

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

BOYERTOWN BOROUGH POLICE DEPARTMENT :
:
v. : Case No. PF-C-06-175-E
:
BOYERTOWN BOROUGH :

FINAL ORDER

Boyertown Borough (Borough) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on September 20, 2007, challenging an August 31, 2007 Proposed Decision and Order (PDO). In the PDO, the Hearing Examiner concluded that the Borough violated Act 111 and Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA) when it required police officers to contribute to the pension plan for the year 2007. The Boyertown Borough Police Department (Union) filed a response to the Borough's exceptions on October 3, 2007. After a thorough review of the record, the Board makes the following

ADDITIONAL FINDINGS OF FACT

11. The collective bargaining agreement effective for 2004 and 2005 has no provision governing police officers' pensions or contributions to the pension plan. (Union Exhibit A).

12. On January 3, 2006, the Borough passed Resolution No. 01-03-06-A eliminating police officers' contributions to the pension plan for 2006, stating:

Pursuant to section 33-2.A of the Code, the Borough is authorized to eliminate the police officers' contributions to the Plan for calendar year 2006, and such contributions shall not be deducted from the Police Officers' compensation for the calendar year 2006.

(Respondent's Exhibit A).

DISCUSSION

The Findings of Fact (FF) are summarized herein as follows. The Borough has in place a police pension plan ordinance, which provides for funding of the plan, in relevant part as follows:

This plan is to be funded and maintained by any of the following methods, or a combination of each:

- A. Contributions by participants. All participants shall make contributions which shall be 5% of their total compensation but no more than 8% of their total compensation. Borough Council may, on an annual basis, by ordinance or resolution, reduce or eliminate contributions into the plan by participants. The Borough may, but need not, have an actuarial study performed prior to reducing or eliminating participants' contributions into the plan....
- B. State aid...
- C. Borough contributions....
- D. Gifts, grants, devises or bequests....
- E. Any other sums received or contributed to the Borough...

(FF 10).

In 2003, the Borough and the Union engaged in negotiations that resulted in the signing of a collective bargaining agreement for the years 2004 and 2005. (FF 3). The collective bargaining agreement itself did not address police officer pensions. (FF 11). However, as a result of the collective bargaining in 2003, on or about December 29, 2003, the Borough enacted Resolution No. 12-29-03A relating to pension contributions, which provided in part:

WHEREAS, the Borough and the Police Officers have collectively bargained over wages and benefits for the Police Officers for the calendar years 2004 and 2005; and

WHEREAS, as a result of such bargaining, the Borough has agreed to eliminate the Police Officers' contributions to the Plan for the calendar years 2004 and 2005.

(FF 4).

Starting in April 2005, the Union and the Borough began negotiations for a successor agreement. (FF 5). Pensions were not discussed during these negotiations. (FF 6). The parties reached an impasse and proceeded to interest arbitration. Pension issues were not presented to the arbitration panel.

During this hiatus between the 2004-2005 agreement and pending interest arbitration for 2006, the Borough enacted Resolution No. 01-03-06-A on January 3, 2006, eliminating police officers' contributions to the pension fund for the year 2006. (FF 12). Pension issues were not raised in these negotiations, and the January 3, 2006 Resolution made no reference to its being enacted as a result of collective bargaining with the Union. The January 3, 2006 resolution expressly recited that the Borough's authority to eliminate police officers' contributions to the pension fund under Act 600, is being exercised pursuant to the Borough's governing, 2003 pension ordinance. (FF 12).

Thereafter, an Act 111 interest arbitration award was issued for the contract period from January 1, 2006 to December 31, 2008. The award did not address police officers' pension contributions. The award did state that "[a]ll existing provisions in Act 111 Awards and collective bargaining agreements not modified by this Award shall remain as is." (FF 7).

After the issuance of the arbitration award, the Borough enacted Resolution No. 11-06-06 on November 6, 2006, which provided that

Pursuant to Section 33-2.A of the Code, the Borough shall require the Police Officers to make monthly contributions to the Plan at statutorily allowed rate of five percent (5%) of their monthly compensation for the calendar year 2007, such contributions to be deducted from the Police Officers' compensation on a weekly basis for the calendar year 2007.

(FF 8).

The Hearing Examiner recognized that pensions are a mandatory subject of bargaining under Section 1 of Act 111, and therefore concluded that the Borough violated its bargaining obligation under Section 6(1)(e) of the PLRA by implementing the November 6, 2006 Resolution providing for five percent employe contributions to the police pension fund. In sixteen separately enumerated exceptions,¹ the Borough essentially argues that the Hearing Examiner erred in finding that the 2004-2005 collective bargaining agreement addresses pensions, and therefore, consistent with the pension plan ordinance, the Borough was permitted to require a five percent contribution from the police officers. The Borough contends that the governing authority for the police officers' pension was the existing ordinance establishing the pension plan, and thus the Borough lawfully enacted the November 6, 2006 Resolution not to eliminate employe contributions, resulting in an employe contribution of five percent to the pension fund in accordance with the pension ordinance.

Initially we note that where there is a collective bargaining agreement expressly establishing an employe pension contribution rate, the employer may not alter that amount without bargaining. Wilkes-Barre Township v. PLRB, 878 A.2d 977 (Pa. Cmwlth. 2005). The Hearing Examiner found that the 2003 resolution eliminating police officers' contributions to the pension fund for 2004 and 2005 amounted to a written agreement with the Union for a zero percent employe contribution. Accordingly, the Hearing Examiner concluded that the 2006 interest arbitration award required maintaining the 2003 Borough resolution in effect.

¹ For purposes of this Final Order, we need not address each of the Borough's exceptions separately.

However, the 2006 interest arbitration award expressly retained only those provisions of *collective bargaining agreements* or *Act 111 interest awards* that were not modified by the 2006 award. While the Borough's December 29, 2003 Resolution eliminating employe contributions for 2004 and 2005 references the negotiations, it is not incorporated into the collective bargaining agreement or otherwise made a part of the contract.² The 2004-2005 collective bargaining agreement is silent on the issue of pensions and employe contributions. As the 2003 Resolution was expressly applicable only for 2004 and 2005, and was not expressly incorporated into any previous agreement or award, the 2006 interest arbitration award did not mandate its prospective application for 2006 and beyond.

The Borough relies on Plainfield Township Policemen's Association v. PLRB, 695 A.2d 984 (Pa. Cmwlth. 1997) to argue that in the absence of express language in a collective bargaining agreement covering pensions, an employer is free to unilaterally modify employe pension benefits. However, Plainfield Township involved the employer's ability to bring unlawful provisions of its pension plan into compliance with Act 600 where no contrary provisions existed in a collective bargaining agreement. To the extent the Borough's exceptions suggest that pensions are not a mandatory subject of bargaining, they are expressly refuted by Section 1 of Act 111, and are denied.

This case, however, does not involve changes to the underlying governing pension plan ordinance,³ but rather concerns the November 6, 2006 Resolution applying the terms of that ordinance to set employe contributions for 2007. As such, we find this case to be legally indistinguishable from Montgomery Township Police Officers v. Montgomery Township, 37 PPER 140 (Final Order, 2006). In Montgomery Township, as here, the employer had a governing pension plan document, which in all material respects mirrored Act 600, and required a five percent employe contribution to the pension fund in the absence of a resolution reducing or eliminating employe contributions in any given year. In accordance with that plan document, from 2001 through 2005 Montgomery Township issued ordinances eliminating employe contributions to the pension plan. However, for 2006 the township advised employes that there would be no elimination of employe contributions, and that employes would be required to contribute five percent of their salary consistent with its pension plan document.

Similarly here, the Borough had in place a governing pension plan ordinance that likewise mirrored Act 600. In 2003, the Borough passed a resolution eliminating employe contributions for 2004 and 2005. In January 2006, the Borough passed a resolution eliminating employe contributions for calendar year 2006. In November 2006, the Borough passed a separate resolution not to eliminate employe contributions for calendar year 2007. All of these resolutions were passed in accordance with the governing pension plan ordinance. Just as in Montgomery Township, not eliminating employe pension contributions in any given year resulted in a mandatory five percent employe contribution, as was called for under the pension plan ordinance.

In finding no unfair labor practice in Montgomery Township, the Board stated

The essence of the Union's exceptions is that merely because circumstances have been that police officers have not contributed to the pension fund since 2001, the officers may not be required to pay into the fund for 2006. The Union's argument misses the

² The Borough's 2003 Resolution is a free-standing arrangement, whereby pursuant to the governing pension ordinance, it would eliminate employe contributions to the pension fund for 2004 and 2005, an arrangement which the Borough fulfilled.

³ Indeed, the Borough's governing pension plan ordinance mirrors Act 600 in all material respects regarding employe contributions. Like Section 33.2 of the Borough's pension ordinance (FF 10), Act 600 provides in relevant part that:

(a) Members shall pay into the fund, monthly, an amount equal to not less than five per centum nor more than eight per centum of monthly compensation....

(b) The remainder of the needed annual contributions, as determined by the actuary, shall become the obligation of the borough, town, township or regional police department, and shall be paid by it to the pension fund by annual appropriations.

(c) The governing body of the borough, town, township or regional police department may, on an annual basis, by ordinance or resolution, reduce or eliminate payments into the fund by members.

mark in regard to the practice involved in this case. The practice at issue is not a zero contribution as alleged by the Union, but it is how the employe contribution rate is set from year to year. The Township pension plan document expresses that the Township, on review of an actuarial study, will decide annually whether to reduce or eliminate employe contributions to the pension fund for that year. Simply because for five years the Township had come to the conclusion that no employe contribution was needed for those years, does not establish a practice of no future contribution, but instead evidences furtherance of the practice of deciding whether to eliminate contributions on review of an actuarial study, a practice followed since 1999, and for 2006.

Montgomery Township, 37 PPER at 437.

The Board recognized in Montgomery Township that where the employes' pension contribution rate in any given year is arrived at through application of the governing pension plan ordinance, it cannot be said that there has been a change to the manner in which contributions are determined and established. Where pensions are not addressed in a collective bargaining agreement or interest arbitration award, the Board may find a bargaining violation if there is a unilateral change to the manner in which employe contributions are determined or established under the governing pension plan document. However, absent a change to the governing pension plan ordinance, a resolution establishing employe contributions in accordance with the pension ordinance is not an unlawful unilateral change to a mandatory subject of bargaining.

Here, no collective bargaining agreement or interest arbitration award addressed the police officers' pensions. Since at least 2003, the governing pension plan ordinance mirrored Act 600 to provide that in the absence of a resolution reducing police officers' pension contributions for a specified year, police officers shall contribute five to eight percent into the pension fund. The November 6, 2006 Resolution advising that there would be no reduction to police officers' pension contributions for 2007 and requiring officers to pay five percent into the pension plan, is a straightforward application of the governing pension ordinance, and does not amount to an unlawful unilateral change to pensions for purposes of Act 111 and the PLRA. Montgomery Township, supra. Accordingly, after a thorough review of the exceptions and all matters of record, the Board shall sustain the Borough's exceptions, and dismiss the Union's charge of unfair labor practices.

CONCLUSIONS

CONCLUSIONS 1 through 3 of the Proposed Decision and Order are affirmed and incorporated herein by reference.

CONCLUSION 4 is vacated and set aside.

5. The Borough has not committed unfair labor practices under Section 6(1)(a) and (e) of the PLRA.

ORDER

In view of the foregoing and in order to effectuate the policies of Act 111 and the Pennsylvania Labor Relations Act, the Board

HEREBY ORDERS AND DIRECTS

That the exceptions filed by Boyertown Borough are hereby sustained, and the Order on page 5 of the PDO is vacated. It is further Ordered that the Charge of Unfair Labor Practices be and hereby is dismissed, and the Complaint issued thereon rescinded.

SEALED, DATED and MAILED pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, Anne E. Covey, Member, and James M. Darby, Member, this eighteenth day of December, 2007. 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.