

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE :
LODGE 9 READING :
 :
v. : Case No. PF-C-09-139-E
 :
CITY OF READING :

PROPOSED DECISION AND ORDER

On December 4, 2009, Reading Lodge No. 9, Fraternal Order of Police (FOP), filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair labor practices alleging that the City of Reading (City) violated sections 6(1)(a) and (c) of the Pennsylvania Labor Relations Act (PLRA) as read in pari materia with Act 111 of 1968 (Act 111) when it "filed an Application with Pennsylvania's Department of Community and Economic Development seeking relief under the Municipalities Financial Recovery Act, Act 47 of 1987, P.L. 246; 53 P.S. § 11701.101 et seq." On January 22, 2010, the Secretary of the Board issued a complaint and notice of hearing assigning the charge to conciliation and directing that a hearing be held on June 3, 2010, if conciliation did not resolve the charge by then. On May 20, 2010, the FOP requested seven witness subpoenas and one subpoena duces tecum. On May 21, 2010, the Board issued the subpoenas as requested.

On June 1, 2010, the hearing examiner, upon the request of the City and without objection by the FOP, continued the hearing and agreed to hold a conference call. On June 3, 2010, the hearing examiner held the conference call. On June 9, 2010, the hearing examiner confirmed that the City had until July 9, 2010, to file motions to dismiss the charge and to quash the subpoenas and that the FOP had 30 days after its receipt of the same to respond.

On July 1, 2010, the Commonwealth of Pennsylvania, Department of Community and Economic Development (DCED), filed a motion to intervene "to protect its exclusive statutory duty and power to designate municipalities financially distressed in accordance with the criteria set forth in Act 47, and subject to judicial review as provided by law" and requested an extension of the briefing schedule. The DCED represented that the City had no objection to its request but that the FOP did. The City requested an extension of the briefing schedule the same day. On July 2, 2010, the hearing examiner granted the DCED's motion to intervene and denied the requests for an extension of the briefing schedule.

On July 9, 2010, the City filed a brief to dismiss the charge and to quash the subpoenas, and the DCED filed a motion to dismiss the charge and a brief. On August 9, 2010, the FOP filed a brief.¹

The hearing examiner, on the basis of all matters of record,² makes the following:

FINDINGS OF FACT

1. The City has recognized the FOP as the exclusive representative of a bargaining unit that includes police officers employed by the City. (Pleadings)

2. On September 10, 2009, the City applied to the DCED for relief under the Municipalities Financial Recovery Act (Act 47). (Pleadings)

3. On November 30, 2009, the City's mayor made the following statement: "The whole reason for going into Act 47, number one, so we can negotiate contracts without having mandated arbitration." (Pleadings)

¹ On August 23, 2010, the City requested the opportunity to file a reply brief and to present oral argument. When the hearing examiner set up the briefing schedule, however, the City never reserved the right to file a reply brief or to present oral argument. The City's request is, therefore, denied.

² Because there has been no evidentiary hearing to date, the following findings are limited to the facts as agreed to by the parties in their pleadings.

DISCUSSION

The FOP has charged that the City committed unfair labor practices under sections 6(1)(a) and (c) of the PLRA as read in pari materia with Act 111 when it "filed an Application with Pennsylvania's Department of Community and Economic Development seeking relief under the Municipalities Financial Recovery Act, Act 47 of 1987, P.L. 246; 53 P.S. § 11701.101 et seq." As set forth in the specifications of charges, the FOP alleges that "[a]t all times relevant herein, several members of the FOP processed and negotiated grievances and unfair labor practice charges on behalf of the members of the FOP" and that "[t]he retaliatory action taken by the City was motivated by anti-union animus in reaction to the protected activities of the bargaining unit members." According to the FOP, anti-union animus on the part of the City may be found in a statement the City's mayor made as follows: "The whole reason for going into Act 47, number one, so we can negotiate contracts without having mandated arbitration."

The City has moved to dismiss the charge on the ground that it does not state a cause of action. According to the City, because Act 47 "prescribes the exclusive mechanism for challenging an Act 47 application," the Board has no jurisdiction to find that its application for Act 47 relief was unlawful, no matter what its motivation may have been. Brief at 10. The City also posits that because it has no authority to alter a recovery plan under Act 47 the Board has no jurisdiction to remedy any unfair labor practices it may have committed in applying for Act 47 relief. In addition, the City contends that its application for Act 47 relief was lawful regardless of its motivation because "Act 47 expressly makes lawful certain financial adjustments that might otherwise be unlawful were Act 111 and the PLRA the only applicable laws to a given labor situation." Brief at 13. The City further contends that "seeking Act 47 protection cannot interfere with labor rights" as a matter of law because existing collective bargaining agreements may not be changed under Act 47. Brief at 2. Moreover, in the City's view, the mayor's statement is constitutionally protected political speech and thus not evidence of anti-union animus in any event.

The DCED has filed a substantially similar motion to dismiss the charge to protect its own jurisdiction to determine whether or not a municipality qualifies for relief under Act 47.

The City also has moved to vacate as irrelevant, unduly burdensome or subject to the deliberative process privilege seven witness subpoenas and one subpoena duces tecum that the Board issued upon the request of the FOP.

The FOP contends that the motions should be denied because the Board has exclusive jurisdiction to find unfair labor practices and to order an appropriate remedy, because the mayor's statement is reflective of anti-union animus on the part of the City no matter how constitutionally privileged he may have been to make it and because the subpoenas are for "necessary and relevant" testimony and documentation and are not subject to the deliberative process privilege. Brief at 9.

The Board has exclusive jurisdiction to find unfair labor practices under the PLRA as read in pari materia with Act 111. PSTA v. PLRB, 671 A.2d 1183 (Pa. Cmwlth. 1996). An employer commits unfair labor practices under sections 6(1)(a) and (c) of the PLRA as read in pari materia with Act 111 if it discriminates against its employees for having engaged in activity protected by those statutes. Duryea Borough Police Department v. PLRB, 862 A.2d 122 (Pa. Cmwlth. 2004). One such activity is engaging in Act 111 interest arbitration. Commonwealth of Pennsylvania, Pennsylvania State Police, 41 PPER 33 (Final Order 2010). In section 252 of Act 47, however, our General Assembly has limited the statutory right of employees with respect to Act 111 interest arbitration by subjecting a future "arbitration settlement" to a recovery plan under Act 47. Wilkinsburg Police Officers Association v. Commonwealth of Pennsylvania, Commonwealth of Pennsylvania DCA, 535 Pa. 425, 636 A.2d 134 (1993); North Braddock Borough, 28 PPER ¶ 28229 (Final Order 1997). In light of that statutory scheme, an employer may lawfully apply for relief under Act 47 even if its motivation for doing so is to limit employee rights with respect to Act 111 interest arbitration. Thus, although the mayor's statement misstates what the City might be able to accomplish under Act 47 in that Act 47 does not bar Act 111 interest arbitration altogether, it otherwise is vindicated by Act 47 itself. Accordingly, the charge does not state a cause of action, and the motions to dismiss must be granted.

In contending that the motions to dismiss should be denied, the FOP asserts that "[t]his case is not about circumventing Act 47 and it is not about freedom of speech. This case is about nothing more than a union engaging in protected activity under the PLRA and Act 111 and seeking appropriate relief from the City's discriminatory and retaliatory actions." Brief at 2. Without indicating what relief the Board may provide to remedy any unfair labor practices the City may have committed, the FOP also notes that it "is not challenging the right or the act of seeking relief [under Act 47]; rather, the FOP seeks relief from the City's anti-union animus, which ultimately led to the filing." Brief at 5. Thus, the FOP would have the Board focus on its exclusive jurisdiction to remedy unfair labor practices and ignore the limitations Act 47 places on the statutory right of employees with respect to Act 111 interest arbitration. In disposing of a charge within its exclusive jurisdiction, however, the Board may not ignore the law, including Act 47. See North Braddock Borough, supra (no unfair labor practices found where an employer refused to comply with a provision of a collective bargaining agreement that was not in conformity with a previously adopted recovery plan under Act 47); see also City of Pittsburgh v. Commonwealth of Pennsylvania, PLRB, 539 Pa. 535, 653 A.2d 1210 (1995) (Board bound by restrictions the Municipal Pension Plan Funding Standard and Recovery Act (Act 205) placed on bargaining under the Public Employe Relations Act); PSTA, supra (Board bound by a consent agreement reached in federal court). The FOP's contention is, therefore, without merit.

Given the disposition of the charge, the City's motion to vacate the subpoenas is moot and therefore need not be addressed.

CONCLUSIONS

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

1. The City is an employer under section 3(c) of the PLRA as read in pari materia with Act 111.
2. The FOP is a labor organization under section 3(f) of the PLRA as read in pari materia with Act 111.
3. The Board has jurisdiction over the parties.
4. The charge does not state a cause of action.

ORDER

In view of the foregoing and in order to effectuate the policies of the PLRA as read in pari materia with Act 111, the hearing examiner

HEREBY ORDERS AND DIRECTS

that the charge is dismissed and the complaint rescinded.

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 twenty-seventh day of August 2010.

PENNSYLVANIA LABOR RELATIONS BOARD

Donald A. Wallace, Hearing Examiner