

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

CAPITAL CITY LODGE NO. 12, :
FRATERNAL ORDER OF POLICE :
 :
v. : Case No. PF-C-09-94-E
 :
CITY OF HARRISBURG :

PROPOSED DECISION AND ORDER

On July 31, 2009, the Capital City Lodge No. 12, Fraternal Order of Police (Union or FOP), filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) alleging that the City of Harrisburg (City) violated Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA) and Act 111. In its specification of charges, the Union alleges that City Council committed a bargaining violation by refusing to enact a pension ordinance modifying the City's police pension plan in accordance with an amendment to the parties' collective bargaining agreement (CBA).

By letter dated August 13, 2009, the Secretary of the Board declined to issue a complaint and notice of hearing and therein notified the Union that she deemed the charge to be untimely filed. The Union filed exceptions to the Secretary's determination and alleged additional facts to support the timeliness of its charge. On November 17, 2009, the Board issued an order directing remand to the Secretary for further proceedings. On November 24, 2009, the Secretary issued a complaint and notice of hearing directing that a hearing be held on February 8, 2010 in Harrisburg, Pennsylvania. During the hearing on that date, both parties in interest were afforded a full and fair opportunity to present evidence and cross-examine witnesses. Both parties filed post-hearing briefs.

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

FINDINGS OF FACT

1. The City is a public employer and political subdivision under Act 111 as read in pari materia with the PLRA. (N.T. 8).
2. The Union is a labor organization under Act 111 as read in pari materia with the PLRA. (N.T. 8).
3. The Union in the past has bargained directly with the Mayor and his administration; it has not bargained directly with City Council. (N.T. 10).
4. On two prior occasions, the Union bargained with Mayor Reed for changes to the police pension plan and on both occasions City Council passed an ordinance containing the agreed upon changes. (N.T. 12).
5. In 2008, the Mayor's office and the Union reopened contract negotiations for wages, pursuant to the reopener clause in the 2004-2010 contract. As a result, they reached an extension agreement affecting wages and pensions that is effective through December 2015. ((N.T. 22; Union Exhibit 1).
6. On November 13, 2008, Mayor Reed signed the contract extension agreement with the Union. The City's Chief Business Administrator at the time, Robert Kroboth, did not sign the contract extension agreement until March 9, 2009, after he reviewed the actuarial study of the proposed pension plan changes. Mr. Kroboth is currently the new administration's Chief of Staff and is also the Chairman of the Police Pension Board, which is responsible for administering the police pension plan. The Chief of Police, the Controller and the Solicitor also signed the extension agreement at about the same time as the Mayor. (N.T. 13, 43-44, 48; Union Exhibit 2).

7. On January 29, 2009, David H. Killick, consulting actuary with Conrad Siegel Actuaries, submitted his actuarial study of the proposed pension plan changes to Mr. Kroboth. (N.T. 33, 38; Union Exhibit 2; City Exhibit 1).

8. Jason Brinker is a Detective assigned to the Criminal Investigation Division at the City's Bureau of Police. He is also the current Union president. On March 9, 2009, Detective Brinker met with Mayor Reed and Mr. Kroboth. During that meeting, Mayor Reed asked the Union to delay the submission of the pension ordinance to City Council because the Mayor had other matters to address with Council. The Union agreed to delay implementation of the pension until the Summer 2009. (N.T. 14, 17).

9. On June 5, 2009, Mr. Kroboth submitted a draft ordinance containing the proposed pension changes to the Public Safety Committee and requested Council action by June 23, 2009. (N.T. 15, 49).

10. to date, Council has not enacted the ordinance or adopted the pension plan changes to which the Mayor agreed. (N.T. 16, 49).

11. The City has implemented all other contract changes in the November 13, 2008 contract extension agreement except the pension changes. (N.T. 17).

12. An actuarial study of the proposed pension plan changes did not exist when the Mayor, Chief and Controller signed the contract extension agreement. (N.T. 24; Union Exhibit 2).

13. Mayor Reed was a member of the Police Pension Board and he is a beneficiary of the police pension fund. He became a member of the police pension in 1999 when the City purchased his prior service time as Mayor. (N.T. 27-28, 47).

14. Under the Municipal Pension Plan Funding Standard and Recovery Act (Act 205)¹, a cost study is required when pension benefit improvements are being considered to inform City officials of the financial impact prior to changing the plan. (N.T. 34-36).

15. Section 304 of Act 205 expressly provides as follows:

(a) Presentation of cost estimate.—Pior to the adoption of any benefit plan modification by the governing body of the municipality, the chief administrative officer of each pension plan shall provide to the governing body of the municipality a cost estimate of the effect of the proposed benefit plan modification.

.

(e) Contents of cost estimate.—Any cost estimate of the effect of the proposed benefit plan modification shall be complete and accurate and shall be presented in a way reasonably calculated to disclose to the average person comprising the membership of the governing body of the municipality, the impact of the proposed benefit plan, the modification on the future financial requirements of the pension plan and the future minimum obligation of the municipality with respect to the pension plan.

(53 P.S. § 895.305(a) & (e)).

16. The proposed pension plan changes contained in the November 13, 2008 contract extension agreement would cost the City an additional \$514,000 in annual contributions to the police pension plan. (N.T. 37).

17. The City's pension plan ordinance provides, in relevant part, as follows:

¹ Act of December 18, 1984, P.L. 1005, No. 205.

Prior to the adoption of any benefit plan modification by the City, the Pension Board shall provide to the City a cost estimate of the proposed benefit plan modification. Such estimate shall be prepared by the Plan's Actuary, which estimate shall disclose to the City the impact of the proposed benefit plan modification on the future financial requirements of the Plan and the future minimum obligation of the City with respect to the Plan.

(N.T. 46; City Exhibit 2, § 2-707.65 at 33).

18. City Ordinance 2-307.5 states, in relevant part, as follows:

Contract administration for the City, heretofore vested in Council, shall be vested in the Mayor and Department of Administration, to be exercised in accordance with the procedures adopted by the Mayor. The exception shall be the award of no-bid contracts for professional services. Due to the sensitive and controversial nature of these contracts, coordination with and approval by the City Council is required.

(City Ordinance No. 5 of 1970, § 2-307.5)

19. Section 4301 of the Third Class City Code² provides, in relevant part, as follows:

Cities shall establish, by ordinance, a police pension fund, to be maintained by an equal and proportionate monthly charge against each member of the police force . . . which fund shall at all times be under the direction and control of council but may be committed to the custody and management of such officers of the city or citizens thereof, or corporations located therein, as may be designed by council, and applied, under such regulations as council may, by ordinance, prescribe, for the benefit of such members of the police force . . .

(53 P.S. § 39301).

20. In July 2009, the Public Safety Committee of City Council held a public hearing on the pension benefit amendment. The bill to amend the police pension plan ordinance did not make it out of committee.

DISCUSSION

The Union argues that the City violated Section 6(1)(a) and (e) of the PLRA and Act 111 by refusing to implement the terms of a valid collective bargaining agreement entered into between the City and the Union. (Union's Post-hearing brief at 4). The Union contends that, although the authority to negotiate and enter into contracts is reserved to City Council as determined by the Commonwealth Court in Moore v. Reed, 559 A.2d 602 (Pa. Cmwlth. 1989), in 1993 City Council delegated that responsibility to the Mayor through the enactment of City Ordinance 2-307.5. (Union's Post-hearing brief at 4). The Union maintains that, as a result of this legislative delegation, the Mayor and the City Controller are solely responsible for negotiating collective bargaining agreements. (Union's Post-hearing brief at 5). Accordingly, argues the Union, when Mayor Reed and City Controller James J. McCarthy signed the November 2008 extension agreement modifying the police pension plan, they entered into an agreement that was binding on City Council. Consequently, claims the Union, City Council was obligated to pass an ordinance modifying the police pension plan in accordance with the extension agreement. (Union's Post-hearing brief at 5).

Conversely, the City argues that City Council possesses exclusive control over amendments to the police pension fund under the Third Class City Code and Act 205. (City's Post-hearing brief at 5). The Mayor cannot bind City Council to collectively bargained for provisions that require legislative action, and those provisions are not deemed approved unless such legislation is enacted by Council. (City's Post-hearing brief at 5).

² Act of June 23, 1931, P.L. 932, Art. XLIII, as amended, 53 P.S. § 39301.

1. CONTRACT AUTHORITY

The Union's contention that City Council relinquished its authority to enter into and agree to contracts in 1993 is misplaced. The Union cited to City Ordinance Section 2-307.5 as authority for the proposition that in 1993 (after the Court's decision in Moore v. Reed, supra) the Harrisburg City Council delegated its authority to enter contracts to the Mayor.³ However, the Ordinance was enacted in 1970, well before Moore v. Reed. The Moore Court noted that although administrative acts are within the purview of the Mayor's authority, legislative action is solely within the province of the City Council. Moore, 559 A.2d at 603. In this regard, the Commonwealth Court, in Moore, opined that "[t]he authority to negotiate a valid and binding contract for a municipality is vested in the City Council. It is a legislative function. Without the assent of City Council, the municipality is not bound." 559 A.2d at 603 (emphasis added). The Moore Court further emphasized that "the term 'execute' means to discharge the ministerial duties relating to contracts and does not embrace negotiations." Id. at 604. Because Ordinance Section 2-307.5 pre-dates the Moore decision, the City Council did not delegate its legislative function to negotiation and enter into contracts subsequent to the Moore decision, as argued by the Union, as a matter of both fact and law.

Moreover, a review of the City's 1970 Ordinance reveals that the City never intended to relinquish any of its legislative functions over negotiating and entering into contracts for the City. Contractual promises bind the City to financial obligations. As the governing body in charge of the City's budget, City Council must be in control of the financial obligations to which it binds the City. The Mayor does not have the power to individually bind the City to financial obligations, which he has not evaluated. Council also does not have the burden of paying for obligations to which they did not agree. City Ordinance 2-307.5 states, in relevant part, as follows:

Contract administration for the city, heretofore vested in Council, shall be vested in the Mayor and Department of Administration, to be exercised in accordance with the procedures adopted by the Mayor. The exception shall be the award of no-bid contracts for professional services. Due to the sensitive and controversial nature of these contracts, coordination with and approval by the City Council is required.

(F.F. 18) (emphasis added). This provision established by ordinance in 1970 what the Commonwealth Court held in Moore, supra, in 1989. The Moore holding was based on Harrisburg's status as a third class city, governed by the Third Class City Code, which adopted Plan A of the Optional Third Class City Charter Law. Specifically, the Court held that the power of this City's Mayor is limited to administering "duties relating to contracts and does not embrace negotiations." Moore, 559 A.2d at 604 (emphasis added).

2. THIRD CLASS CITY CODE, ACT 205 AND THE PENSION ORDINANCE

Under the Third Class City Code, the enactment of pension plans and pension plan modifications is clearly within the province of the City Council. Section 4301 provides that "[c]ities shall establish, by ordinance, a police pension fund." 53 P.S. § 39301. City Council is the governing body with the power and authority to pass an ordinance and legislate. Section 4301 further provides that the pension fund "shall at all times be under the direction and control of council but may be committed to the custody and management of such officers of the city or citizens thereof, or corporations located therein, as may be designed by council, and applied, under such regulations as council may, by ordinance, prescribe, for the benefit of such members of the police force." Id. (emphasis added). The law clearly requires that City Council control and regulate by ordinance the police pension fund and, where Council delegates the administration of the fund, such administration must be in accordance with rules and regulations established by City Council. In accordance with Section 4301, the Harrisburg City Council established a pension fund by ordinance and the administrative functions of the fund are executed by a police pension board. Significantly, while Section 4301 of the Third Class City Code preserves City Council's authority over

³ The ordinance cited by the Union was included as an exhibit attached to the City's post-hearing brief. It was not an exhibit at the hearing, but it is quoted verbatim by the Union in its post-hearing brief.

regulating the terms and conditions of the police pension fund and permits the delegation of ministerial duties, it does not delegate any legislative responsibilities to the Mayor. The terms, policies and modifications of the police pension fund must at all times be presented to, voted upon, and enacted into legislation by the City Council. Although Mayor Reed's position regarding City Council's obligation to approve his proposal are not of record, a mayoral attempt to negotiate a contract containing police pension modifications, while expecting City Council to simply rubber stamp the concomitant financial obligations, would arguably constitute an ultra vires act.

In fulfillment of the City Council's authority and control over legislating the creation and modifications of the police pension plan, our General Assembly enacted Act 205 of 1984 and expressly required that "[p]rior to the adoption of any benefit plan modification by the governing body of the municipality, the chief administrative officer of each pension plan shall provide to the governing body of the municipality a cost estimate of the effect of the proposed benefit plan modification." 53 P.S. § 895.305(a). That section also requires that any cost estimate of a proposed pension benefit plan change shall be presented in a reasonable manner so the governing body can understand the impact of the modification on the future financial requirements of the city. 53 P.S. § 895.305(e). Act 205, therefore, clearly places the authority to modify a police pension plan with the City Council as the "governing body." The Mayor is not the governing body of the City. Act 205 ensures that, before City Council approves or adopts a pension plan modification, the City can afford the proposed changes. Indeed the City's own pension ordinance tracks the language of Act 205 and also requires the following:

Prior to the adoption of any benefit plan modification by the City, the Pension Board shall provide to the City a cost estimate of the proposed benefit plan modification. Such estimate shall be prepared by the Plan's Actuary, which estimate shall disclose to the City the impact of the proposed benefit plan modification on the future financial requirements of the Plan and the future minimum obligation of the City with respect to the Plan.

(F.F. 17) (emphasis added).

The City Council of Harrisburg and Mr. Kroboth followed the mandates of Act 205, the Third Class City Code and its own pension ordinance in this case. Mr. Kroboth was aware that an actuarial study must be performed and presented to the City Council for review and adoption. Therefore, he did not sign the November 2008 extension agreement that Mayor Reed signed. The actuarial report was submitted in January 2009 and Mr. Kroboth did not sign the contract extension agreement until March 9, 2009, after he reviewed the actuarial study of the proposed pension plan changes. On June 5, 2009, Mr. Kroboth submitted a draft ordinance containing the proposed pension changes to the Public Safety Committee and requested Council action by June 23, 2009. The Public Safety Committee of City Council, after learning from the actuarial study that the proposed pension changes would cost the City an additional \$514,000 annually, refused to vote the bill containing the changes out of committee for a full Council vote. This legislative oversight is what the Third Class City Code and Act 205 were designed to protect. In fact, the City's pension ordinance states that the actuarial study is for the purpose of disclosing the City's future financial obligations before acting on any proposed changes. The City's Mayor simply does not have the authority, either through past practice or law, to commit the City to future financial obligations to fund a pension plan without independent review and approval from the legislative branch of the City, which controls the budget and means of raising money through taxes to fund its obligations.

3. REQUIREMENT OF RATIFICATION

The Union had actual knowledge that the Mayor did not have authority to bind the City to pension plan modifications without approval or ratification from City Council. In City of McKeesport Wage and Policy Committee v. City of McKeesport, 31 PPER ¶ 31130 (Final Order, 2000), the Board reiterated the general rule that an employer may commit an unfair labor practice by refusing to execute a written contract agreed to by the parties at the bargaining table. McKeesport, 31 PPER at 308. However, the Board stated that such an agreement must be approved by the governing body. Id. Specifically, the Board held as follows:

Even if the parties had, as the Committee argues, in fact reached agreement as of December 21, 1999, when the Committee by letter informed the City that it agreed to the pension proposal as set forth in the City's December 7 letter, the city would not have been bound by such agreement. Section 4(a) of Act 111 provides in part that where a political subdivision of the Commonwealth is involved, "the agreement shall be deemed not approved within the meaning of this section if it is not approved by the appropriate lawmaking body within one month after the agreement is reached by way of collective bargaining."

Id. at 308 (quoting 43 P.S. § 217.4(a)). The McKeesport Board further explained that where there is no evidence of agreement of City Council, there is no agreement as required by Act 111 and that "any agreement that may arguably have been reached between the [union's] representatives and the City's [representative] would have been tentative only." McKeesport, 31 PPER at 309. The Board's holding in McKeesport makes clear that, under the mandate of Act 111, a union is on notice that it has no agreement regarding pension plan changes without the final legislative approval from City Council. McKeesport, Act 111 and past practice placed the Union on actual notice that the Mayor's agreement regarding pension plan changes was tentative until approved by City Council.

The Union was well aware that the Mayor did not have the benefit of an actuarial study regarding the impact of the proposed pension changes when he signed the extension agreement. An actuarial study pursuant to Act 205 is the sine qua non of making any pension modifications. The absence of such a study in November 2008 placed the Union on notice that any agreement to those changes was tentative at best and subject to rejection by the governing body.

Moreover, the history of the bargaining relationship between the parties reveals that the Union was well aware that City Council was required to approve changes to the pension plan by way of ordinance subsequent to any previously obtained tentative agreements. On two prior occasions, the Union bargained with Mayor Reed for changes to the police pension plan and on both occasions City Council passed an ordinance containing the agreed upon changes. The fact that City Council agreed with the Mayor's proposed changes in the past does not mean that City Council was bound by the Mayor's proposals in the past or that it was rubber stamping tentative agreements made by Mayor Reed in contravention to Act 205 and the Third Class City Code.

4. PENSION CHANGE AGREEMENTS ARE VOID WITHOUT AN ACTUARIAL STUDY

In Shippensburg Police Ass'n v. Borough of Shippensburg, 968 A.2d 246 (Pa. Cmwlth. 2009), the Commonwealth Court held that an Act 111 arbitrator does not have the authority to compel the modification of police pension plan without proof of its actuarial soundness pursuant to Act 205. Significantly, the Shippensburg Court emphasized that "Act 205 applies regardless of any pension plan or contract." Id. at 250 (citation omitted) (emphasis added). The Court further held that "a grievance arbitrator who awards a modification of a police pension plan in the absence of an Act 205 cost estimate requires an illegal act necessitating vacation [of the award]." Id. at 251. In Northampton Township v. Northampton Township Police Benevolent Ass'n, 885 A.2d 81 (Pa. Cmwlth. 20065), the Court similarly held that an Act 111 interest arbitration panel violated the dictates of Act 205 when it issued an award requiring that the township lower the pension contribution rates of its police officers without the benefit of an actuarial study.

In the Commonwealth of Pennsylvania, there is a constitutional exemption requiring municipalities to take legislative action necessary to implement Act 111 arbitration awards, as long as it is not an illegal act. 1 Pa. C.S. Article III, § 31. If an Act 111 arbitrator is without authority to impose pension changes on a municipality without the benefit of an Act 205 actuarial study, then certainly Mayor Reed (who did not have the same power to require City Council to perform legislative acts) was without authority to enter a contract affecting the police pension plan without the benefit of an actuarial study. The record shows that Mayor Reed and the Controller signed the extension agreement in November 2008 before the availability of an actuarial study demonstrating the financial effect of the proposed changes to which he had agreed. Accordingly, even if

Mayor Reed and the Controller had the power to bind the City requiring Council to pass an ordinance, he certainly could not have agreed to the pension changes without an actuarial study revealing the financial implications of the proposed changes to the plan. Although the study was available to City Council's Public Safety Committee when it reviewed the cost of the proposed plan, the Union is seeking to have the proposed plan agreed to by the Mayor enacted into law, and the Mayor entered that agreement before the availability of an actuarial analysis and without understanding the costs to the City of the proposed changes. Although the Mayor is not the governing body and is without power to bind the City to pension changes, at a minimum, Act 205 requires that the costs of pension plan changes be analyzed and understood before changes can be made to a pension ordinance. Absent the necessary financial analysis of the proposed changes, the Mayor's agreement could not be anything but tentative.

Accordingly, the City did not commit unfair labor practices in violation of Section 6(1)(a) and (e) when Council refused to pass an ordinance modifying the police pension plan in accordance with the extension agreement between the Reed administration and the Union.

CONCLUSIONS

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

1. The City is a public employer and a political subdivision of the Commonwealth within the meaning of Act 111 as read in pari materia with the PLRA.

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 City has not committed unfair labor practices within the meaning of Section 6(1)(a) or (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 charge is dismissed, the complaint is rescinded and 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 seventeenth day of September, 2010.

PENNSYLVANIA LABOR RELATIONS BOARD

JACK E. MARINO
Hearing Examiner