COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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

**PROPOSED DECISION AND ORDER**

On June 27, 2005, the Crestwood Education Association (Association) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the Crestwood School District (District) violated Section 1201(a)(1), (3) and (5) of the Public Employe Relations Act (PERA).[1] On August 4, 2005, the Secretary of the Board issued a complaint and notice of hearing directing a hearing before a Board hearing examiner on November 8, 2005. At the request of the Association, the hearing was continued to January 31, 2006. On that date, all parties in interest appeared before the examiner and were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Both parties filed post-hearing briefs on February 27, 2006.

The examiner, on the basis of the testimony and exhibits[2] presented at the hearing and from all other matters and documents of record, makes the following:

FINDINGS OF FACT

1. The District is a public employer for purposes of PERA.

2. The Association is an employe organization for purposes of PERA.

3. The District and the Association were parties to a collective bargaining agreement (CBA) that was effective from September 1, 1994 through August 31, 2002. Article XI of the CBA stated as follows:

> "VOLUNTARY EARLY RETIREMENT/SPECIAL SEVERANCE PAY
>
> The Board agrees to pay to each full-time employee, covered by this Agreement who retires during the term of this Agreement, benefits set forth in this Article . . . .
>
> * * *
>
> (4) The retiring employee shall continue to receive, based on the following employer contribution rate, the same health insurance benefit options provided in the Collective Bargaining Agreement until the employee attains the age of sixty-five (65) or becomes eligible for Medicare, whichever is sooner. The employee who desires to continue such health insurance options shall have the full premium rate for the employee paid by the Board. Said employee has the right to purchase dependent health coverage at his/her expense throughout the life of the Agreement.

[1] The charge under Section 1201(a)(3) of PERA must be dismissed because the Association failed to prove that the District took the action at issue because of a discriminatory motive or anti-union animus. See St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977).

[2] By letter dated February 10, 2006, the District confirmed that it had received the correspondence from the employe that is part of Association Exhibit 1. The District also stated that it maintains its objection that the correspondence is hearsay. However, the District does not challenge the authenticity of the correspondence (N.T. 7-8), and it meets the state of mind exception to the hearsay rule. See Pa.R.E. 803(3); Commonwealth v. Marshall, 287 Pa. 512, 135 A. 301 (1926); Commonwealth v. Collins, 550 Pa. 46, 703 A.2d 418 (1997). Therefore, the correspondence is admitted into the record. Nevertheless, I find it unnecessary to rely on these documents, due to the parties' stipulation to the essential nature of the retirement process followed by the employe (see FF 16).

In addition, the retiring employee shall have the right to purchase the remaining insurance coverage(s) at their expense through a pre-payment plan established by the employer's designated representative. Such payment plan shall also apply to the co-payment of health insurance premiums enumerated above

The parties agree that the amount paid toward health insurance for retirees will be the difference between the amount of money paid by the Retirement System toward the retiree's health insurance benefits and the actual cost of said benefits. For example: 1996-97 – The District will pay the actual cost of the retiree's health benefits minus $55.00. Should the Retirement System change the amount of dollars contributed toward retiree's health insurance benefits, the dollar amount will be calculated in this formula. The clear intent of this language is to have fully paid health benefits for retirees.

(5) **ERI SCHEDULE**

| Years of PSERS Service at Time of Retirement | Incentive |
|---|---|
| 25 | 50% of Final Year's Salary |
| 26 | 50% of Final Year's Salary |
| 27 | 45% of Final Year's Salary |
| 28 | 45% of Final Year's Salary |
| 29 | 40% of Final Year's Salary |
| 30 | 40% of Final Year's Salary |
| 31 | 30% of Final Year's Salary |
| 32 | 30% of Final Year's Salary |
| 33 | 20% of Final Year's Salary |
| 34 | 20% of Final Year's Salary |
| 35 | 10% of Final Year's Salary |

The above listed amounts will paid to said employee by September 1st of the first school year after the retirement effective date . . . .

(6) **SPECIAL SEVERANCE INCENTIVE:** In lieu of the above Early Retirement Incentive the District will offer a special severance incentive. One Hundred Percent (100%) of the bargaining unit member's final year's salary will be paid to an employee who leaves the District during the following times:

a. After the bargaining unit member reaches twenty (20) years of PSERS service.

b. Not later than August 31 after the bargaining unit member reaches fifty-five (55) years of age.

If an employee receives this incentive, the benefits in Section 6 above will not apply. Employees must notify the District of their intent to take this incentive no later than May 1st.

Any bargaining unit member who reached this criteria before the signing date of this contract will be eligible to receive this incentive if they leave the District by January 1, 1997 as long as they are not over the age of fifty-seven (57) by that date. Notification to the District will have to be made for this group of employees by October 1, 1996.

Payment of this incentive will be made to the employee by September 1 of the year following severance.

(7) The Special Severance Incentive outlined in Paragraph (6) above becomes effective with the signing of this Agreement and is not retroactive. The regular Early Retirement Incentive outlined in Paragraph (6) is retroactive to the effective date of this Agreement.

(8) At the request of the retiree payment of the Special Severance Incentive or payment of the regular Early Retirement Incentive may be made over a three (3) year period with one-third (1/3) of the payment being made each year beginning with the September following severance."

(N.T. 6; Joint Exhibit 1).

4. Article XIV, Section 3 of the 1994-2002 CBA stated that "[i]f any provision of this Agreement or any application of this Agreement to any employee or group of employees is held to be contrary to law, then such provision or application shall not be deemed valid and subsisting except to the extent permitted by law and all other provisions or applications shall continue in full force and effect." (N.T. 6; Joint Exhibit 1)

5. The parties stipulated and agreed that at the time of the events at issue, they were working under the terms of the 1994-2002 CBA. (N.T. 6)

6. 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. (N.T. 6-7; Joint Exhibit 2)

7. 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. (N.T. 6-7; Joint Exhibit 2)

8. By memo dated April 15, 2005, the District advised Hoyt as follows:

"The District's records indicate that you have applied to retire this school year or thereafter or that you are eligible to retire this school year or thereafter.

The collective bargaining agreement between the District and the Education Association which expired in 2002 includes a provision for health insurance on retirement paid partly by the District and partly by the retiree using PSERS reimbursements. This provision cannot be enforced prospectively by the District in light of the holdings that such a provision is contrary to law by the Federal Courts in Pennsylvania in Erie County Retirees Association v. County of Erie, 220 F.2d 193 (3rd Cir. 2000) and AARP, et al. v. Equal Employment Opportunity Commission, 2005 WL 723991 (E.D.Pa.). If you are 55 [years] of age or less, you are notified that the SPECIAL SEVERANCE INCENTIVE set forth in Article XI of the contract which expired in 2002 has also been held to be contrary to law because it discriminates against employees over 55.

The contract which expired in 2002 provided 'If any provision of this Agreement or any application of this Agreement to any employee or group of employees is held to be contrary to law, then such provision or application shall not be deemed valid and subsisting except to the extent permitted by law and all other provisions or applications shall continue in full force and effect.'

The Education Association has been on notice of this issue for some time. The District has notified the Education Association of the most recent of these two decisions and has offered to bargain collectively and has bargained on the issues of health insurance on retirement and so-called retirement incentives. In the meantime, however, if you plan to retire this year or in the near future, if you want health insurance, you will have to make arrangements to either continue your health insurance benefits under COBRA or make other arrangements for health insurance benefits after retirement.

Please contact the Business Office if you have any questions about continuing your health insurance benefits under COBRA."

(N.T. 6-7; Joint Exhibit 2)

9. By letter dated June 9, 2005, Hoyt informed the District that he was rescinding his retirement because of the District's "failure to honor the terms and conditions of the Collective Bargaining Agreement between the Crestwood School District and the Crestwood Education Association . . ." Hoyt's letter further stated that "upon resolution of this issue in my favor, I intend to review my options with PSERS and may retire immediately." (N.T. 6-7; Joint Exhibit 2)

10. By memo dated June 29, 2005, the District advised Hoyt that it had approved his request to rescind his retirement. (N.T. 6-7; Joint Exhibit 2)

11. On September 27, 2005, the United States District Court for the Eastern District of Pennsylvania issued an opinion and order vacating the AARP decision referenced in the District's letter of April 15, 2005 (see FF 8). AARP v. Equal Employment Opportunity Commission, 390 F. Supp. 2d 437 (E.D.Pa. 2005).

12. In September or October 2005, the District reinstated the special severance incentive and health insurance benefits set forth in Article XI of the CBA. (N.T. 66-67)

13. By letter dated October 14, 2005, Hoyt informed the District of his intent to retire immediately, contingent upon his receipt of the special severance incentive and health insurance benefits provided in Article XI of the CBA. (N.T. 6-7; Joint Exhibit 2)

14. By letter dated October 21, 2005, the District advised Hoyt that it had approved his request for immediate retirement. (N.T. 6-7; Joint Exhibit 2)

15. Hoyt retired from District employment in October 2005 and subsequently received the special severance incentive from the District. (N.T. 18-19, 28-29)

16. The parties stipulated and agreed that 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, notified the District that she wished to rescind her retirement, and received confirmation that the District approved the rescission of her retirement. (N.T. 7-8)

17. Clare Myers retired from District employment in June 2005. Before her retirement, Myers was president of the Association. (N.T. 52-54)

18. Myers was one of the individuals who were affected by the District's rescission of the early retirement incentives set forth in Article XI of the CBA. She had to pay for her health insurance coverage for September and October 2005, but was subsequently reimbursed for these expenditures by the District. (N.T. 52-54, 59)

19. The District rescinded the special severance incentive and health insurance benefits provided in Article XI of the CBA without prior bargaining with, or agreement by, the Association. (N.T. 55, 59)

20. The District rescinded the special severance incentive and health insurance benefits set forth in Article XI of the CBA upon the advice of the District's attorney, Bruce Campbell. (N.T. 67-68)

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)

## DISCUSSION

The Association alleges that the District violated Section 1201(a)(1) and (5) of PERA by unilaterally rescinding early retirement incentives (health insurance and a special severance incentive) without prior bargaining with the Association. The District contends that the unfair practice charge must be dismissed because it had a sound arguable basis for its unilateral action.

The Board has determined that an early retirement incentive is a mandatory subject of bargaining. Scranton School District, 19 PPER ¶ 19097 (Proposed Decision and Order,

1988), 19 PPER ¶ 19173 (Final Order, 1988), aff'd, 20 PPER ¶ 20101 (Court of Common Pleas of Lackawanna County, 1989); Chichester School District, 16 PPER ¶ 16051 (Proposed Decision and Order, 1985). An employer's unilateral change in a mandatory subject of bargaining is an unfair practice, regardless of whether it occurs during the term of a collective bargaining agreement or following the expiration of such an agreement or during the course of negotiations for a successor agreement. Commonwealth v. PLRB (Venango County Board of Assistance), 459 A.2d 452 (Pa. Cmwlth. 1983). However, if the employer has a sound arguable basis for claiming that its unilateral action was authorized by the collective bargaining agreement, the Board will dismiss a refusal to bargain charge. Pennsylvania State Troopers Association v. PLRB, 761 A.2d 645 (Pa. Cmwlth. 2000).

Here the District unilaterally rescinded early retirement incentives provided in the CBA without prior bargaining with the Association (FF 3, 5, 8, 19).[3] Thus, unless the CBA provides the District with a sound arguable basis for taking such unilateral action, the District clearly committed an unfair practice.

The District contends that it had a sound arguable basis for unilaterally rescinding the early retirement incentives because Section 703 of PERA "makes clear that the parties to the collective bargaining process are prohibited from implementing a provision in a collective bargaining agreement if the implementation of that provision would be in violation of any statute" (District's brief at 5). The District contends that Article XIV, Section 3 of the CBA (see FF 4) "is in conformity with section 703." Id. According to the District:

> "A simple reading of the law –- the ADEA and AARP I –- at the time in question establishes that if [the District] provided superior benefits to fifty-five (55) years old workers than it was providing to older employees, [the District] would have violated the ADEA . . . Accordingly, Crestwood had much more than a 'sound arguable' basis for its actions, rather such actions were compelled by law . . . ."

Id. at 6-7.

The District's argument concerning Section 703 of PERA fails to account for the well-settled case law regarding employer attempts to repudiate contractual terms on grounds of illegality. As Commonwealth Court stated in rejecting a similar argument in Upper Chichester Township v. PLRB, 621 A.2d 1134 (Pa. Cmwlth. 1993):

> "[A] provision to which the township voluntarily agreed during the bargaining process cannot now be objected to by the township on the basis of its illegality. Fraternal Order of Police v. Hickey, 499 Pa. 194, 452 A.2d 1005 (1982).
>
> In Hickey, the City of Scranton and its police department disputed the validity of a clause first included in their collective bargaining agreement in 1973. The clause required the chief of police to be hired from the ranks of the Scranton police department. Scranton and the police continued to include the clause in their collective bargaining agreements through 1978 without challenging its legality. However, in 1978 a new mayor took office and appointed a chief of police from outside the police department. The FOP instituted mandamus proceedings to force compliance with the collective bargaining agreement.
>
> Scranton argued that it was illegal to bind future administrations by the terms of the 1973 agreement. However, the Pennsylvania Supreme Court held that Scranton's actions violated both the PLRA and Act 111. 'To permit a public employer to secure an advantage in the bargaining process by agreeing to a term and subsequently avoid compliance by belatedly asserting that term's illegality is . . . inimical to the integrity of the bargaining

[3] The District's brief suggests that the parties engaged in negotiations over the early retirement incentives after they were rescinded by the District. However, an employer may not take unilateral action in violation of its statutory duty to bargain and then claim satisfaction of that duty by forcing the employes' bargaining representative to negotiate out from under a fait accompli. North Schuylkill School District, 34 PPER 7 (Final Order, 2003), citing City of Easton, 20 PPER ¶ 20098 (Final Order, 1989) and Palmyra Area School District v. PLRB, 27 PPER ¶ 27032 (Court of Common Pleas of Lebanon County, 1995), affirming, 26 PPER ¶ 26087 (Final Order, 1995). Thus, the alleged negotiations after the District's unilateral action are not a defense to the charge.

process and undermines the harmonious relationship it was designed to foster.' Id. at 198, 452 A.2d at 1007."

Id. at 1135. Accord Grottenthaler v. Pennsylvania State Police, 488 Pa. 19, 410 A.2d 806 (1980). See also Pittsburgh Joint Collective Bargaining Committee v. City of Pittsburgh, 481 Pa. 66, 391 A.2d 1318 (1978)(same result under PERA).

In Pittsburgh Joint Collective Bargaining Committee, the employer similarly refused to comply with a provision of the collective bargaining agreement on the ground that the provision conflicted with another statute, and thus was invalid under Section 703 of PERA. However, the Supreme Court held that having gained the benefit of its bargain by agreeing to the various terms of the collective bargaining agreement, the employer was bound to comply with the disputed provision and must raise any claim of illegality in negotiations with its bargaining counterpart.

The same result must obtain here. Under Pittsburgh Joint Collective Bargaining Committee and the other cases cited above, the District may not refuse to comply with Article XI of the CBA on the ground that it is illegal, but rather must raise this concern during negotiations with the Association.

Article XIV, Section 3 of the CBA does not provide the District with a sound arguable basis for claiming that its unilateral action was contractually privileged. That section only addresses circumstances where a "provision of [the CBA] or . . . application of [the CBA] to any employee or group of employees is held to be contrary to law" (FF 4). Here the District neither sought nor obtained a court determination on the legality of the early retirement incentives in the CBA (FF 21). Rather, the District acted upon its attorney's opinion that the early retirement incentives were illegal (FF 20). Because the record contains no evidence that Article XI of the CBA was "held to be contrary to law," Article XIV, Section 3 does not provide the District with a sound arguable basis for refusing to comply with the provisions of Article XI.[4] Therefore, the District violated Section 1201(a)(1) and (5) of PERA by unilaterally rescinding the early retirement incentives set forth in the CBA.

At the hearing, the parties agreed to bifurcate the issue of whether the District committed an unfair practice from the issue of the appropriate remedy. However, upon review of the Board's case law, I find that it would not be appropriate to direct an additional hearing at this time on the issue of remedy. Rather, the Board's usual and customary remedy in a case where an employer takes unilateral action in derogation of its bargaining obligation is to issue an order directing the employer to make affected employes whole for any losses sustained as a result of the employer's unilateral action. See, e.g., Municipality of Murrysville, 34 PPER 167 (Proposed Decision and Order, 2003) and Franklin County, 34 PPER 121 (Proposed Decision and Order, 2003), citing Northeastern Educational Intermediate Unit, 18 PPER ¶ 18203 (Final Order, 1987) and PLRB v. North Hills School District, 8 PPER 208 (Court of Common Pleas of Allegheny County, 1977). Therefore, such an order will be issued in this case. Should a dispute arise concerning the District's compliance with the make whole relief directed to remedy the unfair practice, it will be litigated at the compliance stage of the proceeding, if necessary, following the Board's review of any exceptions to the examiner's proposed decision. Id. Thus, if any party intends to file exceptions to the examiner's decision, they must do so within twenty days of issuance of this order.

## CONCLUSIONS

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

1. The District is a public employer within the meaning of Section 301(1) of the Act.

2. The Association is an employe organization within the meaning of Section 301(3) of the Act.

3. The Board has jurisdiction over the parties hereto.

[4] Indeed, not only did the two cases cited in the District's letter of April 15, 2005 involve parties other than the District and the Association, but neither case involved a special severance incentive like the one at issue here.

4. The District has committed unfair practices in violation of 1201(a)(1) and (5) of PERA.

5. The District has not committed unfair practices in violation of Section 1201(a)(3) of PERA.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the District shall:

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

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

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

(a) Make employes whole for any losses caused by the District's unilateral rescission of the special severance incentive and health insurance benefits set forth in Article XI of the CBA, including payment of simple interest at the statutory rate of six percent per annum for any delay in payment of monies due affected employes;

(b) Post a copy of this decision and order within five (5) days from the 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.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed pursuant to 34 Pa. Code § 95.98(a) within twenty (20) days of the date hereof, this decision and order shall be and become absolute and final.

SIGNED, DATED and MAILED this tenth day of April, 2006.

PENNSYLVANIA LABOR RELATIONS BOARD

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PETER LASSI, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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| | : | |
| 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 employes whole for any losses caused by its unilateral rescission of the special severance incentive and health insurance benefits set forth in Article XI of the CBA, including payment of simple interest at the statutory rate of six percent per annum for any delay in payment of monies due affected employes; that it has posted the proposed decision and order as directed therein; and that it has served a copy of this affidavit on the 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

April 10, 2006

John G. Audi, Esquire
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CRESTWOOD SCHOOL DISTRICT
Case No. PERA-C-05-281-E

Enclosed is a copy of the proposed decision and order in the above-captioned matter.

Sincerely,

PETER LASSI
Hearing Examiner

Enclosure

cc: Crestwood School District