COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

TEAMSTERS LOCAL 205	:	
	:	
v.	:	
	:	
BRENTWOOD BOROUGH, Respondent	:	Case No. PF-C-08-4-W
	:	
and	:	
	:	
MAYOR OF BRENTWOOD BOROUGH, Intervenor	:	

PROPOSED DECISION AND ORDER

On January 10, 2008, Teamsters Local 205(Union) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair labor practices, under the Pennsylvania Labor Relations Act (PLRA), as read in pari materia with Act 111, and therein alleged that that the Borough of Brentwood (Borough) violated Section 6(1)(a) and (e) of the PLRA by refusing to implement the scheduling provisions of an Act 111 interest arbitration award (Award) that was issued in December of 2007.

On May 19, 2008, the Mayor of the Borough of Brentwood, Kenneth Lockhart (Mayor), filed a Petition to Intervene (Petition) in the unfair labor practice proceedings and therein also requested that the unfair labor practice proceedings be continued indefinitely to await a decision in a declaratory judgment action filed in the Court of Common Pleas of Allegheny County (Court). The Borough filed a timely response to the Mayor's Petition in accordance with the established briefing schedule; the Union did not file a response. On July 1, 2008, after thoroughly reviewing the Petition and response thereto, I granted the Petition to Intervene but denied the Mayor's request to hold the matter in abeyance pending the disposition of the Mayor's complaint for declaratory judgment by the Court. Pursuant to that order, I rescheduled a hearing for September 17, 2008 at the Pittsburgh State Office Building in Pittsburgh, Pennsylvania. On that date, the parties arrived for a hearing, but the hearing was postponed after preliminary discussions revealed that the attorney for the Borough and the attorney for the Union may need to testify, thereby requiring additional counsel for those parties. By agreement of the parties, a hearing was rescheduled for October 22, 2008. During the hearing on that date, all parties in interest were afforded a full opportunity to present testimonial and documentary evidence and cross-examine witnesses. All three parties in interest chose to present oral argument on the record at the close of the hearing in lieu of submitting post-hearing briefs in writing.

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

FINDINGS OF FACT

1. The Borough Council and the Mayor are joint public employers and collectively constitute a political subdivision within the meaning of Act 111. (N.T. 11).

2. The Union is a labor organization within the meaning of Section 3(f) of the PLRA as read in pari materia with Act 111. (N.T. 11).

3. The parties' prior collective bargaining agreement expired on December 31, 2007. In anticipation of the expiration of that agreement, the Union requested bargaining in April, 2007. Negotiations during 2007 did not result in a new collective bargaining agreement. The Union requested interest arbitration and submitted to the Borough a list of disputed matters to place before a board of interest arbitrators. This submission included a detailed proposal regarding scheduling of police officers in the bargaining unit. (N.T. 63, 71; Union Exhibits 1 & 2).

4. On November 28, 2007, an Act 111 interest arbitration hearing was held. The hearing commenced approximately at 10:00 a.m. Both the Union and the Borough presented evidence to the arbitration panel. The arbitration panel consisted of Stephen Greenberg, Esquire, the partial arbitrator for the Union; George Gobel, Esquire, the partial arbitrator for the Borough; and Marc Winters, the neutral arbitrator. Mayor Lockhart was present at the hearing from the beginning and remained for the duration of the hearing until he left with his attorney. (N.T. 28-29, 36, 54, 58-59, 109, 181, 64, 128, 135, 210, 219-220; Borough Exhibits 1 & 4).

5. Michael Colarusso, Esquire is the attorney for Mayor Lockhart. All parties understood prior to the arbitration hearing that Mr. Colarusso would be late for the arbitration hearing due to a prior commitment. The parties agreed that all matters pertaining to scheduling would be deferred until Mr. Colarusso arrived approximately at noon. (N.T. 29, 31-32, 72, 109, 128, 205, 210; Borough Exhibit 1).

6. During the arbitration hearing, but prior to Mr. Colarusso's arrival, the Union presented testimony regarding non-scheduling issues only and submitted an exhibit that included copies of the Union's scheduling proposal. When the parties finished presenting their evidence on non-scheduling matters, those persons present stopped the hearing and awaited the arrival of Mr. Colarusso. The reason everyone waited for Mr. Colarusso's arrival was so that all parties could, at that time, present evidence regarding the scheduling. Testimony and discussions regarding scheduling did not occur until the arrival of Mr. Colarusso. (N.T. 37-38, 55, 64-65, 100, 101-102, 105-106, 110, 182, 205; Union Exhibit 1).

7. Upon arriving at the hearing, Mr. Colarusso asked Neutral Arbitrator Winters to be included as a fourth arbitrator on the panel of interest arbitrators for purposes of the scheduling matters only. Mr. Winters denied Mr. Colarusso's request. (N.T. 30-31, 59, 111, 122, 128, 184, 216-217).

8. Neutral Arbitrator Winters afforded Mr. Colarusso an opportunity to present testimonial and documentary evidence on behalf of the Mayor regarding the scheduling of police officers. At no time did Arbitrator Winters state or otherwise indicate that the scheduling dispute had been resolved or decided. This was acknowledged by the Mayor during the hearing. Mr. Winters informed Mr. Colarusso that he would give the same weight and consideration to the Mayor's evidence and arguments regarding the scheduling of police officers as he would to all other evidence and arguments submitted by the parties. (N.T. 66-67, 74-75 105-106, 118, 122-123, 137, 188).

9. Mr. Colarusso declined Mr. Winter's offer to present evidence and argument regarding the scheduling of police officers because he was not permitted to act as a fourth arbitrator for the scheduling issues. The Mayor and his attorney, Mr. Colarusso, left without presenting any evidence and without listening to the subsequently presented testimonial evidence presented by the Union regarding scheduling. (N.T. 56, 74, 105-106, 111-112, 122-123, 129, 136, 185, 217-218, 246, 249-250).

10. After waiting for the Mayor's attorney to arrive to recommence the hearing and present evidence to the arbitration panel regarding scheduling, the Union finished presenting its case to the arbitration panel after the Mayor and Mr. Colarusso departed the hearing. (N.T. 101-102, 112, 123, 136, 218, 246, 249-250).

11. The interest arbitration panel held executive sessions on December 3, 2007. Neutral Arbitrator Winters issued the proposed interest Award on December 5, 2007. Mr. Greenberg, the Union's partial arbitrator signed off on the Award on December 11, 2007. (Borough Exhibit 4).

12. The interest Award changed several terms and conditions of employment. The police schedule that was eventually awarded was not the same schedule as the one proposed by the Union. The arbitration panel altered the Union's proposed system to be more beneficial to the Borough. The interest Award became effective January 1, 2008. The Borough implemented all changes ordered by the Award within the power of Borough Council. The Borough Council has not done anything to prevent the implementation of the interest

Award scheduling provisions. As of the date of the hearing, the Mayor has not implemented the changes to the police schedule in accordance with the Award. In fact, the Mayor has ordered the Chief of Police to not comply with the scheduling provisions of the Award. The schedule that the Mayor has implemented is not the schedule ordered by the Award, and it is not the schedule that was in place prior to the December 31, 2007 expiration of the collective bargaining agreement. (N.T. 26-27, 76-77, 88-91; Union Exhibit 1; Borough Exhibits 3 & 4).

13. The interest Award was not appealed by the Mayor or the Borough Council. The Borough Council accepted the Award at a public Council meeting. (N.T. 76, 146, 208, 234).

DISCUSSION

A. The Mayor's Refusal to Implement the Scheduling Provisions in the Award Constitutes and Unfair Labor Practice.

As an intervenor, the Mayor has all the rights and liabilities of a party to this action, including the right to appeal an appealable order if aggrieved, and he takes the litigation as he finds it. In re Appeal of the Municipality of Penn Hills and Penn Hills Sch. Dist. From the Action of the Board of Property Assessment, 519 Pa. 164, 546 A.2d 50 (1988). The refusal to comply with a valid interest arbitration award is an unfair labor practice. Borough of Lewistown v. PLRB, 558 Pa. 141, 735 A.2d 1240 (1999); Derry Township v. PLRB, 571 A.2d 513 (Pa. Cmwlth. 1989). In entertaining a union's charge alleging that a public employer failed to comply with a valid Act 111 interest arbitration award, the union has the burden of proving the following: (1) there exists a valid interest award that is final and binding; (2) the rights to appeal the award have been exhausted; and (3) the employer failed to comply with the award. Derry Township, supra; PLRB v. Commonwealth of Pennsylvania, 8 PPER ¶ 233 (Nisi Decision and Order, 1977). When a party fails to appeal an arbitration award, that party waives the right to collaterally attack the illegality of the award in an unfair practice proceeding, and the award is presumptively valid. Borough of Lewistown, 735 A.2d at 1246; Polarkoff v. Town Council of the Borough of Aliquippa, 396 A.2d 75, 76 (Pa. Cmwlth. 1979). In the instant case, the Mayor contends that he did not have standing to appeal the interest Award because he was not a party to the proceedings. Having no avenue to directly challenge the Award, the Mayor seems to argue that his only option to challenge the Award was to refuse to comply with the scheduling provisions of the Award and thereafter defend his position in this unfair labor practice proceeding.

Although individual employes clearly lack standing to challenge an interest arbitration award, Lee v. Municipality of Bethel Park, 626 A.2d 1260 (Pa. Cmwlth. 1993), there is no bright-line rule similarly barring a mayor from challenging an interest award as it relates to his/her statutory authority. The Mayor has predicated his position upon both an untested and erroneous assumption. That assumption is that a joint-employer like the Mayor lacks standing to appeal an interest award in court when he was invited to participate in the arbitration process, but he was not a formally designated party. The Mayor's assumption is untested because, having not attempted to take an appeal and obtain a court ruling on that question in this case, there is no way of knowing what the court would have concluded, and the Mayor has thereby waived the argument. In the absence of precedent concluding that he clearly lacks standing (as is the case with individual employes), the Mayor may not sit on his hands without attempting to appeal the Award and simply assert that he has no standing.

Also, the Mayor's position is erroneous because the Commonwealth Court has recognized that someone in the Mayor's position in this case does have standing to appeal an arbitration decision. In Novembrino v. International Association of Machinists and Aerospace Workers Lodge 2462, 601 A.2d 916 (Pa. Cmwlth. 1992), the Court held that the controller for the City of Scranton, an independent city official, had standing to appeal a grievance award, even though she was not a party to and did not participate in the arbitration proceedings, because she was a joint employer with the city and the arbitration proceedings "involved matters which were going to affect her office." Id. at 920 (emphasis added). Similarly, the Mayor here was given notice of and an opportunity to

be heard at the Act 111 interest arbitration proceedings, which he indeed attended. Like the controller in Novembrino, the Mayor was well aware that the scheduling proposals that he opposed were matters that affected the administration and management of his office. Accordingly, he had an obligation to seek an appeal if he believed that the Award was illegal.[1]

The Board is simply not the proper forum to challenge the validity of an interest arbitration award. Interest awards are reviewed under the narrow certiorari standard of review. The Matter of Arbitration Between the City of Washington and Police Department of the City of Washington (Washington Arbitration Case), 436 Pa. 168, 259 A.2d 437 (1969). Under this scope and standard of review, it is for an appellate court to decide whether (1) the arbitration panel properly exercised jurisdiction over the matters in question; (2) the proceedings were regular; (3) the panel exceeded the exercise of its power; or (4) whether the panel or the process violated the constitution. Id. The Board lacks the authority or expertise to scrutinize interest arbitration proceedings and awards in an attempt to resolve these types of questions. If any of the above challenges are made against an interest award, those challenges can only be resolved by a court of competent jurisdiction, not by the Board in an unfair labor practice case. The Board's jurisdiction to determine the validity of an Act 111 interest award in an unfair labor practice case, alleging an unlawful refusal to comply with the award, is limited to determining whether the award can still be appealed; it is under review by a court; or it has been affirmed, modified, or stricken by a court. The Board does not have the authority to evaluate the propriety or legality of the interest arbitration proceedings, the Award or its individual provisions, where a constitutional court has not previously ruled on those matters.

If the courts were to deny mayors standing to appeal interest awards where they affect those mayors' statutory control over police departments, subject matter jurisdiction over reviewing interest arbitration awards under narrow certiorari in cases involving government entities with mayors would, in essence, devolve on the Board. The courts have not denied mayors the right to appeal interest arbitration awards as joint-employers, and to do so would effectively transfer concurrent subject matter jurisdiction to the Board to entertain narrow certiorari review of those awards and assume the role of a reviewing court. Therefore, the Board is without subject matter jurisdiction to entertain the Mayor's defenses as a matter of law. Accordingly, in addition to the ruling in Novembrino, supra, the fact that the Mayor cannot have the propriety of the interest arbitration process and the legality of the Award evaluated by the Board is another reason why a court of competent jurisdiction would grant standing to the Mayor to appeal the Award and challenge its effects on the Mayor's statutory rights and obligations under the Borough Code.

Because the Mayor failed to file an appeal of the Award, which was executed by a majority of the panel, he has waived his legal right to challenge its validity, and he may not now collaterally attack the scheduling provisions of the Award in this unfair labor practice proceeding. The unappealed Award is valid and enforceable as a matter of law. Lewistown, supra. "Once the appeal procedure has been completed, whether by direct appeal or by expiration of the time period to appeal without action, the award is considered to be final and binding." Lewistown, 735 A.2d at 1246. Accordingly, the Union has met its burden of proving that the Award was final and binding and that the appellate rights have been exhausted.

[1] There are formalistic differences in determining standing to appeal an adjudication of a government agency. Appeals from arbitration awards are considered appeals from government agencies under Section 933(b) of the Judicial Code, 42 Pa. C.S. § 933(b). Under Section 702 of the Administrative Agency Law, 2 Pa. C.S. § 702, "any person aggrieved by an adjudication of a Commonwealth agency who has a direct interest in such adjudication shall have the right to appeal therefrom." Id. (emphasis added). Both the Supreme Court and the Commonwealth Court have applied this section to administrative agencies in general (which includes arbitration panels) and noted that it significantly enlarges the class of persons who may protest administrative action. 20 Darlington, et al., Pennsylvania Appellate, § 501:14, p. 718-719 (2007-2008 ed.). However, Section 702 of the Administrative Agency Law does not apply to adjudications that are appealed to courts of common pleas. Id. The Award in this case, as it involves a local government employer and police employes, would be appealed to the local common pleas court. This overly formalistic distinction regarding appellate standing in other contexts is superseded by Novembrino in the context of public sector labor arbitration appeals, which holds that a joint-employer, with distinct statutory and management authority over the employes at issue, indeed has standing to appeal an arbitration award that affects the administration of that joint-employer's office.

The Union has also met its burden of proving that the Mayor has refused to comply with the Award. As of the date of the hearing, the Mayor has not implemented the changes to the police schedule in accordance with the Award. In fact, the Mayor has ordered the Chief of Police to not comply with those scheduling provisions. Also, the current schedule is not the schedule that was in place prior to the expiration of the old collective bargaining agreement that expired on December 31, 2007. The Mayor, who has the sole statutory authority to implement the scheduling changes ordered by the Award has committed unfair labor practices in violation of Section 6(1)(a) and (e) of the PLRA as read in pari materia with Act 111. Although the Borough Council has not directly interfered with the implementation of the Award and lacks statutory authority to implement the scheduling changes, the Borough is jointly liable, as a joint-employer of the Borough, for the unfair labor practices of the Mayor and must provide any monetary make-whole relief, which can only be effectuated through Borough Council.

B. The Interest Arbitration Process was Proper and the Scheduling Provisions of the Award Bind the Mayor.

Notwithstanding the previous conclusion (i.e., whether the Award is enforceable against the Mayor because he failed to attempt to appeal it and the Board lacks subject matter jurisdiction to evaluate the propriety of the arbitration proceedings), it is necessary to also consider whether the Award is legally enforceable against the Mayor in the event the Board, upon review, disagrees with that conclusion. In that event, the Award is alternatively enforceable against the Mayor because the statutory procedure was complied with in good faith and the most due process that could be afforded to the Mayor under the procedure mandated by Act 111 was provided to him.

1. Due Process

The Union contends that the Mayor was given every opportunity to participate in the interest arbitration process. The Mayor, argues the Union, was given his own counsel to represent his position in the arbitration process regarding the scheduling. The Borough and the Union, maintains the Union, put the interest arbitration hearing on hold until the Mayor's attorney, Mr. Colarusso, could arrive and participate. Then the Mayor and his counsel voluntarily departed the interest arbitration hearing and abandoned the process because Mr. Colarusso was not permitted to act as a fourth arbitrator. The Union argues that there are no provisions under Act 111 that allow a fourth arbitrator on an interest arbitration panel or allow a fourth arbitrator on some issues and three arbitrators on other issues, as requested by the Mayor and his counsel. The Union further contends that the Mayor is attempting to collaterally attack the interest Award in this unfair labor practice proceeding, even though he failed to appeal the Award or file a declaratory judgment action to have the scheduling provisions of the Act 111 interest award modified or stricken.

The Borough joins in the Union's arguments and emphasizes the fact that the Mayor was given his own attorney for purposes of the interest arbitration and collective bargaining process. The Borough also emphasizes that the Mayor's claims, that he was excluded from the interest arbitration process because the scheduling matter was decided before Mr. Colarusso arrived at the hearing or because the Union and the Borough were somehow in collusion on the scheduling issue, are not supported by the record. Those claims, argues the Borough, are negated by the fact that the scheduling provisions awarded by the panel are significantly different from the proposed scheduling provisions submitted to the panel by the Union. The evidence, argues the Borough, establishes that the Borough did not agree with the Union's scheduling proposal even if it did not submit a written proposal of its own. The Borough emphasizes that the Mayor has not proven that the Union and the Borough were in collusion or the decision was made regarding scheduling before his attorney's arrival at the hearing.

The Mayor's attorney argues that he tried to present evidence regarding scheduling but the neutral arbitrator allegedly asked, "hasn't this already been determined?" (N.T. 259). The Mayor and his attorney contend that this rhetorical question indicated that the issue had already been decided without his participation. However, the existence of such a statement by the neutral is not supported by the record. In fact, the Borough's position is correct in that the substantial, competent evidence of record establishes the

contrary finding that the neutral arbitrator and the arbitration panel had not considered or decided the scheduling issue prior to the arrival of the Mayor's attorney.

The issue, therefore, becomes whether the Mayor, who is solely authorized to direct scheduling of Borough police under the Borough Code,[2] can lawfully refuse to implement the scheduling provisions of an Act 111 interest Award where he declined an invitation to present evidence of and reasons for his desired scheduling regime to an Act 111 interest arbitration panel because the neutral arbitrator refused his attorney's request to be a fourth member of the tripartite Act 111 interest arbitration panel on that issue.

The Union and Council adequately ensured the protection and provision of the Mayor's due process rights and interests. The Mayor was invited to participate in the Act 111 interest arbitration process and was afforded an opportunity to present evidence and argument in support of his position on the scheduling system which opposed the Union's and Borough Council's position. On November 28, 2007, an Act 111 interest arbitration hearing was held. The hearing commenced approximately at 10:00 a.m. Both the Union and the Borough presented evidence to the arbitration panel. The arbitration panel consisted of Stephen Greenberg, Esquire, the partial arbitrator for the Union; George Gobel, Esquire, the partial arbitrator for the Borough; and Marc Winters, the neutral arbitrator. Mayor Lockhart was present at the hearing from the beginning and remained for the duration of the hearing until he left with his attorney. Michael Colarusso, Esquire is the attorney for Mayor Lockhart. All parties understood prior to the arbitration hearing that Mr. Colarusso would be late for the arbitration hearing due to a prior commitment. The parties agreed that all matters pertaining to scheduling would be deferred until Mr. Colarusso arrived at approximately noon. During the arbitration hearing, but prior to Mr. Colarusso's arrival, the Union only presented testimony regarding non-scheduling issues and submitted an exhibit that included copies of the Union's scheduling proposal. When the parties finished presenting their evidence on non-scheduling matters, those people who were present stopped the hearing and awaited the arrival of Mr. Colarusso. The reason everyone waited for Mr. Colarusso's arrival was so that all parties could, at that time, present evidence regarding the scheduling. Testimony and discussions regarding scheduling did not occurred until the arrival of Mr. Colarusso.

Upon arriving at the hearing, Mr. Colarusso asked Neutral Arbitrator Winters to be included as a fourth arbitrator on the panel of interest arbitrators for purposes of the scheduling matters only. Mr. Winters denied Mr. Colarusso's request. Neutral Arbitrator Winters afforded Mr. Colarusso an opportunity to present testimonial and documentary evidence on behalf of the Mayor regarding the scheduling of police officers. Even the Mayor acknowledged that at no time did Arbitrator Winters state or otherwise indicate that the scheduling dispute had been resolved or decided. Indeed, Mr. Winters informed Mr. Colarusso that he would give the same weight and consideration to the Mayor's evidence and arguments regarding the scheduling of police officers as he would to all other evidence and arguments submitted by the parties. Mr. Colarusso declined Mr. Winter's offer to present evidence regarding the scheduling of police officers because he was not permitted to act as a fourth arbitrator for the scheduling issues. The Mayor and his attorney, Mr. Colarusso, left without presenting any evidence and without listening to the testimonial scheduling evidence presented by the Union. After having waited for the Mayor's attorney to arrive to resume the hearing and present evidence to the arbitration panel regarding scheduling, the Union eventually finished presenting its case to the arbitration panel after the Mayor and Mr. Colarusso departed the hearing. The Mayor could not have been afforded more due process within the mandatory procedures of Act 111.

2. The Mayor's Scheduling Authority is Subordinate to the Mandatory Subjects of Bargaining Under Act 111 and the Panel Properly Exercised Jurisdiction Over Scheduling.

The Borough Code divides the powers of Borough government between a mayor and a borough council.[3] Under this statutory scheme, a mayor is separately elected and does not

[2] Act of February 1, 1966, P.L. (1965) 1656, as amended, 53 P.S. §45101 et seq.

[3] The tax collector, tax assessor and auditors are also elected. "The powers of council are broad and extensive covering virtually the whole range of urban municipal functions." 117 Pa. Manual § 6-5 (2005-2006). Brentwood Borough has not adopted a home rule charter. Id.

hold a position on borough council. 53 P.S. § 46021. A mayor exercises certain executive powers and privileges on behalf of a borough. 53 P.S. §§ 46028-46029. Alternatively, a borough council exercises legislative, appointive, budgetary, compensatory and financial powers on behalf of a borough. 53 P.S. §§ 46005-46006. Section 1121 allocates the powers and responsibilities of these two branches of government over a borough police department. 53 P.S. 46121. Pursuant to this Section, a borough council has the authority to hire, discharge, suspend or demote borough police officers and designate a chief of police. 53 P.S. § 46121. This Section further provides, in relevant part, as follows:

> The mayor of the borough shall have full charge and control of the chief of police and the police force, and he shall direct the time during which, the place where and the manner in which, the chief of police and the police force shall perform their duties, except that council shall fix and determine the total weekly hours of employment that shall apply to the policemen.

Id. According to this Section, express statutory authority and control over the scheduling of borough police is with the office of mayor. Our Supreme Court has addressed the division of government functions in the employment context. In this regard, the Court, in Lewistown Borough stated the following:

> [T]he relationship of employer and employee exists when a party has the right to select the employee, the power to discharge him, and the right to direct both the work to be done and the manner in which such work shall be done. However, a joint employer relationship may exist where no single entity controls all of the terms of the employment relationship, and, thus, such entities are jointly deemed to be employers for purposes of the law.

Lewistown Borough, 558 Pa. at 148-149, 735 A.2d at 1244 (citations omitted) (emphasis added). Accordingly, the Borough Council and the Mayor are joint employers of the Borough's police employes. In this regard, it becomes necessary to examine the rights and obligations of the Mayor and Borough Council in interest arbitration when the interests of the Mayor diverge from those of Borough Council regarding scheduling.

The Borough Code provides that "[i]n the case of a legal dispute between the mayor and council, or in any other case where representation of the mayor and council by the borough solicitor would create a conflict of interest for the borough solicitor, the mayor is authorized to employ outside counsel at borough expense." 53 P.S. § 46117. The Mayor invoked this provision and hired his own attorney to represent him regarding the scheduling changes proposed by the Union since at least early 2007, when Council's willingness to agree to a schedule system change with the Union, which was contrary to the Mayor's wishes, became apparent.

During the hearing, the Mayor conceded that his statutory authority over scheduling police officers can be limited by the collective bargaining laws. (N.T. 258-259). The Mayor, however, contends that such a limitation on his mayoral authority is only valid if he consents to and participates in the Act 111 interest arbitration procedure. The Mayor, however, ignores the fact that he was invited to participate in the arbitration to the full extent permitted by Act 111.

Indeed, shift scheduling for police officers in a bargaining unit has been determined to be a mandatory subject of bargaining and, therefore, is properly within the jurisdiction of an Act 111 interest arbitration panel to modify. Indiana Borough v. PLRB, 695 A.2d 470 (Pa. Cmwlth. 1997); Township of Upper Saucon v. PLRB, 620 A.2d 71 (Pa. Cmwlth 1993). In Upper Saucon, the Commonwealth Court opined that "it requires no stretching of definitions to see that shift schedule assignments relate closely to hours. . . . Therefore, we reject Township's contention that the shift system change at issue here is not a mandatory subject of bargaining because it does not concern 'hours' as that term is used in Act 111." Upper Saucon, 620 A.2d at 74-75. The Commonwealth Court further stated that "[w]e likewise reject the Township's contention that the shift system change, affecting as it did the scheduling of days off, does not concern 'terms and conditions of . . . employment.'" Id. at 75 (emphasis added). Also, in Appeal of the Borough of Ambridge, 417 A.2d 291 (Pa. Cmwlth. 1980), the Commonwealth Court specifically held that

hours of work for a borough's police officers are the proper subject for Act 111 interest arbitration. Id. at 292. The scheduling matter, therefore, was properly before the panel for consideration.

Moreover, in Washington Arbitration Case, supra, our Supreme Court held that an Act 111 interest arbitration panel has authority to rule upon proper terms and conditions of employment. Such a panel may "require a public employer to do that which it could do voluntarily," id. at 442, and must "not mandate that a governing body carry out an illegal act." Id. The scheduling changes required by the interest arbitration panel in this case constituted a proper term and condition of police employment and a mandatory subject of bargaining. This scheduling regime was not illegal, and it was one to which the Mayor certainly could have voluntarily agreed. Therefore, the jurisdiction of the interest panel over the issue of the scheduling system is proper.

The Commonwealth Court has recently decided cases involving row officers and the division of the employer-employe relationship in county government, under both Act 111 and the Public Employe Relations Act (PERA), that seemingly support the position that the Mayor's statutory authority to schedule the police officers may not be bargained away without his approval. Westmoreland County v. Westmoreland County Detectives, 937 A.2d 618 (Pa. Cmwlth. 2007); Erie County v. PLRB, 980 A.2d 369 (Pa. Cmwlth. 2006). These cases, however, are inapposite. Westmoreland County, supra, was an appeal from an Act 111 interest arbitration award granting the County detectives a just-cause provision. The County's partial arbitrator objected to the just-cause provision on the basis that it violated the rights guaranteed to county officials under Section 1620 of the County Code.[4] The District Attorney is the county official with full managerial authority over the County Detectives in Westmoreland County. The County argued that the District Attorney expressly reserved those rights during the bargaining and arbitration process. The County also maintained that it had no authority to voluntarily agree to any infringement on the District Attorney's supervisory powers as guaranteed by Section 1620 of the County Code and, therefore, the Act 111 just-cause provision, objected to by the County and the District Attorney, was beyond the jurisdiction of the arbitration panel. The Union, however, argued that, under Lehigh County v. PLRB, 507 Pa. 270, 489 A.2d 1325 (1985), and Troutman v. PLRB, 735 A.2d 192 (Pa. Cmwlth. 1999), pet. for allowance of appeal den'd, 563 Pa. 624, 757 A.2d 937 (2000), the County Commissioners, as the designated bargaining agent for all County officials under Section 1620, only needed to consult with the judges and various row officials, not obtain their approval, which is what occurred.

The Commonwealth Court, in Westmoreland, however, distinguished Lehigh County and Troutman concluding that mere consultation in those cases was valid because of the "continuous passive abiding of the terms at issue therein for a period of years." Westmoreland, 937 A.2d at 622. The Westmoreland Court stated that "long-standing implicit approval was found therein as a result of the county officers' extended compliance with the terms." Id. The Westmoreland Court, therefore, held that both consultation with and approval from the elected official was required before an interest arbitration panel could infringe upon his/her rights to hire, discharge and supervise his/her employes, as protected by Section 1620.

In Erie County v. PLRB, 908 A.2d 369 (Pa. Cmwlth. 2006), a PERA case, the Commonwealth Court similarly held that a county sheriff, a separately elected row official with supervisory powers over the deputies, was not bound by a collective bargaining agreement provision that required him to allow a county employe to bump into

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[4] Act of August 9, 1955, P.L. 323, as amended, 16 P.S. § 1620. This Section provides, in relevant part, as follows:

> [W]ith respect to representation proceedings before the Pennsylvania Labor Relations Board or collective bargaining negotiations involving any or all employes paid form the county treasury, the board of county commissioners shall have the sole power and responsibility to represent judges of the court of common pleas, the county and all elected or appointed county officers having any employment powers over the affected employes. The exercise of such responsibilities by the county commissioners shall in no way affect the hiring, discharging, and supervising rights and obligations with respect to such employes as may be vested in the judges or other county officers.

16 P.S. §1620 (emphasis added).

his office from another county department without his approval, even though he did not expressly object to the bumping provision during negotiations or arbitration. The Erie County Court opined that matters relating to Section 1620 rights of row officials are not mandatory subjects of bargaining even though they may be for other employers. Id. at 375. A row official may "voluntarily limit their absolute right to supervise employees through appropriate procedures." Id. (emphasis original). The Erie Court further stated that, if not voluntarily granted by the row officer, the issue is summarily closed. Id. Under Erie and Westmoreland, a row official with separate employer authority to hire, discharge and manage employes may refuse to bargain or agree to any subjects affecting his rights to hire, discharge or manage his employes and any unapproved contractual or awarded provision that limits those powers may be stricken by a court when challenged.

These county decisions, however, are premised upon the application of Section 1620 of the County Code. Although the Mayor has statutory authority to supervise and manage the police department, like the row officials in Erie and Westmoreland, there is no statute similar to Section 1620 of the County Code that applies to local municipal government and that expressly removes subjects relating to the Mayor's managerial authority from bargaining. Also, the variety of local government entities with police departments would produce multiple, inconsistent and unequal bargaining rights and obligations with no rational basis for the disparity. It would create unpredictable bargaining environments where the extent to which police and fire officers could bargain terms and conditions of employment would be subject to the vagaries of individual mayors.

In Appeal of the Borough of Ambridge, supra, the Court further opined as follows:

> A borough . . . derives its very power to have a police department from an act of the legislature, Section 1121 of The Borough Code. It would seem strange, in light of that, to conclude that the legislature cannot validly regulate the relations between a borough and its police personnel, and make the hours of work a subject for collective bargaining and arbitration. By Act 111 the legislature has expressed its will to make hours of work one of the arbitrable terms and conditions of employment.

Ambridge, 417 A.2d at 292 (emphasis added). Also, in Zelienople Police Department Wage and Policy Unit v. Zelienople Borough, 27 PPER ¶ 27014 (Final Order, 1995), the Board similarly held as follows:

> [T]he provisions of the Borough Code must be read in light of the Borough's [including the Mayor's] additional obligations under Act 111 requiring borough to negotiate compensation with the collective bargaining representative of its police employes. The statutory obligations for the borough to engage in collective bargaining and the attendant constitutional amendment allowing for binding contracts and arbitration awards under Act 111 stands in stark contrast to the Employer's argument that the statutory authority of borough council to fix and pay compensation is nondelegable.

Zelienople, 27 PPER at 50-51. Accordingly, the statutory powers granted to the Mayor over scheduling hours and those granted to the Borough Council over the amount of hours, as mandatory subjects of bargaining, are both subordinate to the Mayor's and the Council's obligations under Act 111. Pursuant to the mandate of Ambridge, supra and Zelienople, supra, and absent a contrary, limiting statute like Section 1620 of the County Code, the powers of Borough Council and of the Mayor regarding hours are subordinate to the General Assembly's will to subject those powers to the Act 111 process. The Mayor has no similarly offsetting statutory authority, as provided to row officers under Section 1620 of the County Code, to convert a mandatory subject of bargaining into a voluntary or permissive one.

Extending Section 1620 powers to the Mayor in this case would empower a Borough to avoid certain bargaining obligations with its police department that a township would be unable avoid by nature of the differences between township and borough government. This disparity would also exist between boroughs with their own police departments as compared to boroughs that belong to regional police departments (RPDs). The mayor of the stand-alone borough would retain more bargaining power than the mayor of the member borough.

"[W]ith increasing frequency, boroughs, townships and other political subdivisions across our Commonwealth are banding together to provide police services through the formation of regional police departments." Lewistown, 735 A.2d at 1241.

In Lewistown, one borough and two townships entered into an intermunicipal agreement (Agreement) and enacted ordinances approving the Agreement pursuant to the Intergovernmental Cooperation Act.[5] The RPD was under the direction of a board of directors which consisted of delegates appointed by the governing body from each municipality. In the Lewistown Agreement, all the municipalities transferred to the RPD's board of directors "all functions, powers and responsibilities which the municipalities respectively have with respect to the operation, management, and administration of a municipal police department or a municipal police force, including all the functions, powers and responsibilities other municipalities had with respect to collective bargaining." Id. at 1241.

Each municipality must equally transfer authority to the RPD. The mayor of a member borough could not retain his managerial powers while member townships without mayors delegated that authority. An unequal municipal delegation would not properly function. Perhaps a mayor could require that the municipal agreement be drawn up so that he is a delegate on the board of directors of the regional police department and thereby have some control. But in that case, the mayor is a member of one entity, i.e., the RPD board of directors which controls the RPD, and there is no division of power as in the borough itself. The Supreme Court, in Lewistown, expressed its abhorrence for disparities of collective bargaining rights among police officers employed by different public service entities. The Court recognized that RPDs are not political subdivisions but refused to deny police officers the full panoply of Act 111 rights for that reason and opined as follows:

> This would lead to the anomalous situation in which police officers employed by regional police departments would not be covered by Act 111 but officers directly employed by boroughs and townships would be covered by Act 111. This absurd result is obviously contrary to the intent of the legislature in enacting Act 111.

Lewistown, 735 A.2d at 1245. The Supreme Court here is concerned with preventing police employes employed by different types of local government employers from being treated unequally under Act 111 simply by virtue of the form of municipal government or the form of public employer. A similar anomaly would result if the Mayor in this case had more rights to disavow a valid Act 111 interest award than the police officers of a township or a borough member of an RPD.

3. The Arbitration Was Not Flawed by the Neutral's Refusal to Permit the Mayor's Attorney to Serve as a Panel Member.

The Mayor argues that he had a right to present his case by having his attorney serve as a fourth interest arbitration panel member participating in executive sessions. The Mayor contends that, having been refused a position on the panel, he was effectively excluded from the interest arbitration process. However, the Mayor's attorney did not have a legal right to participate as a fourth interest arbitration panel member.

Section 4(b) of Act 111 provides, in relevant part, that "[t]he Board of arbitration shall be composed of three persons, one appointed by the public employer, one appointed by the body of policemen or firemen involved, and a third member to be agreed upon by the public employer and such policemen or firemen." 43 P.S. § 217.4(b)(emphasis added). The term "shall" as used in this Section makes a three-person panel absolutely mandatory without exception. Section 7(a) of Act 111 further provides that "[t]he determination of the majority of the board of arbitration thus established [pursuant to Section 4] shall be final on the issue or issues in dispute and shall be binding upon the public employer and policemen or firemen involved." 43 P.S. § 217.7(a)(emphasis added). Section 4(b) and Section 7(a) taken together clearly preclude a tie vote. Utilizing a

[5] Act of July 12, 1972, P.L. 762, No. 180, as amended, 53 P.S. §§ 481-490, repealed, Act of December 19, 1996, P.L. 1158, No. 177, 53 Pa. C.S.A. §§ 2301-2315.

four-member panel invites the possibility for a tie vote with no resolution. A tie vote with no resolution on an issue is contrary to the clear statutory design of Act 111, i.e., to facilitate swift, efficient settlement of labor disputes involving essential public service employes.

In International Ass'n of Firefighters, Local 463 v. City of Johnstown, 344 A.2d 754, 755-756 (Pa. Cmwlth. 1975), rev'd on other grounds, 468 Pa. 96, 360 A.2d 197 (1976), the Commonwealth Court, focusing on the efficacy of the mandatory timelines crafted by Act 111, aptly recognized that Act 111 "is designed to protect not only the rights of the collective bargaining agent and of the employer but of the public as well to efficient government through the timely adoption of municipal budgets and of necessary implementing legislation." Id. (emphasis added). In other words, time is of the essence in an Act 111 interest arbitration proceeding convened for the purpose of resolving labor disputes that have reached impasse after thirty days of negotiating. Therefore, facilitating a tie-vote on an interest arbitration panel and violating Act 111 by including a fourth arbitrator on that panel would eviscerate the carefully crafted mandatory system of Act 111 and its design to promote fast dispute resolution. A fourth panel member could stalemate negotiations into the indefinite future. Indeed, the parties may even be unable to appeal the Award due to the fact that there would not have been a final, appealable decision without a majority ruling. 43 P.S. § 217.7(a).

Moreover, the Mayor requested to have his proposed partial fourth arbitrator participate on the panel for only one issue, i.e., the scheduling issue. Assuming that a fourth arbitrator would be permissible under Act 111, a four-member arbitration panel on one issue is equally in violation of the statute. The entire written Award encompassing all the issues in dispute must be signed by a majority of three panel members. 43 P.S. § 217.7(a). There is no mechanism under Act 111 to bifurcate issues for presentation or panel determination. All disputed issues must be decided by the three-member panel. The statute simply does not permit a fourth member to vote on one issue alone while the remaining issues are resolved by a majority vote of the three-member panel.

The statutory process under Act 111 in this case was adequately complied with by affording the Mayor an opportunity to present his evidence and argument in support of his scheduling scheme to the panel. Even though the Mayor did not have a statutory right to separately participate in the Act 111 interest arbitration panel and its executive sessions, he should have participated in the arbitration proceedings by presenting his case to the three-member panel, as he was invited to do. The Mayor's dissatisfaction with the statutory process, which does not contemplate four arbitrators, must be addressed by our General Assembly. Therefore, even if the validity of the Act 111 Award and process is properly before the Board in this case, the Award is valid and enforceable against the Mayor. Accordingly, the Mayor has engaged in unfair labor practices in violation of Section 6(1)(a) and (e) of the PLRA as read in pari materia with Act 111. Although the Borough Council in this case has not directly interfered with the implementation of the Award and it is without statutory authority to implement the scheduling changes, the Borough is jointly liable, as a joint-employer of the Borough, for the unfair practices of the Mayor and must provide any monetary make-whole relief, which can only be effectuated through Borough Council.

CONCLUSIONS

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

1. The Borough Council and the Mayor are joint public employers and collectively constitute a political subdivision within the meaning of Act 111.

2. The Union is a labor organization within the meaning of the PLRA as read in pari materia with Act 111.

3. The Board has jurisdiction over the parties hereto.

4. The Borough of Brentwood, by and through its Mayor, has 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 Borough Council and the Mayor of Brentwood Borough shall:

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

2. Cease and desist from refusing to bargain collectively in good faith with the exclusive employe representative in the appropriate police bargaining unit.

3. Take the following affirmative action, which the hearing examiner finds necessary to effectuate the policies of Act 111 as read in pari materia with the PLRA:

(a) Immediately implement the scheduling provisions of the December, 2007 Act 111 interest arbitration Award and all matters related to those provisions retroactively to January 1, 2008;

(b) Make whole bargaining unit employes for identifiable and quantifiable losses resulting from the Mayor's refusal to comply with the interest arbitration Award;

(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 ninth day of December, 2008.

PENNSYLVANIA LABOR RELATIONS BOARD

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Jack E. Marino, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

TEAMSTERS LOCAL 205	:	
	:	
v.	:	
	:	
BRENTWOOD BOROUGH, Respondent	:	Case No. PF-C-08-4-W
	:	
and	:	
	:	
MAYOR OF BRENTWOOD BOROUGH, Intervenor	:	

AFFIDAVIT OF COMPLIANCE

The Mayor of Brentwood Borough hereby certifies that he has ceased and desisted from violations of Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act; that he has implemented the scheduling provisions of the Award and all matters related to those provisions retroactively to January 1, 2008. The Borough Council hereby certifies that it has made whole bargaining unit employes for identifiable and quantifiable losses resulting from the Mayor's refusal to comply with the interest arbitration Award. The Mayor certifies that he has posted a copy of this decision and order in the manner prescribed in paragraph 2(d) of the Order. The Council and the Mayor certify that they have served a copy of this affidavit on the Union at its principal place of business with their respective signatures.

(1) _____
Mayor Date

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

_____
Signature of Notary Public

(2) _____
Borough Council President Date

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

_____
Signature of Notary Public