

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

UNITED AUTOMOBILE, AEROSPACE :
AND AGRICULTURAL IMPLEMENT WORKERS :
OF AMERICA, UAW, LOCAL 204 ASSOCIATION :
: Case. No. PERA-C-09-241-W
v. :
: :
SALEM TOWNSHIP :

PROPOSED DECISION AND ORDER

On June 29, 2009, the United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, Local 204 (Union or Complainant) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) alleging that Salem Township (Township or Respondent) violated Sections 1201(a)(1) and (5) of the Public Employe Relations Act (PERA) by failing to comply with the terms of the settlement of a prior unfair practice charge.

On July 31, 2009, the Union filed an amended charge of unfair practices.

On August 8, 2009, the Secretary of the Board issued a Complaint and Notice of Hearing, directing that a hearing be held on October 29, 2009, in Pittsburgh. The hearing was held as scheduled, at which time, the parties submitted a Stipulation.

The examiner, based upon the Stipulation and all matters of record, makes the following:

FINDINGS OF FACT

1. David Galando was an employee of the Township and a member of the UAW. (Stipulation)
2. David Galando went off work in 2000 on a non-work related disability which ultimately resulted in his death in 2008. (Stipulation)
3. At all times material hereto, the Township and UAW were subject to a Collective Bargaining Agreement which required the Township to provide a pension benefit to members of the UAW, and certain death benefits to their survivors, as provided for in the Pension Plan. (Stipulation)
4. At the time Galando went off work in 2000, the Township's Service Employee's Pension Plan provided a death benefit ***equal to the accrued benefit earned by the employee to the date of death*** to the surviving beneficiary of a plan participant who died prior to his retirement date, and prior to the termination of his employment. (Stipulation) (Emphasis and italics in stipulation)
5. The Township's previous Board of Supervisors removed the above provision through the Amendment and Restatement of the Plan by its enactment of Ordinance 07-2001. (Stipulation)
6. In doing so, the Township substituted a new provision which would pay a surviving beneficiary of a plan participant who died before reaching his retirement date and prior to the termination of his employment, ***only the amount of the employee's paid in contributions***. As this was a non-contributory plan, no accrued monthly benefit would be paid to the beneficiaries of participants who would have otherwise been entitled to an "accrued benefit" under the prior Plan. (Stipulation) (Emphasis and italics in stipulation)
7. Between 2001 and the date of Mr. Galando's death, the Township and UAW engaged in collective bargaining on terms and conditions of employment, including some provisions of the Pension Plan unrelated to the death benefit provisions referenced above. (Stipulation)

8. The UAW did not discover the change in the death benefit provision as the changed provision was never disclosed to the UAW and they believed the provision requiring the payment of an "accrued benefit" was still intact. (Stipulation)

9. The Township was likewise unaware of the terms of the prior Plan which provided an accrued monthly benefit, or that this change had occurred, because the Township Supervisors involved in Collective Bargaining between 2002 and 2008 were not involved in collective bargaining with the UAW between 1999 and 2001, the time the change was made. (Stipulation)

10. Both parties were operating under a mutual misunderstanding with respect to the nature and extent of the death benefits provided under the Plan. (Stipulation)

11. This misunderstanding was not discovered until the UAW learned that the surviving spouse of David Galando would not be entitled to Mr. Galando's accrued benefit based on the 2001 Plan Amendment which eliminated the accrued monthly benefit. (Stipulation)

12. The UAW filed an action against the Township with the Pennsylvania Labor Relations Board at Case No. PERA-C-08-376-W, alleging that the Township unilaterally modified that provision of the Township's Service Employees' Pension Plan which provided a death benefit **equal to the accrued benefit earned by the employee to the date of death** to the surviving beneficiary of a plan participant who died prior to his retirement date, and prior to the termination of his employment. As such, the UAW alleged the Township had wrongfully denied such benefit to Galando. (Stipulation) (Emphasis and italics in stipulation)

13. Pension Plan Benefits are "terms and conditions of employment" subject to collective bargaining in Pennsylvania and the unilateral modification by an employer of the terms and conditions of employment contained in a Collective Bargaining Agreement, without engaging in collective bargaining, is contrary to Pennsylvania law and constitutes an Unfair Labor Practice. (Stipulation)

14. As the evidence in that case suggested the Township's previous Board of Supervisors unilaterally removed the above provision through the Amendment and Restatement of the Plan by its enactment of Ordinance 07-2001 without collective bargaining, the parties hereto entered a Stipulation and Agreement dated November 19, 2008, to resolve the unfair labor practice charge filed by the UAW with the Commonwealth of Pennsylvania Labor Relations Board at Case No. PERA-C-08-376-W. A copy of that Stipulation and Agreement is attached hereto, made a part hereof and marked Exhibit "A". **(In relevant part, the Stipulation and Agreement stated, "1. The Township shall cause its Pension Plan Administrator to pay the designated beneficiary of David Galando, deceased, a pension benefit equal to the Accrued Benefit earned to the date of David Galando's death.** (Stipulation)(Emphasis added by Hearing Examiner)

15. As part of that Stipulation, the Township agreed to amend that portion of the pension plan relating to the payment of death benefits to surviving beneficiaries. (Stipulation)

16. By mutual agreement, the Township and UAW also reviewed the remaining provisions of the 2001 Restated Plan to determine whether any other material changes had been made without bargaining. (Stipulation)

17. No other non-bargained for modifications were discovered. (Stipulation)

18. Thereafter, and consistent with the aforesaid agreement, the Township adopted Ordinance No. 04-2008 on December 17, 2008 to amend and restate the Service Employees' Pension Plan consistent with the terms of the Stipulation and Agreement. A copy of Ordinance No. 04-2008 containing the Amended and Restated Plan is attached hereto, made a part hereof and marked Exhibit "B". (Stipulation)

19. David Galando was hired by the Township on June 4, 1975. His status as a full-time employee changed on February 27, 2000 when he could not perform the functions of his job as a result of a non-work related illness. (Stipulation)

20. Galando collected short term disability benefits and then long term disability benefits provided by the Township under the terms of the UAW collective Bargaining Agreement. (Stipulation)

21. Although Galando apparently applied for and received Social Security Disability payments, the Township had no information concerning the permanency of his disability and was never advised by Galando that he would not be returning to work. (Stipulation)

22. The Township believed Galando intended to return to work as soon as his physical condition improved. (Stipulation)

23. There is no evidence to suggest Galando's employment was terminated by the Township or there was any effort to modify his rights or employment status under the UAW Collective Bargaining Agreement. (Stipulation)

24. After the original unfair labor practice charge had been settled, the Actuary/Plan Administrator for the Township's Pension Plan raised questions as to whether Galando's failure to be a "regular full time employee", working for wages with the Township for a period of approximately seven (7) years (between 2001 and 2008) caused a "break in service" which would impact the ability of Galando's surviving spouse to collect a surviving spouse benefit under the terms of the pension plan as Amended and Restated in December 2008. (Stipulation)

25. Under the terms of the Pension Plan as Amended and Restated, if Galando had a "break in service" as a result of his non-work related illness, Galando's widow would not be entitled to the accrued monthly benefit contemplated in the Amended and Restated Pension Plan. (Stipulation)

26. These questions caused the accrued monthly pension benefit contemplated in the November 2008 Stipulation and Agreement entered between the Township and UAW to go unpaid and a second unfair labor practice charge to be filed by the UAW against the Township with the PLRB at PERA-C-09-241-W to enforce the Stipulation and Agreement. (Stipulation)

27. All Collective Bargaining Agreements between the Township and UAW from 1997 to date contain bargained for provisions providing for mandatory "leaves of absence" under circumstances such as Galando's. Article 9, Paragraph 1 in each Agreement from 1997 to date provides that:

*"A leave of absence **shall** be granted to any employee during the period he is suffering an illness or injury, whether occupational or non-occupational **for the duration of such illness or injury**, except that the Employer reserves the right to deny a leave of absence where an injury occurred as a result of self-employment or employment by another employee."*

(Stipulation)(Emphasis and italics in stipulation)

28. Under the Amended and Restated Pension Plan an "authorized leave of absence" is defined as a "temporary cessation from active employment with the employer pursuant to an established non-discriminatory policy *whether occasioned by illness, military service or any other reason. An authorized leave of absence shall not cause a break in service.*" (See paragraph 1.07) (Stipulation) (Italics in stipulation)

29. During an "authorized leave of absence" the employee is still "in service" with the Township, despite the fact they are not present or working for wages. (Stipulation)

30. Under the terms of the Pension Plan, a plan participant (like Galando) does not need to be a "wage earning employee" or "physically present at work" to be eligible to collect a retirement benefit. (Stipulation)

31. The Pension plan defines an "employee" as, "any individual employed by the Township on a regular, full time basis" ...(See Paragraph 1.19). (Stipulation)

32. An employee becomes eligible for participation in the plan during periods of employment on a "regular full-time basis" (See Paragraph 2.01). That paragraph provides that:

"Each employee who is employed as a regular, full time employee of the employer shall participate herein *as of the date on which such employee's employment first commences and recommences* provided all prerequisites to participation under this plan have been fulfilled including, but not limited to, completion of all forms required by the plan administrator. Each employee who was a participant in the plan on the date prior to the restatement date shall continue to be a participant on and after the restatement date subject to all the terms and conditions of the plan as set forth herein."

(Stipulation)(Italics in stipulation)

33. An "employee" may be a "participant" in the Plan regardless of whether they are actively accruing benefits. (Stipulation)

34. An "employee" "accrues benefits" only when they are working as "regular full time employees". (Stipulation)

35. A "change in status" occasioned by an "authorized leave of absence" does not "terminate" employment, but merely operates to *suspend* the accrual of benefits for those periods when the participant is not present at work on a regular full time basis and being paid wages. (Stipulation)(Italics in stipulation)

36. The Amended and Restated Pension Plan recognizes that an "authorized leave of absence" results in a "change in status" of an employee and not a termination of employment or break in service. (Stipulation)

37. Paragraph 2.04 of the Pension Plan addresses the effect on the continuing "accrual of benefits" following the "change in status" of a "regular full time employee" as a result of circumstances other than severance from employment. It provides that a "participant" who remains *in the service* of the Township but ceases to be an "employee eligible for participation hereunder" shall have *no further benefit accruals occur until the individual again qualifies as a "participant" hereunder eligible to resume such accrual of benefits.* (Stipulation)(Italics in stipulation)

38. Plan Paragraph 1.26, which defines "monthly average compensation", also establishes the method of calculating retirement benefits where a "participant" retires during a period in which he is still "in service" but not a "regular full time employee". Paragraph 1.26 provides in pertinent part as follows:

"Monthly average compensation shall be calculated by taking into account *only those periods during which an employee receives salary*, as that term is defined in this Section 1.26. Therefore, for example, the monthly average compensation for a participant who is voluntarily or involuntarily serving in the United States Armed Forces during the final 36 months of credited service shall be based on the period during which the employee last received salary (as defined in the preceding paragraph) from the employer."

(Stipulation) (Italics in stipulation)

39. The death benefit provisions of the Plan do not require an accrued death benefit to be paid to the beneficiary of an "employee" engaged in "regular full time employment". Instead, it requires the death benefit to be paid to the beneficiary of any "participant" who dies prior to reaching their retirement date and prior to the termination of their employment. (Stipulation)

40. A surviving beneficiary of a plan participant would not be entitled to receive an accrued pension benefit under the Plan if the participant's employment had been terminated prior to death (i.e. a "break in service"). (Stipulation)

41. As the Township did not terminate David Galando's employment, his status may be considered an "authorized leave of absence" under the collective Bargaining Agreement and pension plan and he has sustained no severance from employment or break in service. (Stipulation)

42. This status would entitle him to participate in the Plan, but not accrue additional benefits during his period of illness, as he was not being paid as a "regular full time employee". (Stipulation)

43. Galando's beneficiary would be entitled to the accrued pension benefit at issue here if the circumstances support a finding that Galando experienced a "change in employment status" under the Plan and not a "termination of his employment" resulting in a "break in service" and a denial of the benefit. (Stipulation)

44. During his lifetime, Galando did not elect a surviving spouse option under the terms of the Pension Plan. (Stipulation)

45. If there is no "break in service" Galando would be entitled to receive the normal form of benefit payment under Paragraph 5.01 of the Pension Plan document which provides for a payment of the accrued benefit for the life of the participant, with 120 months of payments guaranteed. (Stipulation)

46. As Galando did not collect his benefit and did not survive for a period of 10 years from the date his "change in status" occurred, his widow/beneficiary, Margaret Galando, would be eligible to receive her husband's full vested pension benefit, calculated as of the date he was last eligible to accrue benefits as a "regular full time employee", for a ten (10) year period. (Stipulation)

47. Under the terms of the Amended and Restated Pension Plan, the amount of the benefit would be calculated and fixed as of February 27, 2000, the date Galando last worked for wages. (Stipulation)

48. The retirement benefit would be reduced consistent with the terms of the Pension Plan as Galando did not reach his normal retirement age. This calculation, and the reductions, is set forth in detail in correspondence from the Plan's Actuary, Gabrielle Slaughaupt, dated September 10, 2009, a copy of which is attached hereto as Exhibit "C". (Stipulation)

49. According to the Actuary, such Pension Benefit would be calculated to provide Galando's surviving spouse a fixed monthly benefit of \$775.74 per month for a period of ten (10) years beginning on February 1, 2010. (Stipulation)

50. Margaret Galando supports the foregoing stipulations and is in agreement with this payment as evidenced by a letter from her private Counsel, Attorney James Horchak, dated October 7, 2009, a copy of which is also attached as Exhibit "D". (Stipulation)

51. The facts and conclusions set forth above are supported by the record of proceedings in this matter on both substantive and legal grounds. (Stipulation)

DISCUSSION

The Union's charge of unfair practices alleges that the Township violated Section 1201(a)(1) and (5) of PERA by failing to comply with the terms of a settlement agreement of a prior unfair practice charge, PERA-C-08-376-W, arrived at on November 19, 2008. The Township decided not to make pension payments to the surviving spouse of an employee that it had agreed to in the Stipulation and Agreement settling the prior charge.

A public employer commits an unfair practice in violation of Section 1201(a)(1) and (5) of PERA, when it fails to comply with the terms of a settlement agreement of another unfair practice charge. Avery v. Commonwealth, PLRB, 509 A.2d 888 (Pa. Cmwlth. 1986); City of Philadelphia 29 PPER ¶ 19186 (Proposed Decision and Order, 1988).

On the day of the hearing in this matter, the Union and the Township stated that they had reached an agreement of this latest charge. The parties presented a Stipulation with accompanying exhibits. The reason the Township decided not to make the pension payments was because the Township's actuary had "questions" about the amount of the payment to the beneficiary. (Stipulation No. 26) The Stipulation went on to state that the Township had its actuary's question answered and that it now agrees to pay the surviving spouse fixed monthly pension benefits of \$775.74 for a period of ten years beginning on February 1, 2010. The Stipulation also states that the Township agrees to amend that portion of the pension plan relating to the payment of death benefits to surviving beneficiaries. (Stipulation No. 15)

The resolution of this charge is commendable. Nonetheless, the failure to comply with the settlement of the prior unfair practice charge does constitute an unfair practice and the Board must enter the customary conclusions and order.

CONCLUSIONS

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

1. Salem Township is a public employer within the meaning of Section 301(1) of PERA.
2. The United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, Local 204 is an employe organization within the meaning of Section 301(3) of PERA.
3. The Board has jurisdiction over the parties hereto.
4. The Township has committed unfair practices within the meaning of Sections 1201(a)(a)(1) and (5) of 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 Salem Township shall

1. Cease and desist from interfering, restraining or coercing employes in the exercise of the rights guaranteed in the Public Employe Relations Act.
2. Cease and desist from refusing to bargain collectively with the exclusive bargaining representative of its employes.
3. Take the following affirmative action, which the hearing examiner finds necessary to effectuate the policies of the PERA:
 - (a) Comply with all provisions of the Stipulation presented to the Pennsylvania Labor Relations Board on October 29, 2009;
 - (b) Direct the Pension Plan Administrator to provide David Galando's surviving spouse fixed monthly pension benefits of \$775.74 per month for a period of ten (10) years beginning on February 1, 2010;
 - (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 the bargaining

unit 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 (20) days of the date hereof, this order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this eighteenth day of November, 2009.

PENNSYLVANIA LABOR RELATIONS BOARD

Thomas P. Leonard, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

UNITED AUTOMOBILE, AEROSPACE :
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OF AMERICA, UAW, LOCAL 204 ASSOCIATION : Case. No. PERA-C-09-241-W
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AFFIDAVIT OF COMPLIANCE

Salem Township hereby certifies that it has ceased and desisted from its violations of Sections 1201(a)(1) and (5) of PERA; that it has complied with all provisions of the Stipulation presented to the Pennsylvania Labor Relations Board on October 29, 2009; that it has directed the Pension Plan Administrator to provide David Galando's surviving spouse fixed monthly benefits of \$775.74 per month for a period of ten (10) years beginning on February 1, 2010; that it has posted a copy of the proposed decision and order in the manner prescribed therein and that it has served a copy of this affidavit on the Union 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