IN THE COMMONWEALTH COURT OF PENNSYLVANIA

John J. Vitullo	:	
	:	
v.	:	No. 1692 C.D. 2010
	:	
Borough of Whitehall,	:	Argued: April 5, 2011
Appellant	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: May 5, 2011

The Borough of Whitehall (Borough) appeals from an order of the Court of Common Pleas of Allegheny County (trial court) reversing the decision of the neutral Hearing Examiner and ordering that retired police officer John J. Vitullo is due a cost-of-living adjustment (COLA) in accordance with Section 501 of the collective bargaining agreement (CBA) between the Borough and the Wage-Policy Committee of the Borough of Whitehall Police Department (Bargaining Unit). We reverse.

Vitullo is a former Borough police officer, who retired in January 2008, and a current recipient of a pension from the Borough's Police Pension Plan (Pension Plan). In January 2009, the first anniversary of his retirement, Vitullo became entitled to an annual COLA. The Borough engaged Mockenhaupt Benefits Group (Actuary) to calculate the COLA. The Actuary utilized the Consumer Price Index – Urban Wage Earners and Clerical Workers (CPI-W) specified in the

Pension Plan document to calculate the COLA. The Actuary compared the value of the CPI-W in January 2008, which was 206.744, to the value of the index in January 2009, which was 205.700, and concluded that because the CPI-W declined from January 2008 to January 2009, there would be no increase in Vitullo's pension. The Actuary's conclusion was adopted by the Borough and Vitullo filed an appeal under the Local Agency Law.[1] A neutral Hearing Examiner was appointed pursuant to Borough Resolution No. 09-855 to conduct a hearing and make findings of fact and conclusions of law. The Resolution further provided that the decision of the Hearing Examiner would be final and appealable by the parties.

Vitullo argued before the Hearing Examiner that the Borough's use of the CPI-W in calculating the COLA was in conflict with the COLA provision of the CBA between the Borough and the Bargaining Unit. Vitullo argued that the Borough should have used the CPI for All Urban Consumers (CPI-U) to calculate the COLA and that on the basis of the CPI-U, he is entitled to a pension increase. He also argued that the method of the COLA calculation was flawed, arbitrary and capricious and could not be supported under the doctrine of past practice because it was not known to the Bargaining Unit.

The Borough argued that the utilization of the CPI-W to calculate the COLA is consistent with the provisions of the CBA, the language of the Plan, and past practice.[2] The Borough contended that the CPI-W has been utilized without objection from the Bargaining Unit for the last decade.

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[1] 2 Pa.C.S. §§551-555, 751-754.

[2] Evidence of "past practices" is used in arbitrations in four situations: (1) to clarify ambiguous language; (2) to implement contract language which sets forth only a general rule; (3) to modify or amend apparently unambiguous language which has arguably been waived by the parties; and (4) to create or prove a separate, enforceable condition of employment which cannot

(Continued....)

The Hearing Examiner found as follows. Article V, Section 501 of the CBA governs pension benefits and provides that the "[COLA] shall be made on each annual anniversary of a Police Officer's retirement in an amount equal to the percentage change in the U.S. Consumer Price Index for the most recent available twelve-month period." See Reproduced Record (R.R.) at 83a-85a.[3] Section 4.04 of the Pension Plan provides for a COLA as follows:

> Each participant who shall retire and receive a retirement benefit pursuant to section 4.02 hereunder shall be entitled to receive a [COLA] to the amount of benefit payable to such Participant under section 4.02 effective as of each annual anniversary date of the original commencement of the Participant's retirement benefit payments hereunder. Such [COLA] shall be an amount equal to the percentage

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be derived from the express language of the CBA. County of Allegheny v. Allegheny County Prison Employees Independent Union, 476 Pa. 27, 34, 381 A.2d 849, 852 (1977); Central Susquehanna Intermediate Unit Educational Association v. Susquehanna Intermediate Unit No. 16, 459 A.2d 889 (Pa. Cmwlth. 1983). The meaning of "past practice" has been appropriately defined as follows:

> A custom or practice is not something which arises simply because a given course of conduct has been pursued by Management or the employees on one or more occasions. A custom or a practice is a usage evolved by men as a normal reaction to a recurring type situation. It must be shown to be the accepted course of conduct characteristically repeated in response to the given set of underlying circumstances. This is not to say that the course of conduct must be accepted in the sense of both parties having agreed to it, but rather that it must be accepted in the sense of being regarded by [parties] involved as the normal and proper response to the underlying circumstances presented.

County of Allegheny, 476 Pa. at 34 n.12, 381 A.2d at 852 n.12 (citation omitted).

[3] We note that contrary to Pa.R.A.P. 2174, which mandates that the reproduced record contain a full and complete table of contents, there is no table of contents included in the reproduced record filed by the Borough in this appeal. We remind counsel that the Pennsylvania Rules of Appellate Procedure are not discretionary but mandatory and a party's failure to follow the Rules only hinders the courts' thorough review of an appeal.

> change in the Consumer Price Index (CPI-W) during the last year times the retirement benefit payable under section 4.02 but shall not exceed: (1) the percentage increase in the [CPI] from the year in which the Participant was last employed as an Employee of the Employer; (2) the total retirement benefits payable under this Plan shall not exceed seventy-five percent (75%) of the Participant's Final Monthly Average Salary; (3) the total cost of living increase shall not exceed thirty-percent (30%) of the Participant's retirement benefit under the Plan; and (4) the [COLA] shall not impair the actuarial soundness of the Pension Fund.

Id. at 96a-97a.

The Actuary credibly testified that he used the CPI-W to calculate Vitullo's 2009 COLA and that this resulted in no COLA for Vitullo. The Actuary testified that it was his view that the CPI-W was the better index to apply to police pensions as it did include union employees but did not include self-employed individuals and professionals as does the CPI-U. The Actuary testified that he had been calculating the COLA on the basis of the CPI-W since the 1990's and that he had never had any discussions with anyone as to which CPI should be used.

Vitullo and the Borough Manager both credibly testified that there was never any bargaining over which CPI should be used to calculate the COLA. The Borough Manager credibly testified that during his tenure the COLA had been consistently calculated using the CPI-W.

The Hearing Examiner found that there was no conflict in the testimony regarding the use of the CPI-W. The Hearing Examiner cited Section 5 of what is commonly referred to as Act 600,[4] which provides that:

[4] Act of May 29, 1956, P.L. (1955) 1804, as amended, 53 P.S. §771(g)(1). Act 600 governs municipal police pensions.

> The ordinance or resolution establishing the police pension fund may provide for a cost of living increase for members of the police force receiving retirement benefits. The cost of living increase shall not exceed the percentage increase in the Consumer Price Index from the year in which the police member last worked, shall not cause the total police pension benefits to exceed seventy-five per centum of the salary for computing retirement benefits and shall not cause the total cost of living increase to exceed thirty per centum. No cost of living increase shall be granted which would impair the actuarial soundness of the pension fund.

The Hearing Examiner concluded that neither the CBA nor Act 600 specifies which of the two indexes, CPI-W or CPI-U, are to be used to calculate the COLA. Thus, the Hearing Examiner determined that it was appropriate to resolve the issue based on the past practice of using the CPI-W. In addition to the past practice doctrine, the Hearing Examiner pointed out that Section 4.04 of the Pension Plan, which was adopted by the Borough on January 19, 2000 through enactment of a public ordinance, specifies that the CPI-W is to be used. Therefore, the Hearing Examiner concluded that the Borough properly used the CPI-W to calculate the COLA.

The Hearing Examiner also rejected Vitullo's argument that the method used to calculate the COLA was in error. Vitullo contended that the change in the CPI should have been calculated by taking the monthly amount of the change in the CPI from month to month from January 2008 to January 2009 and averaging these monthly changes, which he argued would have result in an increase in his pension. The Hearing Examiner determined that neither the CBA, the Pension Plan nor Act 600 make any reference to averaging the monthly changes in the CPI over the year. The Hearing Examiner concluded further that the

utilization of Vitullo's proposed method would violate the limits established by Act 600.

Accordingly, the Hearing Examiner denied Vitullo's appeal and he further appealed to the trial court. The issues presented to the trial court were: (1) whether the Pension Plan Actuary used the correct CPI in calculating the COLA; and (2) whether the Pension Plan Actuary's calculation of the COLA by comparing the CPI on the date of retirement and the anniversary date was the correct procedure under the CBA.

Upon review, the trial court reversed the Hearing Examiner's determination. The trial court stated that the only issue before it was the proper interpretation of Section 501 of the CBA and what method of calculation was proper. The trial court held that the proper interpretation of Section 501 of the CBA is Vitullo's interpretation. The trial court reasoned that it was unlikely that a COLA analysis would be intended to cover cost adjustments for only two months out of a twelve month time period. Thus, the trial court held that the proper interpretation of Section 501 of the CBA is that the cost of living calculation should be computed by taking into account the CPI for each month of the twelve month period between Vitullo's retirement date and the anniversary of that date, which would yield a 2.6% cost of living increase.

Accordingly, the trial court ordered that Vitullo is due a COLA in accordance with the court's interpretation of Section 501 of the CBA. This appeal by the Borough followed.[5]

[5] Where, as here, a complete record is developed before the local agency, our scope of review is limited to determining whether constitutional rights were violated, whether there was an error of law or violation of agency procedure, and whether necessary findings of fact are supported by substantial evidence. Gilotty v. Township of Moon, 846 A.2d 195 (Pa. Cmwlth.),

(Continued....)

The issues presented in this appeal are:

> 1. Whether the Actuary used the correct U.S. Department of Labor CPI in calculating the COLA by using the CPI-W specified in the Pension Plan document adopted as Ordinance No. 911.
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> 2. Whether the Borough's Pension Plan Actuary's calculation of the COLA by comparing the CPI on the date of retirement and on the anniversary date was the correct procedure under the CBA which specifies that adjustment be made "on each annual anniversary" of retirement.
>
> 3. Whether the trial court erred in reversing the Hearing Examiner's decision, where substantial evidence supported the Hearing Examiner's findings of fact and conclusions of law and where that decision was reasonable, not capricious, arbitrary or correctly applied Act 600.

Initially, we note that the trial court did not decide the Borough's first issue raised herein of whether the Pension Plan Actuary used the correct CPI in calculating the COLA. However, Vitullo is no longer challenging the Actuary's use of the CPI-W when determining whether Vitullo would receive a COLA.[6] Accordingly, we will only address the remaining issues raised by the Borough in this appeal.

The Borough argues that the Actuary utilized the correct method in determining whether Vitullo would receive a COLA. The Borough contends that the Hearing Examiner properly concluded that neither the CBA, the Plan nor Act

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petition for allowance of appeal denied, 581 Pa. 683, 863 A.2d 1150 (2004).

[6] Vitullo offers no argument in his brief on this issue and counsel for Vitullo confirmed for the Court during oral argument on this matter that Vitullo is not challenging the use of the CPI-W by the Actuary in his calculation of Vitullo's COLA.

600 make any reference to averaging the monthly changes in the CPI over the year under consideration. The Borough argues that the method used by the Actuary for sixteen years and applied to all other Pension Plan participants conforms to the precise language of the CBA and Act 600. The method advanced by Vitullo and adopted by the trial court has no support in the contract language or in Act 600.

The Borough argues further that there is no evidence to support a 2.6% increase in Vitullo's pension based on a 2.6% increase in the cost of living. The only reference to a 2.6% increase in the record is contained in a cross-examination question by Vitullo's counsel and in his counsel's closing statement. R.R. at 34a; 53a. The Borough contends that there are no calculations to support a 2.6% COLA and the trial court erred by making substituting its own finding in this regard. See In Re: Appeal of Chief Floyd Nevling v. Borough of Pleasant Hills, 907 A.2d 672 (Pa. Cmwlth. 2006); Davis v. Civil Service Commission, 820 A.2d 874 (Pa. Cmwlth. 2003).

Although the parties stipulated before the Hearing Examiner that the CBA was the governing document,[7] we begin by reviewing the language of Section 501 of the CBA, Section 4.04 of the Pension Plan and Section 5(g)(1) of Act 600. Section 501 of the CBA provides: "[COLA] shall be made on each annual anniversary of a Police Officer's retirement in an amount equal to the **percentage change** in the U.S. Consumer Price Index for the most recent available twelve-month period." R.R. at 85a (emphasis added). Section 4.04 of the Pension Plan provides that the COLA "shall be an amount equal to the **percentage change** in the Consumer Price Index (CPI-W) during the last year . . ." R.R. at 96a (emphasis added). Finally, Section 5(g)(1) of Act 600 provides that the COLA "shall not exceed the

[7] See R.R. at 25a.

percentage increase in the Consumer Price Index from the year in which the police member last worked . . ." 53 P.S. §771(g)(1) (emphasis added).

As can be seen from the plain language of each of the foregoing provisions, each refers to the **"percentage change"** not the **"average percentage change."**[8] Therefore, a reasonable and straight forward interpretation is that the COLA is to be calculated by comparing the value of the CPI in the month the Pension Plan member retired to the value of the CPI on the same month a year later to ascertain the percentage change in the CPI for that year. This is the precise method of calculation utilized by the Actuary and accepted by the Hearing Examiner. Moreover, this is the method of calculation that had been utilized by the Actuary and accepted by both the Borough and the Bargaining Unit for the past sixteen years. Therefore, it has been the accepted course of conduct characteristically repeated and regarded by the Borough and the Bargaining Unit as

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[8] With respect to the interpretation of contract language, our Superior Court has stated:

> It is a basic tenet of contract law where contract language has a meaning that is generally prevailing, it is interpreted in accordance with that meaning. *See generally* Restatement (2d) of Contracts §§ 202(3)(a), 203(a). The intent of the parties to a written contract is ascertained from that writing, the contractual terms are ascribed their ordinary meaning, and where the language is unambiguous, intent is gleaned from the language. Thus, a party may not claim its reasonable expectations are inconsistent with clear contract language. Indeed, when we interpret contracts, the intent of the parties is held to be reasonably manifested by the language itself.

Gustine Uniontown Associates, Ltd. v. Anthony Crane Rental, Inc., 892 A.2d 830, 837 (Pa. Super. 2006) (footnote and citations omitted).

With respect to statutory language, it is well settled that all statutory law must be given reasonable construction. Kelly v. Jones, 214 A.2d 345 (Pa. Super. 1965). In addition, the rules of statutory construction apply to ordinances. Township of Manchester v. Mayo, 746 A.2d 666 (Pa. Cmwlth. 2000).

the normal and proper method to calculate a Pension Plan member's annual COLA.[9] See County of Allegheny.

Accordingly, we conclude that the trial court erred in: (1) rejecting the Hearing Examiner's interpretation of the CBA, the Pension Plan and Act 600; and (2) accepting Vitullo's interpretation of the CBA that the cost of living calculation should be computed by averaging the percentage change in the CPI for each month during the twelve month period between Vitullo's retirement date and the anniversary of that date.

A further review of the record reveals that the Hearing Examiner's decision is based on substantial evidence. It was well within the province of the Hearing Examiner to accept the Actuary's and the Borough Manager's testimony as credible and to weigh the evidence in favor of the Borough. See In Re: Appeal of Nevling, 907 A.2d at 674 ("The reviewing court is not to substitute its judgment for that of the local agency. Assuming the record demonstrates the existence of substantial evidence, the court is bound by the local agency's findings.") (Citation omitted). Therefore, the Hearing Examiner's finding that Vitullo is not entitled to a COLA is supported by substantial evidence.[10]

[9] We note that the Actuary testified that the decline in the CPI with regard to the calculation of Vitullo's COLA was a very unusual situation. R.R. at 32a. The Actuary testified that in the time that he had been calculating the COLAs, this was the first year in which there was a decrease in the CPI. Id.

[10] Based on our disposition of this appeal, we need not address the Borough's argument that the trial court's determination that Vitullo is entitled to a 2.6% COLA increase is not supported by substantial evidence.

Accordingly, the trial court's order is reversed.

JAMES R. KELLEY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

John J. Vitullo	:	
	:	
v.	:	No. 1692 C.D. 2010
	:	
Borough of Whitehall,	:	
Appellant	:	

O R D E R

AND NOW, this 5th day of May, 2011, the order of the Court of Common Pleas of Allegheny County in the above-captioned matter is reversed.

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JAMES R. KELLEY, Senior Judge