COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PORT AUTHORITY TRANSIT POLICE ASSOCIATION	:	
	:	
v.	:	Case No. PERA-C-07-323-W
	:	
PORT AUTHORITY OF ALLEGHENY COUNTY	:	

PROPOSED DECISION AND ORDER

On July 19, 2007, the Port Authority Transit Police Association (Association) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair practices alleging that the Port Authority of Allegheny County (Authority) violated sections 1201(a)(1) and 1201(a)(5) of the Public Employe Relations Act (PERA) "by unilaterally changing provisions of the Collective Bargaining Agreement(s) dealing with Health Insurance and Pensions."

On August 3, 2007, the Secretary of the Board declined to issue a complaint on the charge. The Secretary reasoned as follows:

> "The Board will dismiss a refusal to bargain charge if the employer established a sound arguable basis for the claim that its action was contractually privileged (i.e. that the parties satisfied their statutory bargaining duty and the matter is presently addressed in the collective bargaining agreement). Ellwood City Police Wage and Policy Unit v. Ellwood City Borough, 28 PPER ¶ 28200 (Final Order, 1997). Here, because the collective bargaining agreement links the health and pension benefits with the benefits for non-represented employes, it appears that the Employer has satisfied its duty to bargain over this issue and that it has a sound arguable basis for changing the health and pension benefits for bargaining unit employes. As it appears you essentially allege that the Employer violated the collective bargaining agreement, your remedy would be to file a grievance pursuant to the collective bargaining agreement."

On August 23, 2007, the Association filed exceptions alleging that the Secretary erred in declining to issue a complaint for three reasons: (1) because the Association was entitled to a full evidentiary hearing, (2) because the Authority "has not and could not establish a 'sound arguable basis that its action was contractually privileged'" and (3) that the Board "has gone too far in its reliance on NLRB cases to justify its doctrine that one defense to a unilateral change charge is that an employer's action may be contractually privileged."

On November 20, 2007, the Board issued an order directing remand to secretary for further proceedings in which it directed the Secretary to issue a complaint. The Board stated, however, that its order "shall not be construed by the parties as a determination that the August 3, 2007 decision of the Secretary was in error."

On December 13, 2007, the Secretary issued a complaint and notice of hearing directing that a hearing be held on February 7, 2008, if conciliation did not resolve the matter by then. The hearing examiner subsequently continued the hearing to April 9, 2008.

On April 9, 2008, the hearing was held. At the outset of the hearing, the parties presented a joint stipulation of facts. The hearing examiner then afforded the parties a full opportunity to present additional evidence and to cross-examine witnesses. On June 13, 2008, each party filed a brief by deposit in the U.S. Mail.

The hearing examiner, on the basis of the evidence presented by the parties at the hearing and from all other matters of record, makes the following:

FINDINGS OF FACT

1. In 1988, the Board certified the Association as the exclusive representative of a bargaining unit that includes transit police officers employed by the Authority. (Case No. PERA-R-88-173-W)

2. In 1993, the Board certified the Association as the exclusive representative of a bargaining unit that includes transit police lieutenants and sergeants employed by the Authority. (Case No. PERA-R-93-229-W)

3. Effective August 1, 2004, the parties entered into a four-year collective bargaining agreement for the transit police officers providing at article XVIII as follows:

> "The Pension Plan currently in effect for officers covered by this Agreement shall be continued for the term of this Agreement. Any changes instituted in such Plan by the Authority during the life of this Agreement shall be applicable to the officers covered by this Agreement, in like manner and time as to other employees covered by this Pension Plan."

(Joint Stipulation 19, Exhibit P)

4. Effective August 1, 2004, the parties entered into a four-year collective bargaining agreement for the transit police lieutenants and sergeants providing at article XIX as follows:

> "The pension plan currently in effect for supervisors covered by this Agreement shall be continued for the term of this Agreement. Any changes instituted in such plan by the Authority during the life of this Agreement shall be applicable to the supervisors covered by this Agreement, in like manner and time as to other employees covered by this pension plan."

(Joint Stipulation 19, Exhibit Q)

5. The pension plan in effect for transit police officers and for transit police lieutenants and sergeants as of August 1, 2004, is entitled "Port Authority of Allegheny County Retirement and Disability Allowance Plan for Employees Not Represented by a Union." (N.T. 14; Joint Stipulations 4, 6, 8, 10, Exhibit A)

6. By its own terms, the pension plan also covers employes of the Authority "who are not represented by a Union for collective bargaining purposes." (Joint Stipulation 4, Exhibit A)

7. On March 30, 2007, the Authority adopted a resolution amending the pension plan in pertinent part as follows:

> "1. Section 6 of the Plan is amended to eliminate the option to purchase prior public service on or after July 1, 2007, except for prior qualified military service.
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> 2. Section 8.1 of the Plan is amended to change the vesting schedule from five (5) to ten (10) Years of Continuous Service. The provision is clarified to reflect that a participant who has not completed five (5) Years of Continuous Service before July 1, 2007 will be required to complete ten (10) Years of Continuous Service under the Plan to receive a Normal Retirement Benefit. A participant who has received five (5) Years of Continuous Service before July 1, 2007 will remain vested in benefits accrued as of June 30, 2007, and may accrue additional benefits on or after July 1, 2007 after completion of ten (10) Years of Continuous Service.
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> 3. Section 2.8 of the Plan is amended to eliminate, after July 1, 2007, the crediting of unused sick leave towards continuous service for retirements.
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> 5. For participants who retire after July 1, 2007, the applicable provisions of Section 12 are amended to (i) eliminate post-retirement health benefits; and (ii) for participants with at least ten (10) Years of Continuous Service, replace such benefits with a $500 per month supplement for up to five (5) years during the period of retirement from age 60 to 65 of until Medicare eligibility, whichever occurs first."

(Stipulation 22, Exhibit V)

8. On July 1, 2007, the Authority applied the amendments to the pension plan to the transit police officers and to the transit police lieutenants and sergeants. (N.T. 10-12)

DISCUSSION

The Association has charged that the Authority committed unfair practices "by unilaterally changing provisions of the Collective Bargaining Agreement(s) dealing with Health Insurance and Pensions." According to the Association, the Authority changed those provisions when it applied to transit police officers and transit police lieutenants and sergeants represented by the Association amendments to a pension plan that covers them. The Association contends that the Authority was under an obligation to bargain before applying those amendments to those employes because the amendments changed pension and health care benefits under the pension plan and because pension and health care benefits are mandatory subjects of bargaining.

The Authority contends that the charge should be dismissed for lack of proof. According to the Authority, it acted in conformity with rather than in contravention of the pension provisions of the collective bargaining agreements when it applied the amendments to the pension plan to the transit police officers and to the transit police lieutenants and sergeants. In the Authority's view, it did not act unilaterally under the circumstances but rather was contractually privileged to act as it did.

An employer commits unfair practices under sections 1201(a)(1) and 1201(a)(5) if it repudiates a provision in a collective bargaining agreement. Millcreek Township School District v. PLRB, 631 A.2d 734 (Pa. Cmwlth. 1993), appeal denied, 537 A.2d 626, 641 A.2d 590 (1994). If, however, the employer was contractually privileged to act as it did, then no such unfair practices may be found. SEPTA, 35 PPER 73 (Final Order 2004), citing Pennsylvania State Troopers Association v. PLRB, 761 A.2d 645 (Pa. Cmwlth. 2000). As the court explained in Pennsylvania State Troopers Association:

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

761 A.2d at 651.

The record shows that the parties have entered into collective bargaining agreements with provisions referencing the pension plan for the transit police officers and for the transit police lieutenants and sergeants. See findings of fact 3-5. The record also shows that the Authority applied to the transit police officers and to the transit police lieutenants and sergeants amendments to the pension plan that changed health care and pension benefits available to them and to other employes covered by the pension plan. See findings of fact 6-8.

The dispositive question is whether the Authority repudiated the pension provisions of the collective bargaining agreements when it applied the amendments to the pension plan to the transit police officers and to the transit police lieutenants and sergeants.

The Association contends that the Board should answer that question in the affirmative because the first sentence of each pension provision states that the pension plan "currently in effect for [employes] covered by this Agreement shall be continued for the term of this Agreement." See findings of fact 3-4. When read in a vacuum, that sentence seemingly prohibits the Authority from changing the pension plan for the transit police officers and for the transit police lieutenants and sergeants during the terms of the collective bargaining agreements, which provides support for the Association's contention. There is a second sentence in each pension provision, however, that in apparent contradiction of the first sentence seemingly permits the Authority to change the pension plan for the transit police officers and for the transit police lieutenants and sergeants during the terms of their collective bargaining agreements under certain circumstances. The second sentence in each pension provision states as follows:

> "Any changes instituted in such plan by the Authority during the life of this Agreement shall be applicable to the [employes] covered by this Agreement, in like manner and time as to other employees covered by this pension plan."

Id.

On that record, there is no basis for finding that the Authority repudiated the pension provisions in the collective bargaining agreements when it applied the amendments to the pension plan to the transit police officers and to the transit police lieutenants and sergeants. To the contrary, in light of the second sentence in each pension provision, it is apparent that the Authority has a sound basis for construing those provisions to mean that it could change the pension plan for the transit police officers and for the transit police lieutenants and sergeants as it did for other employes covered by the pension plan. Under the circumstances, only an arbitrator has jurisdiction to decide if the Authority violated the pension provisions of the collective bargaining agreements when it applied the amendments to the pension plan to the transit police officers and to the transit police lieutenants and sergeants. See Pennsylvania State Troopers Association, supra (the Board is not to function as an arbitrator to determine whose interpretation of a collective bargaining agreement is correct).

In further support of its contention, the Association posits that the Authority's construction of the second sentence of the pension provisions of the collective bargaining agreements violates a traditional rule of contract interpretation. As set forth in its brief at 7, the Association's position is as follows:

> "[The Authority] would have the second sentence require that any Pension Plan changes be applied to [the Association's] member[s] in the 'exact' manner and time as they apply to non-union employees-–this interpretation of the second sentence, however, belies the intent of the first sentence.
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> Indeed, one of the traditional rules of contract construction is that contracts—-including collective bargaining agreements—-must be interpreted in a common sense fashion to avoid nonsensical results. See e.g., Galgay v. Gil-Pre Corp., 864 F.2d 1018, 1025 (3d Cir. 1988)(where the Court rejected a proferred interpretation of a section of the parties' CBA because it would render that section 'nonsensical'). Therefore, to read the entire paragraph in such a way as to avoid a nonsensical, contradictory result, would require the second sentence's use of the word 'like' to mean 'similar' or 'approximate.' Put another way, because the first sentence of [the pension plan provisions] forbid[s] [the Authority] from changing the Pension Plan during the term of the Agreement, the second sentence can only permit [the Authority] to impose any changes upon [the Association's] members at 'approximately' the same time, or, as soon as the Agreement expires."

Brief at 7. Under Pennsylvania State Troopers Association, supra, however, whether or not the Authority's construction of the second sentence is in violation of a traditional rule of contract construction is for an arbitrator, not the Board, to decide.

The Association also relies on Upper Chichester Township v. PLRB, 621 A.2d 1134 (Pa. Cmwlth. 1993), where the court held that an employer committed unfair labor

practices by unilaterally changing the terms of a pension plan. The Association's reliance on that case is misplaced, however. In that case, there was no dispute that the employer violated the parties' collective bargaining agreement when it changed the terms of the pension plan. That case is, therefore, inapposite.

In addition, the Association relies on Wilkes-Barre Township v. PLRB, 878 A.2d 977 (Pa. Cmwlth. 2005), where the court held that an employer committed unfair labor practices by unilaterally changing the terms of a pension plan. The Association's reliance on that case is equally misplaced, however. In that case, the court observed that the charging party "did not allege a breach of contract, nor did it seek an interpretation of the CBA." Id. at 982-983. By contrast, the Association has alleged a breach of contract and is seeking an interpretation of the parties' collective bargaining agreements. Wilkes-Barre Township is, therefore, inapposite as well.

CONCLUSIONS

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

1. The Authority is a public employer under section 301(1) of the PERA.

2. The Association is an employe organization under section 301(3) of the PERA.

3. The Board has jurisdiction over the parties.

4. The Authority has not committed unfair practices under sections 1201(a)(1) and 1201(a)(5) of the PERA.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the complaint is rescinded and the charge dismissed.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty days of the date hereof, this order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this tenth day of July 2008.

PENNSYLVANIA LABOR RELATIONS BOARD

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Donald A. Wallace, Hearing Examiner