completion and filing of the attached affidavit of compliance.

[3] Although not dispositive, it is noted that while the Association established that the letters were admissible under the business records exception to the hearsay rule, Pa.R.E. 803(6), the Association did not thereby establish that the Borough received the letters.

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 May 2006.

PENNSYLVANIA LABOR RELATIONS BOARD

_____

Donald A. Wallace, Hearing Examiner

Direct Dial
717-783-6025

Fax Number
717-783-2974

May 12, 2006

Richardson Todd Eagen, Esquire
LIGHTMAN & WELBY
2705 N. Front St.
Harrisburg, PA 17110

Joseph P. Semasek, Esquire
Attorney at Law
331 West Monroe Street
McAdoo, PA 18237

MCADOO BOROUGH
Case No. PF-C-05-148-E

Enclosed is a copy of the proposed decision and order that I have issued this date.

Sincerely,

DONALD A. WALLACE
Hearing Examiner

Enclosure

cc: McAdoo Borough
Sean T. Welby, Esquire