

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE, :
LODGE NO. 5 :
 :
v. : Case No. PF-C-06-69-E
 :
CITY OF PHILADELPHIA :

PROPOSED DECISION AND ORDER

A charge of unfair labor practices was filed with the Pennsylvania Labor Relations Board (Board) by the Fraternal Order of Police, Lodge No. 5 (Union) on May 8, 2006, alleging that the City of Philadelphia (City) violated Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA) as read with Act 111.

On June 22, 2006, the Secretary of the Board issued a complaint and notice of hearing wherein a hearing was set for July 13, 2006, in Philadelphia, Pennsylvania. After a series of continuance requests the hearing was held on September 8, 2006, when both parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Both parties filed pre-hearing and post-hearing briefs.

The examiner, on the basis of the testimony and exhibits presented at the hearing and from all other matters and documents of record makes the following findings of fact.

FINDINGS OF FACT

1. The Union is a labor organization.
2. The City is a political subdivision of the Commonwealth of Pennsylvania.

3. The City and the Union are parties to a series of interest arbitration awards. An interest arbitration panel was convened in March of 2004, and issued its award on August 13, 2004, covering the period from July 1, 2004 through June 30, 2008. That award provided for a re-opener to address the amount of the City's contribution to the Union's Joint Health Benefits Program Trust for the period July 1, 2005 through June 30, 2007. Those monthly contributions to the Trust are how the City funds health care benefits for bargaining-unit, covered employes and eligible retirees. (Joint Exhibit 1, 2).

4. Pursuant to the re-opener provision, the parties conducted hearings before the arbitration panel in the spring of 2005, to establish the City's Trust contribution. On August 10, 2005 the panel issued its award. Dissatisfied with the panel's award, the City filed a petition to vacate the award in the Philadelphia Court of Common Pleas on September 9, 2005. On October 31, 2005 the Philadelphia Court of Common Pleas granted the City's petition to vacate the panel's award and remanded the matter to the panel with instructions that the panel include a detailed writing of all factors it considered in giving substantial weight to the City's Five Year Plan. (Joint Exhibit 3, 4).

5. On January 13, 2006 the arbitration panel issued its revised award, adding factual findings but keeping the same economic terms as in the August 10, 2005, award. The City again filed a petition to vacate with the Philadelphia Court of Common Pleas. By order dated April 17, 2006, the Common Pleas Court denied the City's petition to vacate the revised award. Dissatisfied with the Common Pleas Court's decision, on May 25, 2006, the City filed a notice of appeal to the Pennsylvania Commonwealth Court. (Joint Exhibit 5, 6, 7; City Exhibit 1, 2).

6. On January 26, 2007 the Commonwealth Court issued its opinion in City of Philadelphia v. FOP Lodge No. 5, 1040 C.D. 2006 (January 26, 2007), vacating the Court of Common Pleas order of April 17, 2006 and remanding the case to the Court of Common Pleas with instructions "to apply the proper standard of review articulated under PICA¹ in accordance with this opinion." (Slip Opinion at 14)

¹ Pennsylvania Intergovernmental Cooperation Authorities Act for Cities of the First Class, 53 P.S. § 12720.101 et seq. Specifically, Commonwealth Court required the Court of Common Pleas to apply the standard of review set forth in Section 209(k) of PICA, 53 P.S. § 12720.209(k).

7. Pursuant to the Commonwealth Court's remand, the Philadelphia Court of Common Pleas, in a memorandum and order dated February 6, 2007, again denied the City's motion to vacate the arbitration panel's revised award. The Common Pleas Court found that the panel had given substantial weight to the City's five-year plan and that there was substantial evidence to support the panel's determination. Dissatisfied with that result, the City again appealed the February 6, 2007, decision to Commonwealth Court. (City of Philadelphia v. FOP Lodge No. 5, No. 0961 (Feb. Term, February 8, 2007, Control No. 024960); Supplemental Brief of City of Philadelphia, filed March 5, 2007, p. 2)

DISCUSSION

The Union charges the City with violating Section 6(1)(a) and (e) of the PLRA as read with Act 111 because the City has not yet complied with the tenets of an interest arbitration award initially issued on August 10, 2005, but revised on January 13, 2006, pursuant to court order. The City parries this charge with the argument that it has appealed the award and therefore has an automatic supersedeas under the Pennsylvania Rules Of Appellate Procedure (Pa. R.A.P.). The City also argues that the underlying award is not "final and binding" and therefore is unenforceable.

The City's arguments, however, do not carry the day. A fair reading of the Appellate Rules and the applicable law leads to the conclusion that the City does not have an automatic supersedeas and is, therefore, ordered to comply with the award in its entirety. At the outset, unraveling the skein of procedural history for this award is helpful.

The interest arbitration award in question was originally issued pursuant to a re-opener clause in the parties' 2004-2008 interest arbitration award. This re-opener was specifically to deal with the City's contributions to health care for bargaining unit members. As set forth in the 2004-2008 interest award, a panel of arbitrators was reconvened in June of 2005, held hearings and issued its award on August 10, 2005. That award covered the period from July 1, 2005 to June 30, 2007.

Not happy with the panel's award, the City appealed to the Philadelphia Court of Common Pleas. Convinced that the City's objections had legal merit, the Common Pleas Court remanded the case to the panel for additional findings of fact legally necessary yet omitted from the original award. On January 13, 2006, the arbitration panel issued its revised award². This revised award, in order to comply with the Court's directions, contained an additional twenty-five pages of findings. Even so, the award still retained the same monetary contribution by the City to healthcare for the upcoming two years, as did the August 10th award.

The City then sought to vacate the revised award in the Philadelphia Court of Common Pleas. On April 17, 2006 the Court of Common Pleas denied the City's petition to vacate the revised award. The City then appealed that decision to Commonwealth Court.

On January 26, 2007 Commonwealth Court issued an opinion and order vacating the Common Pleas Court's order of April 17, 2006, and remanding the case for consideration on the merits, applying the standards of review set forth in the PICA legislation.

After reviewing the arbitration panel's revised award and the City's grounds for appeal, using the factors as directed by Commonwealth Court, the Court of Common Pleas, in an order dated February 6, 2007, again denied the City's petition to vacate the award. The City has since appealed this last Common Pleas defeat back to Commonwealth Court.

Based upon this procedural history, the City asserts it has an automatic supersedeas under the Rules of Appellate Procedure, and that the Board cannot order compliance with an order that is not "final and binding." A review of Board law and the Appellate Rules reveals why these arguments are fallacious.

² The impartial arbitrator signed the award on January 13, 2006. The Union's arbitrator signed the award on January 17, 2006. The City's arbitrator signed the award on January 18, 2006, and issued his dissenting opinion on January 30, 2006. The Union's arbitrator then issued a concurring opinion on February 3, 2006. (Joint Exhibit 5).

Pa. R.A.P. 1736 sets forth the grounds for an automatic supersedeas to issue and the Board has opined on its applicability in the grievance arbitration setting. As the Board explained in City of Philadelphia, 32 PPER ¶ 32102 (Order Directing Remand to Secretary for Further Proceedings, 2001):

"[I]n 1987 the Rules of Appellate Procedure were amended and the Amendment to Rule 1736 fundamentally altered the protections provided to employers . . . Pa.R.A.P. 1736 provides as follows:

(a) General Rule. No security shall be required of

[2] Any political subdivision . . . except in any case in which a common pleas court has affirmed an arbitration award in a grievance or similar personnel matter . . .

(b) Supersedeas Automatic. Unless otherwise ordered pursuant to this chapter the taking of an appeal by any party specified in Subdivision (a) of this rule shall operate as a supersedeas in favor of such party.

The note following the rule more fully explains the amendment:

The 1987 amendment eliminates the automatic supersedeas for political subdivisions on appeals from the common pleas court where that court has affirmed an arbitration award in a grievance or similar personnel matter.

Thus, once an arbitration award has been affirmed by a common pleas court, the award becomes enforceable. The aggrieved employer has been stripped of its ability to delay compliance with the award by seeking further redress in subsequent appeals. The Commonwealth Court explained that Pa.R.A.P. 1736(a)(2) 'expressly negates an automatic supersedeas for a political subdivision in an appeal from an arbitration award.' Commonwealth, Dep't of the Auditor General v. AFSCME, Council 13, 573 A.2d 233, 234 (Pa. Cmwlth. 1990). See also . . . Cheltenham Township Police Ass'n v. Cheltenham Township, 21 PPER ¶ 21026 (Final Order, 1989); City of Philadelphia, Office of Housing and Community Development v. AFSCME, Local 1971, 37 Pa. D. & C. 4th 116 (Philadelphia County Common Pleas, 1996); Crawford County v. AFSCME, Council 85, 27 PPER ¶ 27117 (Crawford County Common Pleas, 1996)(where arbitration award affirmed by common pleas, application for a stay denied; while appellate court could ultimately reverse arbitrator, no irreparable harm in requiring employer to comply with award)."

32 PPER at 267. See also Philadelphia OHCD, 34 PPER 15 (Proposed Decision and Order, 2003) (employer committed unfair practice by failing to comply with grievance arbitration award after it was affirmed by Common Pleas Court); Lebanon County, 37 PPER 25 (Proposed Decision and Order, 2006)(same); Milton Regional Sewer Authority, 37 PPER 143 (Proposed Decision and Order, 2006)(same); Bethel Park School District, PERA-C-06-528-E (Proposed Decision and Order, issued March 16, 2007)(same).

The rub here is that we're not dealing with a grievance arbitration award, but rather an interest arbitration award. The City posits that its appeal of the interest arbitration award does not involve an "arbitration award in a grievance or similar personnel matter." Pa.R.A.P. 1736(a)(2). Consequently, argues the City, it is entitled to an automatic supersedeas.

In support of that stance the City quotes the legal maxim, "expressio unius est exclusion alterius" which translates to the "expression of one thing is the exclusion of another."³ That adage, however, is not applicable to the issue at hand since Rule 1736 does mention something other than an appeal from a grievance arbitration award - namely, "or similar personnel matter...." The issue then becomes whether an interest arbitration award is anticipated under that general phraseology. Commonwealth Court's decision in

³ *Black's Law Dictionary* 692 (Revised Fourth Ed. 1968)

Snyder County Prison Board and County of Snyder v. PLRB, ___ A.2d ___, 37 PPER 160 (Pa. Cmwlth. 2006), gives some guidance in that regard.

In Snyder County, Commonwealth Court opined over the perimeters of an automatic supersedeas, and the exceptions thereto: "The exception to an automatic supersedeas is triggered by the affirmance of an *arbitration award*, which award may arise from a grievance or from a 'personnel matter' similar to a grievance." Id. at ___, 37 PPER at 498 (emphasis in original). Essentially then, the Commonwealth Court found that this rule means there is no automatic supersedeas when there is an affirmance of a grievance arbitration award or an affirmance of an arbitration award in a similar personnel matter. There are only two kinds of arbitration awards - grievance and interest awards. It logically flows that the "similar personnel matter" refers to interest arbitration awards - just what we have here. Therefore, there is no automatic supersedeas and the City must comply with the award.

The City also argues that the interest arbitration award is not "final and binding" and therefore, under the Board's own law, the City is insulated from forced compliance. The City cites to PLRB v. Commonwealth, 478 Pa. 582, 387 A.2d 475 (Pa. 1978). In that case our Supreme Court set forth the test to establish when an employer violated the Public Employe Relations Act (Act)⁴ by its failure to comply with an arbitration award. Under the criteria set forth, an employer violated the Act when there was an arbitration award for which the appeal process had been exhausted and yet the losing employer had not complied. Our Supreme Court penned this decision some nine years before the amendment to the Appellate Rules that created the exception to the automatic supersedeas in Rule 1736.

Nevertheless, the City, in referring to the standard set forth in PLRB v. Commonwealth, *supra*, asserts "this continues to be the standard today, applicable both to arbitration awards issued under [the Act] and those issued under Act 111, and applicable to both grievance and interest arbitration awards." (City post-hearing brief at 6-7). The City follows that with a series of seven case citations, all of which, according to the City, support its assertion that "the Board cannot find that the City committed an unfair labor practice by failing to implement the Award unless and until it finds that the appeal procedure available to the City with respect to the Award has been exhausted." (City post-hearing brief at 8).

Those cited cases, but for one, all involved situations where there was no appeal taken from the interest or grievance arbitration awards in question. The remaining case involved a pending appeal in the Court of Common Pleas, a situation where the Appellate Rules clearly grant an automatic supersedeas. Those cases, while instructive about the enforceability of non-appealed awards, cast little light on whether the Appellate Rules automatically protect the City from compliance with an interest arbitration award affirmed by the Court of Common Pleas that the City subsequently appealed to Commonwealth Court.

The Board, however, has opined on that "final and binding" issue insofar as it abuts the 1987 exception to an automatic supersedeas in the Appellate Rules, City of Philadelphia, *supra*, and concluded that "once an arbitration award has been affirmed by a common pleas court, the award becomes enforceable." 32 PPER at 266. The Board went on to say,

[t]o the extent that there may be any post-1987 Board final orders that withhold enforcement of affirmed arbitration awards pending a second level of appellate review in reliance on PLRB v. Commonwealth, *supra*, the Board will no longer adhere to them as precedent. To find otherwise would defeat the purpose of the change to Pa.R.A.P. 1736 and would occasion unwarranted delay in the timely enforcement of arbitration awards which remain on appeal under the narrow scope of judicial review of arbitration awards.

32 PPER at 267; see also City of Philadelphia, 29 PPER ¶ 29042 (Final Order, 1998)(1987 amendment to Rules of Appellate Procedure indicated employer's reliance on PLRB v. Commonwealth is misplaced).

⁴ The Act is a similar bargaining statute to the PLRA as read with Act 111, but covers non-uniformed public employes. 43 P.S. § 1101.101 to 1101.2301.

In City of Philadelphia, 29 PPER ¶ 29042 (Final Order 1998), the Board dealt with the issue of whether an appeal to Commonwealth Court from a Common Pleas affirmance of an interest arbitration award⁵ by the union afforded an automatic supersedeas to either party. In ruling that the union was not afforded an automatic supersedeas under the Appellate Rules, the Board went on to observe,

[f]urther, and perhaps of greater significance is the fact that even had the Employer, a political subdivision, appealed the [interest] arbitration award, Rule 1736(a) which generally provides for instances where supersedeas pending appeal is automatic contains a significant exception [in Pa.R.A.P. 1736(a)(2)]....

29 PPER at 96. The Board then went on to discuss the policy behind the decision:

The amendment [Pa.R.A.P. 1736(a)(2)] was added in 1987 to avoid the result urged by the Employer here, namely the pendency of an appeal from a public sector labor [interest] arbitration award being used to defeat the obligation to comply with an award which is designed to provide an expeditious resolution to public sector labor disputes."

29 PPER at 96. Insofar as the City argues the continued vitality of PLRB v. Commonwealth, *supra*, under the instant facts, it merely reinforces the observation of Justice Oliver Wendell Holmes, Jr. that "[l]awyers spend a great deal of their time shoveling smoke."

The City makes much ado about the fact that its appeal is grounded in the PICA legislation, as opposed to being grounded in either the PLRA or Act 111. While it is true that under case law PICA affords the City a separate ground for appeal of an interest arbitration award issued pursuant to the PLRA and Act 111, the Rules of Appellate Procedure still apply to that appeal.

The City argues that PICA was created to protect the City's financial stability; and therefore requiring the City to perform under an interest arbitration award the City is currently appealing would remove PICA's protections. That argument presupposes that the City's appeal has legal merit, that the City's performance under the award would indeed undercut its financial stability, that the award will be vacated and remanded, and that the panel will reach a different and lesser dollar amount as a result thereof. The City's argument is no different than any losing party's argument. And that argument is - we might be right.

The Rules of Appellate Procedure strip away the automatic supersedeas protections for the losing employer after an arbitration award is affirmed but once by a court of common pleas. Nevertheless, there have been two appeals and one remand to the Court of Common Pleas and two appeals to the Commonwealth Court that have resulted in one Commonwealth court opinion, two arbitration panel awards and three opinions by the Court of Common Pleas. Throughout that entire serpentine process, the dollar amounts assessed against the City by the arbitration panel have not once changed.

The fact that the City has new grounds (PICA) under which the award has already been reviewed by the Court of Common Pleas does not negate the fact that despite this plethora of appeals there has been no change in the amount of the panel's award against the City. The dénouement of the City's argument is that this arbitration award, despite its constant affirmation, cannot be enforced until every last appeal possible has been, not only taken, but also resolved. That inordinate delay in performance blatantly flies in the face of, not only the public policy behind collective bargaining, but also the language in the Rules of Appellate Procedure and applicable case law.

The City is found to have violated Section 6(1)(a) and (e) of the PLRA as read with Act 111. It is therefore ordered to comply immediately with the tenets of the interest arbitration panel's award of January 13, 2006.

CONCLUSIONS

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

⁵ The interest arbitration award appealed was pursuant to Section 805 of the Act, rather than pursuant to Act 111. Nevertheless, for our purposes they are treated alike. FOP, Lodge No.5 v. City of Philadelphia, 725 A.2d 206 at 209-210 (Pa. Cmwlth. 1999).

1. The City is an employer within the meaning of Section 3(c) of the PLRA as read with Act 111.

2. The Union is a labor organization within the meaning of Section 3(f) of the PLRA.

3. The Board has jurisdiction over the parties hereto.

4. The City has committed unfair labor practices within the meaning of Section 6(1)(a) and (e) of the PLRA as read 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 City shall:

1. Cease and desist from interfering with, restraining or coercing employes in the exercise of the rights guaranteed in the PLRA and Act 111.

2. Cease and desist from refusing to collectively bargain with the representatives of its employes.

3. Take the following affirmative action:

(a) Immediately tender to the Union those amounts required by the January 13, 2006 interest arbitration award, plus 6% *per annum* interest on that amount, calculated from January 13, 2006, until the Union is actually paid;⁶

(b) Immediately comply with all other requirements of the January 13, 2006, arbitration award not already complied with;

(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 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 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 thirtieth day of March, 2007.

PENNSYLVANIA LABOR RELATIONS BOARD

Timothy Tietze, Hearing Examiner

⁶ There is viva voce testimony that the City has already made an eight million dollar payment to the Union pursuant to this interest award. (N.T. 7, 8, 14). To the extent the City has already paid on the award's amount there need be no interest on that already paid amount.

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AFFIDAVIT OF COMPLIANCE

The City of Philadelphia hereby certifies that it has ceased and desisted from its violation of Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act and Act 111; that it has complied with all requirements of January 13, 2006, arbitration award including paying the Union all monies due plus 6% *per annum* interest on the amount due, from January 13, 2006, until the Union is actually paid; that it has posted a copy of the proposed decision and order as directed therein; and that it has served an executed copy of this affidavit on the Fraternal Order of Police, Lodge No. 5 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