

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

INTERNATIONAL ASSOCIATION OF :
FIREFIGHTERS, LOCAL 302 :
 :
v. : Case No. PF-C-07-94-E
 :
CITY OF ALLENTOWN :

PROPOSED DECISION AND ORDER

On June 8, 2007, the International Association of Firefighters, Local 302 (Union) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) alleging that the City of Allentown (City) violated Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA) and Act 111, by failing to comply with the grievance procedure set forth in the parties' collective bargaining agreement (CBA).

On July 3, 2007, the Secretary of the Board issued a complaint and notice of hearing directing a July 18, 2007 hearing in Allentown, Pennsylvania. During the July 18th hearing, both parties in interest were afforded a full opportunity to present viva voce and documentary evidence and cross-examine witnesses. Also, the parties agreed to factual stipulations. Both parties simultaneously filed post-hearing briefs.

The examiner, based upon all matters of record, makes the following findings of fact.

FINDINGS OF FACT

1. The City is a political subdivision under Act 111 as read in pari materia with the PLRA. (N.T. 7).
2. The Union is a labor organization under Act 111 as read in pari materia with the PLRA. (N.T. 7).
3. On April 23, 2007, Union President Lieutenant John S. Stribula filed grievance number 302-07-35 (Grievance) alleging that the City's Fire Department Administration violated the CBA by making a temporary assignment to duty across shift lines when it assigned Fire Marshal Bob Kudlak to the vacant position of Captain of Public Affairs. (N.T. 13-16; Joint Exhibit 2).
4. On May 18, 2007, after processing the Grievance through the first two steps of the contractual grievance procedure, the City scheduled a third-step grievance hearing for May 24, 2007 pursuant to Article 19 Section (B) of the grievance procedure. A hearing was held for the Grievance on May 24, 2007 (Grievance hearing). (N.T. 16-17, 19, 51; Joint Exhibits 1-3).
5. Article 19, Section (B) of the CBA provides the following:
 - (B) Within fifteen (15) days (exclusive of Saturdays, Sundays, and holidays) after receipt of written appeal, the Director of Finance and Human Resources shall schedule and hold a closed hearing. At this hearing, the Director of Finance and Human Resources or designee shall consider the presentation from the UNION, the grievant, and the CITY representatives. At any time prior to the requested hearing, the Director of Finance and Human Resources or Designee may undertake such investigations as necessary and shall be empowered to sustain or offer a settlement to resolve the grievance. Within twenty (20) work days of the conclusion of the hearing(exclusive of Saturdays, Sundays, and holidays), the Director/designee shall render a written decision to both parties.

(Joint Exhibit 1; Article 19, Section (B) at 24).

5. The Designee of the Director of Finance and Human Resources for the Grievance Hearing was Dwayne Tolson (Hearing Officer or Mr. Tolson) who holds the position of budget analyst for the City. (N.T. 21, 89, 91).

6. The CBA does not explicitly outline minimum hearing requirements and obligations. The established past practice of the parties in conducting third-step grievance hearings reveals that the formality of the third-step grievance hearings varies. The practice has been to permit the grieving party to present its case first followed by an opportunity for the responding party to advance its position. The past practice also has been that the City is not required to and does not always make available representatives/witnesses to answer Union questions at the hearing. The CBA grievance procedure also does not require the City to produce witnesses at a third-step grievance hearing. At those hearings where the City makes a representative available, the Union questions those representatives 50%-75% of those times and is permitted to cross-examine and offer rebuttal. Sometimes the hearing becomes a conversation between the parties. (N.T. 21, 31-32, 42, 76-77, 80, 90-91, 95-96; Joint Exhibit 1).

7. During the Grievance Hearing, the Union presented its case followed by the City's presentation of its case, consistent with past practice. City representatives were available to the Union and subject to examination by Union President Stribula. The parties' representatives did not testify under oath or affirmation. (N.T. 25, 91, 100).

9. During the Union's questioning of City officials at the Grievance Hearing, the parties became hostile toward each other. The City's Labor Relations Manager, James Maley, objected to the Union's hostile questioning, but the Hearing Officer overruled the objection and requested that the parties continue. City officials continued to answer questions. (N.T. 67, 70, 80-82, 101, 103).

10. Both sides had finished presenting their case on the substance of the Grievance when Lieutenant Stribula began questioning Chief Lindenmuth about training issues. At that time, the Chief deferred to Deputy Chief Robert Scheirer. Deputy Chief Scheirer answered questions and provided information regarding training and education for promotional temporary assignments to duty. At this point, both sides were yelling at one another and Mr. Maley proclaimed that the City was not answering anymore questions. Perceiving a stalemate that was not producing results, Hearing Officer Tolson concluded the Grievance Hearing and thanked everyone for their participation, at which time some City representatives began leaving. (N.T. 26-28, 59, 67, 70, 77-78, 81-82, 88, 97-98, 101-103).

11. Hearing Officer Tolson was satisfied that he heard enough information from both parties to issue a decision on the Grievance. Mr. Tolson did in fact subsequently issue an undated decision. (N.T. 30, 78, 91, 93; Complainant Exhibit 1).

DISCUSSION

In its specification of charges, the Union alleges that the City engaged in unfair labor practices in violation of Section 6(1)(a) and (e) by repudiating the parties' CBA when "management personnel refused to respond to inquiries from the Complainant" during the Grievance Hearing.¹ In its post-hearing brief, the Union specifically argues that the City's unilateral determination that it would no longer answer questions during the Grievance Hearing constitutes an unfair labor practice. The Union maintains that, by that conduct, "the City unilaterally changed the terms and conditions of employment: the third step hearing process set forth in the grievance procedure which allows for examination of each side['s] witnesses, subject to the Hearing Officer's rulings." (Union's post-hearing brief at 12). The City, however, raises two affirmative defenses. The City first contends that the charge should be dismissed because City management possessed a sound arguable basis for believing that its conduct was within the terms of the grievance procedure set forth in the parties' CBA. The City also argues that the charge should be dismissed under

¹ The Union also alleges that the City violated its bargaining obligations under the CBA by refusing to produce a requested witness at the Grievance Hearing. In its post-hearing brief, the Union abandoned that claim and, indeed, the record establishes that the witness request related to another grievance that is not at issue in this charge. Accordingly, the charge is dismissed as it relates to the witness request.

the forfeiture provisions of Section 10.1 of the PLRA, which requires the Board to dismiss an unfair labor practice charge where the complainant engaged in conduct that constitutes an unfair labor practice under Section 6 of the statute and arises from the same set of circumstances as the charge.

The Commonwealth Court, in Wilkes-Barre Township v. PLRB, 878 A.2d 977 (Pa. Cmwlth. 2005), reiterated that "the Board `exists to remedy violations of statute, i.e., unfair labor practices, and not violations of contract.'" Id. at 982 (citation omitted). "Where a breach of contract is alleged, it should be resolved by an arbitrator using the grievance procedure set forth in the parties' collective bargaining agreement." Id. "However, the Board is empowered to review an agreement to determine whether the employer clearly has repudiated its provisions because such a repudiation may constitute both an unfair labor practice and a grievance." Id. (emphasis added). The Board, therefore may not interpret contracts to determine whether an employer violated the parties' agreement. Although the Board possesses statutory authority to enforce the parties bargaining obligations and thereby remedy an employer's repudiation of a contractual grievance provision, Moshannon Valley Sch. Dist. v. PLRB, 597 A.2d 229 (Pa. Cmwlth. 1991), alloc. denied, 530 Pa. 662, 609 A.2d 170 (1992); Brandywine Heights Area Educ. Ass'n v. Brandywine Heights Area Sch. Dist., 36 PPER 97 (Final Order, 2004); Palmerton Area Educ. Support Personnel Ass'n v. Palmerton Area Sch. Dist., 33 PPER 33161, aff'd, 34 PPER 92 (Court of Common Pleas of Carbon County, 2003); Ambridge Area Educ. Ass'n v. Ambridge Area Sch. Dist., 28 PPER 28092 (Final Order, 1997), only where the contract is clear may the Board enforce its provisions. Wilkes-Barre, supra; Brandywine, supra. Understanding these clearly defined limitations, the Board long ago adopted the doctrine of contractual privilege, which is also known as the sound arguable basis doctrine, in Jersey Shore Area Educ. Ass'n v. Jersey Shore Area Sch. Dist., 18 PPER 18117 (Final Order, 1987). The Board's consistent application of the doctrine of contractual privilege has repeatedly received the imprimatur of the Commonwealth Court. Wiles-Barre, supra; Pennsylvania State Troopers Ass'n v. PLRB, 804 A.2d 1291 (Pa. Cmwlth. 2002); Pennsylvania State Troopers Ass'n v. PLRB, 761 A.2d 645 (Pa. Cmwlth. 2000).

In Fraternal Order of Transit Police v. Southeastern Pennsylvania Transportation Authority (SEPTA), 35 PPER 73 (Final Order, 2004), the Board aptly opined as follows:

In Jersey Shore Area Educ. Ass'n v. Jersey Shore Area Sch. Dist., 18 PPER 18117 (Final Order, 1987), the Board adopted the rule set forth in NCR Corp., 271 N.L.R.B. 1212, 117 L.R.R.M. 1062 (1984) and Vickers, Inc., 153 N.L.R.B. 561, 59 L.R.R.M./ 1516 (1965), "whereby a refusal to bargain charge will be dismissed if the employer establishes a sound arguable basis for the claim that its action was contractually privileged." Ellwood City Police Wage and Policy Unit v. Ellwood City Borough, 28 PPER 28200, at 433 (Final Order, 1997). The Commonwealth Court has sanctioned the Board's adoption and application of the affirmative defense of contractual privilege. Pennsylvania State Troopers Ass'n v. PLRB (PSTA I), 804 A.2d 1291 (Pa. Cmwlth. 2002); Pennsylvania State Troopers Ass'n v. PLRB (PSTA II), 761 A.2d 645 (Pa. Cmwlth. 2000). "The 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 employer's action was permissible under the agreement." PSTA II, 761 A.2d at 651. "An employer's interpretation need not necessarily be the correct interpretation in order to provide a valid defense, so long as there is a `sound arguable basis' for its interpretation and a `substantial claim of contractual privilege.'" Jersey Shore, 28 PPER at 340. In this regard, ***the Board "will not enter the dispute to serve the function of arbitrator in determining which party's interpretation is correct."*** Id. at 341 (quoting NCR Corp., 117 L.R.R.M. at 1063).

SEPTA, 35 PPER at 229 (emphasis added). Accordingly, an employer does not engage in unfair labor practices in violation of Section 6(1)(a) & (e) of the PLRA if it has a sound arguable basis for ascribing a particular meaning to the applicable contractual language AND if its actions are in accordance with that construction of the agreement. Pennsylvania State Troopers Ass'n, 761 A.2d at 651.

In this case, the specific provision at issue is the third step of the grievance procedure at Article, Section 19(B), which provides, in pertinent part, as follows:

[T]he Director of Finance and Human Resources shall schedule and hold a closed hearing. At this hearing, the Director of Finance and Human Resources or designee shall consider the presentation from the UNION, the grievant, and the CITY representatives. . . . Within twenty (20) work days of the conclusion of the hearing (exclusive of Saturdays, Sundays, and holidays), the Director/designee shall render a written decision to both parties.

(Joint Exhibit 1; Article 19, Section (B) at 24) (emphasis added). The Union argues that the term "hearing" as used in Article 19(B) obliges the City representatives to submit to cross-examination until the Union finishes its questioning. However, the Union concedes in its post-hearing brief that the hearing procedure is subject to the rulings of the Hearing Officer and that, if the Hearing Officer agreed with the City that questioning should be terminated, there would be no unfair labor practice. The substantial evidence of record supports the conclusion that the Hearing Officer did agree with and approve the City's position that questioning of City representatives should be terminated.²

During the Union's questioning of City Fire Department Administrators at the Grievance Hearing, the parties became hostile toward each other. Mr. Maley objected to Union's hostile questioning, but the Hearing Officer overruled the objection and requested that the parties continue. City officials continued to answer questions. Both sides had finished presenting their case on the substance of the Grievance when Lieutenant Stribula began questioning Chief Lindenmuth about training issues. At that time, the Chief deferred to Deputy Chief Robert Scheirer. Deputy Chief Scheirer answered questions and provided information regarding training and education for promotional temporary assignments to duty. At this point, both sides were yelling at one another and Mr. Maley proclaimed that the City representatives were not answering anymore questions. Perceiving a stalemate that was not producing results, Hearing Officer Tolson concluded the Grievance Hearing and thanked everyone for their participation, at which time some City representatives began leaving. (N.T. 26-28, 59, 67, 70, 77-78, 81-82, 88, 97, 101-103). Hearing Officer Tolson was satisfied that he heard enough information from both parties to issue a decision, which he subsequently issued in an undated document. (N.T. 30, 78, 91, 93; Complainant Exhibit 1). Mr. Tolson clearly agreed with the City that the questioning and the hearing should conclude, especially since the questioning, which changed direction to address training and education, became irrelevant to the processing of the Grievance.

Additionally, Hearing Officer Tolson had previously demonstrated his willingness to order the City representatives to continue answering questions, over the City's objection to hostile questions, when he determined that he wanted to hear more information. By refusing to order continued questioning when Mr. Maley proclaimed that City representatives were not answering any more questions, Mr. Tolson clearly was in agreement that questioning should end. Mr. Maley's decision remained subject to Mr. Tolson's approval or disapproval. Therefore, the ultimate decision to terminate questioning and conclude the Grievance Hearing was Mr. Tolson's, and the necessary factual predicate for the Union's charge is unsupported.

In support of its contractual privilege defense, the City contends that the CBA does not explicitly permit or require the production or examination of witnesses, but only the presentation of both parties' positions to the satisfaction and understanding of the Hearing Officer. (City's post-hearing brief at 7). The CBA requires a "hearing" before the Director of Finance and Human Resources or his/her designee who shall consider the "presentation" from the parties. Thus, the City argues that City representatives were arguably in compliance with the CBA when, after both parties presented their positions and the City answered all the Union's questions in good faith, the City sought to terminate the hearing amidst hostile questioning. (City's post-hearing brief at 8).

² There is a conflict in the record as to whether the City's Labor Relations Manager, James Maley, stated that only he, i.e., Mr. Maley, would not answer anymore questions or whether Mr. Maley spoke on behalf of all present City administrators. The examiner resolves this conflict in favor of the Union witnesses, Lieutenant Stribula and Firefighter Warnkessel, who credibly testified that Mr. Maley spoke for all present City administrators.

Both Union and City witnesses established past practices, which give meaning to the parties' understanding of the CBA. County of Allegheny v. Allegheny County Prison Employees Indep. Union, 476 Pa. 27, 381 A.2d 849 (1977). One past practice of the parties in conducting third-step grievance hearings has been to permit the grieving party to present its case first followed by an opportunity for the responding party to advance its position. Another past practice also has been that the City is not required to and does not always make available witnesses to answer Union questions at the hearing. At those hearings where the City makes a representative available, the Union questions those representatives only 50%-75% of those times. In fact, sometimes the hearing becomes a conversation between the parties.

The CBA does not explain the requirements of a "hearing" or a "presentation". However, the unambiguous minimum requirements of Article 19, Section (B) is that both parties have an opportunity to present their positions in some manner sufficient for the designated hearing officer to understand the issues and render a decision. Although past practice demonstrates that third-step grievance hearings vary in character with no requirement to present witnesses, the minimum obligations clearly required by Article 19, Section (B) are not satisfied if the City prematurely leaves the hearing with all of its representatives before the hearing officer has sufficient information to render a decision or prior to the Union completing its presentation, regardless of whether the City brings witnesses for questioning. Whether the City provides "witnesses" or not, the City does have an obligation to attend the "hearing" with at least one representative to present its case. To unilaterally and prematurely leave no City representative present would deprive the Union of its opportunity to fully participate in the grievance hearing process.

In Pittsburgh Joint Collective Bargaining Committee v. City of Pittsburgh, 481 Pa. 66, 74-75, 391 A.2d 1318, 1322-23 (1978), our Supreme Court placed paramount emphasis on the fundamental significance of honoring the expectations of the parties after those expectations have been raised and established through mutual understanding and course of conduct. The City may not determine the procedure by which it initiates and engages in the contractually required grievance process only to unilaterally renege, after it has raised the expectations of the Union that the City is proceeding in that manner, simply because it was not contractually required (or legally permitted) to proceed in that particular manner. Id. Therefore, if the City chooses to bring witnesses and present them for questioning, the City is not free to prematurely terminate the questioning before the Union completes the presentation of its case for the hearing officer simply because the City is not under an obligation to bring those witnesses in the first instance. The Union's presentation, once witnesses are made available and after questioning has ensued, becomes dependent on the witnesses for that particular hearing presentation. The Union's presentation symbiotically becomes a function of the manner in which that particular hearing is being conducted by the City. To conclude that the City had a sound arguable basis to terminate a third-step grievance hearing unilaterally and prematurely without the approval of the Hearing Officer would empower the City to prematurely terminate any third-step grievance hearing, before the hearing officer gained a complete understanding of the issues, simply because the City is not required to bring witnesses. Such an absurd result is not contemplated by the reasonable minimums provided by the CBA, especially since the City arguably brings a "witness" anytime it is represented at a third-step grievance hearing, i.e., every third-step hearing.

However, the City did not act unilaterally or prematurely, and it has a sound arguable basis that its actions at the Grievance Hearing complied with the requirements of the terms "hearing" and "presentation" as provided in Article 19, Section (B) of the CBA. Consequently, both parties received the benefit of the bargained for grievance procedure. The City had a sound arguable basis for disengaging from hostile Union questioning during the Grievance Hearing because Hearing Officer Tolson approved the ending of the Grievance Hearing after he determined that he heard sufficient information from both parties and after relevant questioning regarding the processing of the Grievance at issue was complete. Accordingly, the Union has not met its burden of establishing that the City failed to comply with the grievance procedure in the CBA, and therefore, the City has not violated Section (6)(1) (a) and (e) of the PLRA as read with Act 111. The examiner cautions that the conclusion reached herein is limited to the unique facts of record in this case. The operative facts here are that both parties finished presenting their case to the Hearing Officer who approved of the termination of

the Grievance Hearing only after he had obtained enough information from both parties. Had the City prematurely left the Grievance Hearing with all of its representatives without the Hearing Officer's assent, the result may have been different.

The City's second affirmative defense under Section 10.1 of the PLRA is simply without merit. Contrary to the City's position, it is not an unfair labor practice within the meaning of Section 6 of the PLRA to request attorney fees and delay damages, in the nature of \$25.00 for every day that the grievance remains unresolved, as part of a grievance remedy. Also, the City has provided no case authority that supports its position.

The City relies on Section 6(2)(b) of the PLRA, which prohibits a labor organization from seizing, holding or causing damage to an employer's property with the intent to compel the employer to accede to the union's demands. However, by demanding attorney fees and delay damages, the Union cannot be said to have seized, held or destroyed City property. Whether the Union receives the relief requested, or some part thereof, will be decided by an arbitrator in the lawful, peaceful process of arbitration. Indeed, an arbitrator may award none of the relief requested. Accordingly, the Union is not holding property for the purpose of coercion, in violation of Section 6(2)(b), by requesting attorney fees and delay damages in its grievance, anymore than a union requesting interest and backpay in a discharge grievance constitutes an unfair labor practice in violation of that Section. Section 6(2)(b) does not prohibit, or even contemplate, unreasonable remedy requests sought through a legitimate grievance procedure.

CONCLUSIONS

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

1. The Township is a political subdivision and public employer under PLRA and Act 111.
2. The Union is a labor organization under PLRA and Act 111.
3. The Board has jurisdiction over the parties hereto.
4. The City has not committed unfair labor practices within the meaning of Section 6(1)(a) and (e) 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 and Act 111, the hearing examiner

HEREBY ORDERS AND DIRECTS

That the charge is dismissed and the complaint is rescinded.

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 tenth day of September, 2007.

PENNSYLVANIA LABOR RELATIONS BOARD

Jack E. Marino, Hearing Examiner