

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

TEAMSTERS LOCAL 776 :
 :
 v. : Case No. PERA-C-04-642-E
 :
 RYE TOWNSHIP :

PROPOSED DECISION AND ORDER

On December 20, 2004, Teamsters Local Union No. 776 (Union) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair practices alleging that Rye Township (Township) violated sections 1201(a)(1) and 1201(a)(5) of the Public Employee Relations Act (Act) by unilaterally changing employe terms and conditions of employment when it refused to pay an injured employe (Martin Clouse) his full wages after he was injured. By letter dated February 15, 2005, the Secretary of the Board informed the Union that the Board was unable to process the charge as filed and that it had 20 days to amend the charge "to provide information which was the basis of any prior policy the Township may have followed with regard to payment of wages." On February 23, 2005, the Union filed an amended charge providing the information requested by the Secretary. On April 11, 2005, the Secretary issued a complaint and notice of hearing directing that a hearing be held on June 21, 2005, if conciliation did not resolve the charge by then. On June 20, 2005, the hearing examiner continued the hearing upon the request of both parties so they could explore a potential settlement of the charge.

By letter dated August 21, 2006, the Secretary informed the Union that the charge would be dismissed for lack of prosecution unless it requested permission to withdraw the charge or showed cause why further proceedings were warranted. On September 1, 2006, the Union informed the Secretary that the parties had been unable to reach a settlement and requested that the hearing be rescheduled. On September 5, 2006, the hearing examiner rescheduled the hearing to November 21, 2006.

The hearing was held as rescheduled. Both parties were afforded a full opportunity to present evidence and to cross-examine witnesses. On February 5, 2007, the Union filed a brief by U.S. Mail. On February 20, 2007, the Township filed a brief by U.S. Mail.

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. In April 2002, the Township's handbook for its non-uniformed employes provided at section D.2(d) as follows:

"Disability Compensation - The Township provides weekly disability income insurance for non-work related injuries or illnesses for full time employees. An employee who is unable to work due to an injury or illness and who is eligible for disability payments will be paid his full pay or salary.**

* Any employee who receives full salary during a time he is receiving work comp payments or disability payments shall turn over to the Township any payments or compensation paid to him from the work comp or disability carrier.

** For Disability payments only, any days (not dollar amounts) not eligible for disability payments shall be deducted from the employees sick leave."

(N.T. 35, 52, 58; Joint Exhibit 1)

2. Effective January 1, 2004, the Township had a disability income insurance policy with Trustmark Life Insurance Company (Trustmark) providing for weekly payments of \$250.00 for a maximum of 35 weeks for non-work related injuries. (N.T. 43-44; Township Exhibit 2)

3. On May 12, 2004, the Board certified the Union as the exclusive representative of a bargaining unit that includes members of the Township's road crew. (Case No. PERA-R-04-75-E)

4. On July 30, 2004, a member of the road crew (Mr. Clouse) suffered a non-work related injury. He was not able to return to work. (N.T. 12, 22-23, 62; Township Exhibit 3)

5. The Township provided Mr. Clouse with forms to file with Trustmark for disability payments. (N.T. 23, 29-30, 38-39, 59)

6. Mr. Clouse filed the forms with Trustmark and began receiving disability payments. He turned the disability payments over to the Township. (N.T. 13-14, 23-24, 39, 53)

7. On October 28, 2004, and thereafter the Township did not pay Mr. Clouse his full pay. (N.T. 14, 24, 27, 41; Township Exhibit 1)

8. In November 22, 2004, the Township's board of supervisors passed a resolution (No. 04-16) "correcting" section D.2(d) of the handbook to provide as follows:

"The Township provides weekly disability income insurance for non-work related injuries or illnesses for full-time employees.

An employee may choose to use his or her sick time and/or vacation time and receive their full salary while off on disability, provided the Township receives a signed physician's slip documenting the disability.

An employee who receives his or her full salary during a time he is receiving disability payments will only receive the difference between the base gross salary and the amount of the disability benefit received. The employee must provide a copy of the disability check received showing the dates of eligibility to the Township office prior to payroll processing.

After an employee has exhausted his or her accumulated sick and vacation days, the employee may, if permitted under the Township's group disability insurance plan, continue to receive disability payments from the Township's insurance carrier, but shall not receive any compensation directly from the Township."

(Joint Exhibit 2)

9. The Township did not bargain with the Union before it did not pay Mr. Clouse his full pay and before the board of supervisors passed the resolution. (N.T. 20)

10. Mr. Clouse received disability payments from Trustmark through the end of December 2004. (N.T. 14-15, 29, 60-62)

11. The Township did not provide Mr. Clouse with forms to file with Trustmark to continue his disability payments beyond December 2004. (N.T. 61)

DISCUSSION

The Union has charged that the Township committed unfair practices under sections 1201(a)(1) and 1201(a)(5) by unilaterally changing employe terms and conditions of employment when it refused to pay Mr. Clouse his full pay after he was injured. According to the Union, under the disability compensation policy as set forth in the Township's handbook for non-uniformed employes that was in effect at the time of his injury, Mr. Clouse was entitled to his full pay while injured. The Union submits that the Township was under an obligation to bargain before refusing to pay Mr. Clouse his full pay under the circumstances and that Mr. Clouse should be made whole for his loss of pay for as long as his injury kept and will keep him from working.¹

¹ In its brief, the Union also contends that the Township committed unfair practices by terminating Mr. Clouse because the Union filed the charge. A close review of the charge, however, reveals no allegation that the Township committed unfair practices by terminating Mr. Clouse because the Union filed the charge. The Board, of course, only has jurisdiction to find the unfair practices alleged in a charge, Commonwealth of Pennsylvania (Liquor Control Board), 22 PPER ¶ 22009 (Final Order 1991), citing PHRC v. United States Steel Corporation, 458 Pa. 559, 325 A.2d 910 (1974). Moreover, the record shows that the Township terminated Mr. Clouse on May 2, 2005 (N.T. 62), which is well after the Union filed the charge. Post-charge conduct may not form the sole basis for the finding of an unfair practice. Commonwealth of Pennsylvania, Pennsylvania State Police, 37 PPER 4 (Final Order 2006) (construing analogous provisions of the Pennsylvania Labor Relations Act), so there is no basis for finding that the Township committed unfair practices by terminating Mr. Clouse because the Union filed the charge in any event.

The Township contends that the charge should be dismissed for lack of proof that Mr. Clouse was ever entitled to his full pay while injured. The Township submits that it was under no obligation to bargain with the Union before refusing to pay Mr. Clouse his full pay under the circumstances. The Township also contends that even if it had been under an obligation to bargain with the Union before refusing to pay Mr. Clouse his full pay, there is no back pay liability on its part because any loss of pay he may have suffered is speculative. The Township further contends that the charge should be dismissed as moot because the parties have entered into a collective bargaining agreement covering disability compensation.

Turning first to the question of mootness, it is noted that the general rule is that a refusal to bargain charge is to be dismissed as moot if the parties enter into a collective bargaining agreement after the alleged refusal to bargain occurred. SEPTA, 37 PPER 119 (Final Order 2006). There is an exception to the general rule, however, where an employe's claim for back pay is still outstanding. As the Board explained in City of Philadelphia, 36 PPER 158 (Final Order 2005):

"Under Section 1302 of [the Act], which recognizes that the Board may issue a complaint to determine if the respondent 'has engaged in . . . any such unfair practice[,] it is within the discretion of the Board whether to adjudicate and remedy past violations of [the Act]. Fraternal Order of Police, Queen City Lodge #10 v. City of Allentown, 27 PPER ¶27250 (Final Order, 1996). In determining whether alleged past violations of bargaining obligations occurring during negotiations should be heard, the Board considers as paramount whether its involvement after a successor agreement has been reached, is appropriate under the facts of any particular case. In this regard, the Board distinguishes between those charges where the employes continue to suffer residual effects of an unlawful, unilateral change to wages, hours and working conditions, which are typically not moot, as opposed to those involving bargaining tactics which do not result in affirmative relief to the employes, but rather cease and desist orders, which are generally mooted by the parties' entry into a collective bargaining agreement. Hazleton Area Education Support Personnel Association v. Hazleton Area School District, 29 PPER ¶ 29180 (Final Order, 1998)."

Id. at 467-468 (footnote omitted). Mr. Clouse's claim for full pay is still outstanding. Thus, it is apparent that the exception to the general rule applies, and the charge is not moot even though the record shows that the parties have entered into a collective bargaining agreement covering disability compensation (Joint Exhibit 3).

Turning next to the merits of the charge, it is noted that an employer commits unfair practices under sections 1201(a)(1) and 1201(a)(5) if it unilaterally changes employe terms and condition of employment. Appeal of Cumberland Valley School District, 483 Pa. 134, 394 A.2d 946 (1978). Employe wages are among their terms and conditions of employment. Id. No such unfair practices may be found, however, if the terms and conditions of employment the employer allegedly changed never existed. Clarks Summit Borough, 29 PPER ¶ 29216 (Final Order 1998).

As set forth in finding of fact 1, the record shows that at the time of Mr. Clouse's injury the Township's handbook for non-uniformed employes provided that employes who suffered non-work related injuries were to be paid their full pay if they were not able to work and if they were eligible for disability payments, with the proviso that they were to turn over to the Township any disability payments they received. As set forth in findings of fact 4, 6, 7 and 8, the record also shows that the Township did not pay Mr. Clouse his full pay after he suffered a non-work related injury even though he was not able to work and was eligible for disability payments and that the Township subsequently "corrected" the handbook to provide that employes who suffered non-work related injuries were only to be paid their full pay if they had available sick and vacation time. As set forth in finding of fact 9, the record further shows that the Township did not bargain with the Union before it refused to pay Mr. Clouse his full pay and before it "corrected" the handbook.

On that record, it is apparent that the Township unilaterally changed employe terms and conditions of employment and thereby committed unfair practices in violation of sections 1201(a)(1) and 1201(a)(5) as charged. See Cumberland Valley School District, supra (employer violated sections 1201(a)(1) and 1201(a)(5) when it unilaterally terminated employe wages in the form of fringe benefits).

The Township contends that the charge should be dismissed for lack of proof that Mr. Clouse was ever entitled to his full pay while injured. According to the Township, the handbook in effect at the time of Mr. Clouse's injury inadvertently and erroneously referenced Heart and Lung Act benefits that only uniformed employes are entitled to and thus had no application to Mr. Clouse as a non-uniformed employe. In support of its contention, the Township points out that it used to have one employe handbook for its uniformed and non-uniformed employes (N.T. 35-36), that during the tenure of its Secretary (Daisey Lightner) no employe other than Mr. Clouse was ever injured (N.T. 39), that it only paid Mr. Clouse his full pay after he was injured for as long as he had available sick and vacation leave (N.T. 38-39) and that when Mr. Clouse claimed that he was entitled to his full pay after he exhausted his sick and vacation leave it "corrected" the handbook to provide that non-uniformed employes who suffer non-work related injuries as he did are not entitled to compensation from the Township unless they have available sick and vacation leave (N.T. 43-45; Joint Exhibit 2). In addition, the Township submits that the hearing examiner improperly sustained an objection by the Union to a question it asked of Ms. Lightner in an "attempt[] to introduce testimony regarding the intent of the handbook" (brief at 4 n. 4).

Notably, however, the record does not show that the handbook makes any reference to Heart and Lung Act benefits, much less an inadvertent or erroneous one; to the contrary, as set forth in finding of fact 1, the record shows that the handbook makes no reference to the Heart and Lung Act. Moreover, the lack of any such reference is hardly noteworthy. The record shows that the handbook relates to "non-work related injuries." Id. The Heart and Lung Act, of course, only applies in the case of a work related injury. 53 P.S. § 637. Thus, there is no basis for finding that the handbook inadvertently and erroneously referenced Heart and Lung Act benefits as the Township contends.

None of the facts cited by the Township in support of its contention provides any better basis for finding that the handbook inadvertently and erroneously referenced Heart and Lung Act benefits. Far from showing that the handbook inadvertently and erroneously referenced Heart and Lung Act benefits, the fact that that the Township used to have one employe handbook for its uniformed and non-uniformed employes shows at best that its uniformed and non-uniformed employes may have been subject to the same disability compensation policy for non-work related injuries in the past, while the fact that no employe other than Mr. Clouse was ever injured during Ms. Lightner's tenure as Secretary shows at best that the Township never had occasion to apply its disability compensation policy before Mr. Clouse was injured. The fact that the Township only paid him his full pay for as long as he had available sick and vacation leave and the fact that the Township "corrected" the handbook to provide that non-uniformed employes who suffer non-work related injuries are not entitled to compensation from the Township unless they have available sick and vacation leave are of no moment because, as set forth in finding of fact 1, the handbook in effect at the time of Mr. Clouse's injury does not show that Mr. Clouse was only entitled to his full pay while he had available sick and vacation leave. The question the Township asked of Ms. Lightner was to explain her understanding of the benefits available for a non-work related injury "in terms of the language" set forth in the handbook (N.T. 36). Id. As set forth in finding of fact 1, the record shows that the handbook expressly provides that "[a]n employe who is unable to work due to an injury or illness and who is eligible for disability payments will be paid his full pay or salary." Accordingly, the Union properly objected to the Township's question on the ground that "the document's clear on its face" (N.T. 36). See SSHE, 32 PPER ¶ 32080 (Final Order 2001)(a written document will speak for itself).

Turning finally to the question of remedy, it is noted that the Board may order make whole relief to remedy an employer's unfair practices. Appeal of Cumberland Valley School District, supra. It also is noted that the Board may order back pay as part of make whole relief, North Schuylkill School District, 36 PPER 1 (Final Order 2005), unless

the amount of any back pay lost is speculative. Upper Moreland Township School District, 31 PPER ¶ 31006 (Final Order 2000), aff'd, 33 PPER ¶ 33092 (Court of Common Pleas of Montgomery County 2002).

As set forth above, the record shows that at the time of Mr. Clouse's injury a non-uniformed employe who suffered a non-work related injury was entitled to their full pay for as long as they were unable to work and were eligible for disability payments, with the proviso that they were to turn over to the Township any disability payments they received. As set forth in finding of fact 2, the record also shows that under the Township's disability income insurance policy in effect at the time of Mr. Clouse's injury disability payments were available for a maximum of 35 weeks. As set forth in findings of fact 4, 6 and 10, the record further shows that after Mr. Clouse suffered a non-work related injury he was not able to return to work and was eligible for disability payments.

On that record, it is apparent that as the result of the Township's unfair practices Mr. Clouse lost his full pay for the 35-week period set forth in its disability insurance income policy. Thus, in order to be make Mr. Clouse whole, the Township must pay him 35 weeks full pay with interest at the statutory rate, subject to the return of any disability payments he received but did not turn over.

The Union's contention that Mr. Clouse should be made whole for his loss of pay for as long as his injury has kept and will keep him from working finds no support in the record. As noted above, the record shows that employes who suffered an injury as Mr. Clouse did were only eligible for disability payments for a maximum of 35 weeks. Thus, contrary to the Union's contention, there is no basis for ordering any relief for as long as his injury has kept and will keep him from working.

The Township's contention that there is no back pay liability on its part also finds no support in the record. In the Township's view, any loss of pay Mr. Clouse may have suffered is speculative because he never filed for disability benefits after December 2004, leaving his eligibility for disability payments beyond December 2004 open to question by his own making. There is no dispute, however, that Mr. Clouse was eligible for disability payments through December 2004, so the Township's back pay liability extends at least through then. Moreover, as set forth in findings of fact 2 and 11, the Township initially provided Mr. Clouse with the forms to file for disability payments yet did not do so after December 2004. Thus, any question about his eligibility for disability payments after December 2004 was of the Township's making, not his. Thus, the Township is liable for his loss of pay as set forth above.

CONCLUSIONS

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

1. The Township is a public employer under section 301(1) of the Act.
2. The Union is an employe organization under section 301(3) of the Act.
3. The Board has jurisdiction over the parties.
4. The Township has committed unfair practices under sections 1201(a)(1) and 1201(a)(5) of the Act.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the Township shall:

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

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 limited to the discussing of grievances with the exclusive representative.

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

(a) Pay Mr. Clouse 35 weeks full pay, subject to the return of any disability payments he received but did not turn over;

(b) Pay interest at the simple rate of six per cent per annum on the pay due Mr. Clouse from the date it was due to the date it was paid;

(c) 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

(d) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this 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 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 ninth day of March 2007.

PENNSYLVANIA LABOR RELATIONS BOARD

Donald A. Wallace, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

TEAMSTERS LOCAL 776 :
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AFFIDAVIT OF COMPLIANCE

The Township hereby certifies that it has ceased and desisted from its violations of sections 1201(a)(1) and 1201(a)(5) of the Act, that it has paid Mr. Clouse as directed, that it has posted the proposed decision and order as directed and that it has served an executed copy of this affidavit on the Union.

Signature/Date

Title

SWORN AND SUBSCRIBED TO before me
the day and year aforesaid.

Signature of Notary Public