

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

ELIZABETHTOWN POLICE OFFICERS ASSOCIATION :
:
v. : Case No. PF-C-07-50-E
:
ELIZABETHTOWN BOROUGH :

PROPOSED DECISION AND ORDER

On March 6, 2007, the Elizabethtown Police Officers Association (Association) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair labor practices alleging that Elizabethtown Borough (Borough) had violated sections 6(1)(a) and 6(1)(e) of the Pennsylvania Labor Relations Act (PLRA) as read in pari materia with Act 111 of 1968 (Act 111) by repudiating the officer in charge pay provision of an interest arbitration award as amended by a supplemental interest arbitration award. On April 20, 2007, 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 June 29, 2007, if conciliation did not resolve the charge by then. On May 16, 2007, the hearing examiner continued the hearing at the request of the Association and without objection by the Borough. On September 25, 2007, the hearing was held. Both parties were afforded a full opportunity to present evidence and to cross-examine witnesses. On November 5, 2007, each party filed a brief.

The hearing examiner, on the basis of the evidence presented by the parties at the hearing, makes the following:

FINDINGS OF FACT

1. The Borough employs police officers who are represented by the Association.
(N.T. 7; Joint Exhibit 1)

2. On August 24, 2005, an interest arbitration panel issued an award with a term "commencing January 1, 2004 through December 31, 2008." The award included an officer in charge pay provision as follows:

"8. Officer In Charge Pay

When an officer is assigned to perform the duties of a higher rank for a period of four (4) hours or longer, the member will receive compensation at the rate he/she would have received had he/she been promoted to that rank for the period of time in which he/she is performing the assigned duties."

(N.T. 7; Joint Exhibits 1-2)

3. The interest arbitration panel subsequently reconvened to resolve a grievance in which Officer Timothy Wheale alleged that the Borough was incorrectly interpreting the officer in charge pay provision to mean "that OIC pay would only be payable to officers with less than four (4) years service and at the top patrolman's pay rate." (N.T. 7; Joint Exhibits 1, 8, 13)

4. On November 28, 2006, the interest arbitration panel issued a supplemental interest arbitration award as follows:

"Provision 8. Officer in Charge, requires the Borough to compensate any patrol officer that is required to work as Officer in Charge an additional wage differential between his/her current wage rate and the wage rate of a Corporal, if the patrol officer works as the Officer in Charge for a period of four (4) hours or longer.

In the instant grievance, Officer Wheale is to be compensated as set forth above, for those times that he worked as Officer in Charge for a period of four (4) hours or longer."

(N.T. 7; Joint Exhibits 1, 8)

5. By email dated January 26, 2007, the Borough's chief of police (Jack F. Mentzer) wrote to the Association's president (Corporal Gordon J. Berlin) as follows:

"I have received direction from the Borough regarding the recently awarded grievance filed by Officer Wheale regarding OIC pay and how it will be applied to other officers in the E.P.O.A. The Borough will be paying officers who serve as OIC the appropriate pay difference between their pay and Corporal pay, effective from the date the Borough received the award notification, December 29, 2006.

I will be going back through the duty schedule and tallying the hours for individual officers from December 29, 2006 and forwarding that information to you in the near future. I ask that you have affected officers check those hours I provide you. If an officer agrees with those hours, have that officer contact me (electronic mail will suffice) stating so and I will forward the information to the Borough for processing of the retroactive pay. If officers disagree with my calculations, please have those officers contact me as soon as possible in an attempt to clear up any discrepancies. I will not forward individual information for processing of the retroactive pay until I hear from each affected officer in either case.

Please note that Officer Wheale's retroactive pay is being handled separately from the rest of the department due to his recently awarded grievance.

In the near future I will be providing direction to officers on how OIC pay requests will need to be submitted for pay. Additionally, I will be issuing a memorandum, to put into each officer's department manual, on the responsibilities associated with being an officer serving as OIC."

(N.T. 7, 24; Joint Exhibits 1, 9)

DISCUSSION

The Association has charged that the Borough committed unfair labor practices under sections 6(1)(a) and 6(1)(e) of the PLRA as read in pari materia with Act 111 by repudiating the officer in charge pay provision of an interest arbitration award as amended by a supplemental interest arbitration award. As set forth in the specification of charges, the Association avers that the Borough did so on January 26, 2007, when it notified the Association that it "would not make payment for Officer in Charge Pay retroactive to January 1, 2004, the effective date of the Interest Arbitration Award." In the Association's view, the supplemental interest arbitration award obligated the Borough to pay officer in charge pay to all eligible police officers retroactive to the effective date of the interest arbitration award--January 1, 2004. According to the Association, with the possible exception of one police officer (Officer Wheale), the Borough has not met its obligation in that regard.¹

The Borough contends that the charge should be dismissed for lack of proof. According to the Borough, it has a sound basis for arguing that the supplemental interest arbitration award only obligated it to pay officer in charge pay to Officer Wheale retroactive to January 1, 2004, so there is no basis for finding that it repudiated the officer in charge pay provision of the interest arbitration award as amended by the supplemental interest arbitration award.

An employer commits unfair labor practices under sections 6(1)(a) and 6(1)(e) if it repudiates a provision in an interest arbitration award. City of Chester, 22 PPER ¶ 22006 (Proposed Decision and Order 1990). As the court explained in Pennsylvania State Troopers Association v. PLRB, 761 A.2d 645 (Pa. Cmwlth. 2000), however:

"The [Board] has recognized 'contractual privilege' as an affirmative defense to a charge of unfair labor practices alleging a refusal to bargain in good faith. The

¹Officer Wheale testified that the Borough only paid him officer in charge pay retroactive to January 1, 2004, "to some degree" (N.T. 26). The Association acknowledged at the hearing, however, that the charge does not encompass any dispute the parties may have in that regard (N.T. 28). Thus, any dispute the parties may have in that regard is not before the Board and will not be addressed.

defense calls for the dismissal of such charges where the employer establishes a 'sound arguable basis' in the language of the parties' collective bargaining agreement, or other bargained-for agreement, for the claim that the [respondent]'s action was permissible under the agreement. See [Ellwood City Police Wage and Policy Unit v. Ellwood City Borough], 29 PPER ¶ 29213 (Final Order 1998), aff'd, 736 A.2d 707 (Pa. Cmwlth. 1999)]; Delaware County Lodge #27 of the Fraternal Order of Police on behalf of the Members of the Police Force of the Borough of Prospect Park v. Prospect Park Borough, 27 PPER [¶] 27222 (Final Order 1996); Jersey Shore Area Education Association v. Jersey Shore Area School District, 18 PPER [¶] 18117 (Final Order 1987)(quoting NCR Corp., 271 N.L.R.B. 1212 (1984) as saying that 'where an employer has a sound arguable basis for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract as he construes it, the [National Labor Relations Board] will not enter the dispute to serve the function of arbitrator in determining which party's interpretation is correct')."

761 A.2d at 651. The same analysis applies when the parties' dispute involves an interest arbitration award. City of Pittsburgh, 24 PPER ¶ 24111 (Final Order 1993); City of Wilkes-Barre, 31 PPER ¶ 31135 (Proposed Decision and Order 2000).

As set forth in finding of fact 2, the record shows that effective January 1, 2004, an interest arbitration panel issued an award that included an officer in charge pay provision. As set forth in finding of fact 3, the record shows that the panel subsequently reconvened to resolve a grievance in which Officer Wheale alleged that the Borough was incorrectly interpreting the officer in charge pay provision to mean "that OIC pay would only be payable to officers with less than four (4) years service and at the top patrolman's pay rate." As set forth in finding of fact 4, the record shows that the panel issued a supplemental interest arbitration award generally providing that the Borough is required to pay officer in charge pay "at the wage rate of a corporal" and specifically providing that "[i]n the instant grievance, Officer Wheale is to be compensated as set forth above, for those times that he worked as Officer in Charge for a period of four (4) hours or longer." As set forth in finding of fact 5, the record shows that the Borough thereafter notified the Association that with the exception of Officer Wheale it would pay officer in charge pay to eligible police officers at the corporal's wage rate "effective from the date the Borough received the award notification, December 29, 2006."

A close review of the supplemental interest arbitration award shows that it is silent as to its effective date and only mentions Officer Wheale by name. Thus, it is apparent that the Borough has a sound basis for arguing that the supplemental interest arbitration award only obligated it to pay officer in charge pay to Officer Wheale retroactive to January 1, 2004. See City of Pittsburgh, supra (where an interest arbitration award did not expressly modify the recognition clause in a collective bargaining agreement to include police recruits, the employer had a sound basis for arguing that it was under no obligation to pay them under the award). It also is apparent that the Borough's notification to the Association that with the exception of Officer Wheale it would only pay officer in charge pay to eligible police officers at the corporal's wage rate "effective from the date the Borough received the award notification, December 29, 2006," was in accordance with its construction of the supplemental arbitration award.

Under the analysis set forth in Pennsylvania State Troopers Association, supra, when an employer has a sound basis for ascribing a particular meaning to the provisions of an interest arbitration award and has acted in accordance with its construction of those provisions as here, there is no basis for finding that the employer repudiated the provisions of the award. In such a case, the only relief available to the other party to the award is in arbitration. Accordingly, the charge must be dismissed. Compare City of Chester, supra (where an interest arbitration award expressly provided for the payment of overtime if an off duty police officer attended a district justice hearing, the employer repudiated its provisions by not paying them overtime for attending such hearings).

The Association contends that the Borough has no basis for arguing that the supplemental interest arbitration award only obligated it to pay officer in charge pay to Officer Wheale retroactive to January 1, 2004. As set forth in its brief at 5, the

Association submits that any such interpretation of the supplemental interest arbitration award is "tortured" because it (1) "ignores the fact the Wheale grievance is to be resolved 'as set forth above' consistent with terms of Supplemental Interest Arbitration Award" and (2) "ignores the fact the OIC pay benefit became effective January 1, 2004." As noted above, however, the supplemental interest arbitration award only mentions Officer Wheale by name and is silent as to its effective date, so the Association's contention finds no support in the record. Compare City of Wilkes-Barre, supra (where an interest arbitration award expressly provided that an employer "may not change the existing work schedule as it pertains to rotating shifts," the employer had no sound basis for arguing that its change to existing work schedules in that regard was contractually privileged).

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 as read in pari materia with Act 111.
2. The Association is a labor organization under section 3(f) of the PLRA as read in pari materia with Act 111.
3. The Board has jurisdiction over the parties.
4. The Borough has not committed unfair labor practices under sections 6(1)(a) and 6(1)(a) of the PLRA as read in pari materia with Act 111.

ORDER

In view of the foregoing and in order to effectuate the policies of the PLRA as read in pari materia with Act 111, 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 twenty-eighth day of November 2007.

PENNSYLVANIA LABOR RELATIONS BOARD

Donald A. Wallace, Hearing Examiner

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November 28, 2007

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ELIZABETHTOWN BOROUGH
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Enclosed is a copy of my proposed decision and order.

Sincerely,

DONALD A. WALLACE
Hearing Examiner

Enclosure

cc: Elizabethtown Borough