IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Penn Township,	:	
Appellant	:	
	:	
v.	:	
	:	No. 2249 C.D. 2009
Penn Township Police Association	:	Argued: November 9, 2010

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER FILED: December 13, 2010

Penn Township (Township) appeals from the October 27, 2009 order of the Court of Common Pleas of Westmoreland County (trial court) affirming an arbitration award and dismissing a petition filed by the Township. There are three issues before the Court: (1) whether Section 5 of the Police Pension Fund Act (Act 30),[1] supersedes the applicable collective bargaining agreement (CBA) with respect to retirement/disability pensions, (2) whether Act 30 authorizes an arbitrator or court to rewrite a CBA to award police officers benefits far in excess of those specified in the CBA, and (3) whether Section 305 of the Municipal Pension Plan Funding Standard and Recovery Act (Act 205),[2] requires that an actuarial study be conducted

[1] Act of April 17, 2002, P.L. 239, 53 P.S. § 771. Act 30 amended the Act of May 29, 1956, P.L. (1955) 1804, *as amended,* 53 P.S. §§ 767-778, which is commonly referred to as "Act 600."

[2] Act of December 18, 1984, P.L. 1005, *as amended,* 53 P.S. § 895.305.

prior to any alteration of the Township's pension plan. For reasons that follow, we affirm the trial court.

John Simcoviak and Jeffery Gillen (Grievants) were employed by the Township as police officers and are members of the Penn Township Police Association (Association). The officers terminated their employment on December 21, 2008 and October 28, 2007, respectively, and were eligible for in-service pensions from the Penn Police Pension Plan provided by the Township following injuries they received in service.

The Grievants filed a grievance with the Chief of Police after receiving letters dated June 30, 2008, concerning the calculations of their disability pensions and cost of living adjustment (COLA) payments. The grievance was denied by the Township and appealed to arbitration by the Association. A hearing was held on January 20, 2009. On April 11, 2009, the Arbitrator sustained the grievance to the extent that the Grievants are to have their disability pensions recalculated to include the respective final year payments to each individual, which will reflect their total compensation. The Arbitrator found that the Grievants were not entitled to a COLA. The Township appealed the Arbitrator's award to the trial court, and on October 27, 2009, the trial court affirmed the Arbitrator's award. The Township appealed to this Court.[3]

The Township first argues that Act 30 cannot supersede the CBA with respect to retirement/disability pensions. Specifically, the Township contends that

[3] "[O]ur review is limited to questions concerning: (1) the arbitrators' jurisdiction; (2) the regularity of the proceedings; (3) an excess of the arbitrators' powers; and (4) deprivation of constitutional rights. An arbitrator who mandates that an illegal act be carried out exceeds his or her powers." *City of Scranton v. E.B. Jermyn Lodge No. 2 of Fraternal Order of Police*, 965 A.2d 359, 363 (Pa. Cmwlth. 2009) (citation omitted).

the CBA grants disability benefits based upon a police officer's base salary at the time of the disability, and any disability benefit paid out of the pension fund must be subject to an "actuarial equivalent" reduction under the "Service Connected Disability Pension" section of the CBA. The Township further contends that because the CBA existed prior to the enactment of Act 30, the trial court and the Arbitrator improperly held that Act 30 superseded the CBA, and that such an actuarial reduction was not permitted. We disagree.

Act 30 provides:

> In the case of the payment of pensions for permanent injuries incurred in service, the amount and commencement of the payments . . . shall be calculated at a rate *no less than* fifty per centum of the member's salary at the time the disability was incurred . . . .

53 P.S. § 771(e)(1) (emphasis added). Significantly, on November 18, 2002, the Township enacted Resolution No. 97 which provided that the Penn Police Pension Plan was being amended to comply with Act 30.

The CBA in effect at the time of the officers' disabilities stated: "The pension shall be the actuarial equivalent of the amount equal to fifty (50 %) percent of the participants final monthly average salary determined as of the disability date." This was consistent with Act 600.[4] Specifically, Act 600 permitted work-related disability pensions but set no minimum or maximum standards concerning how they would be calculated.

While it is true that this Court held that the General Assembly did not clearly and manifestly intend for the retroactive application of Act 30, the Court has also held that "[r]etroactive application of a law is not *per se* prohibited. It is prohibited only if it offends due process." *Borough of Jefferson Hills v. Jefferson*

[4] Act 600 is the predecessor to Act 30. *See* footnote 1.

Hills Police Dep't Wage and Policy Comm., 904 A.2d 61, 65 (Pa. Cmwlth. 2006) (citation omitted).

Here, the applicable portion of the statute is not affecting contributions to the plan by either the officers or the employer as in *Borough of Jefferson Hills*; it merely only sets a minimum as to how the pension may be calculated. Indeed, the Township's Resolution 97 clearly indicates the Township's intention to comply with Act 30. Thus, there is no due process violation in the retroactive application of Act 30 in this case. Here, the actual calculation was determined by the Arbitrator using the CBA as affected by the current state of the law, which is clearly within the scope of the Arbitrator's authority. Thus, the Arbitrator did not exceed his authority by using Act 30 and the applicable CBA to determine his calculations.

The Township next argues Act 30 does not authorize an Arbitrator or court to rewrite the CBA to award police officers benefits far in excess of those specified in the CBA. Specifically, the Township contends that Act 30 establishes payment of the member's salary "at the time the disability was incurred," not average salary or total W-2 salary. The Township further contends that the language of Act 30 clearly demonstrates legislative intent that salary to be used in disability calculations must be different than salary in normal retirement calculations; hence, the award improperly relied on the definition of compensation from the CBA, used for normal retirement purposes, when interpreting Act 30 for disability retirement purposes. We disagree.

The language of Act 30 sets a floor, not a ceiling, on disability pension benefits. The Township calculated the Grievants' disability pensions based on the years they retired from the Department due to disability. Both pensions are calculated using base salary and longevity for their respective years of retirement.

Although the statute does not mention longevity as a factor in calculating pension benefits, it is not excluded as the statute establishes a minimum, but no maximum. As it is undisputed that Act 30 does not define the term "salary" and that Act 30 only mandates a "minimum" rate at which pensions may be calculated, the award did not improperly exceed Act 30 benefits, or those specified in the applicable CBA.

Finally, the Township argues that Act 205 requires that an actuarial study be conducted prior to any alteration of the Township's pension plan. Specifically, the Township argues that because the Arbitrator has ordered a modification of the pension plan without such study, the award is illegal and must be reversed. We disagree.

Act 205 provides: "Prior 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). Further, this Court has 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." *Shippensburg Police Ass'n v. Borough of Shippensburg*, 968 A.2d 246, 251 (Pa. Cmwlth. 2009).

Here, the Arbitrator's award does not modify the pension plan in that, as stated by the Arbitrator, "the disability Benefit provision uses the term compensation, rather than salary." Reproduced Record at 25a. Thus, the Arbitrator's award, which uses the Grievants' total compensation in their disability pension calculations, is consistent with the current pension plan. In order for an actuarial study to be required it has to be established that disability pension calculations before the award were completely and consistently different from the calculation used in determining the

award and all disability pension calculations after the award, and that in fact has not been established. Because the record lacks proof that calculating the disability pension using total compensation rather than base salary will affect the Township's pension liability, an actuarial study is not required under Act 205. The Township has not met its burden in proving that the award was in fact a plan modification. Thus, the Arbitrator did not exceed his authority.

For all of the above reasons, the order of the trial court is affirmed.

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JOHNNY J. BUTLER, Judge

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O R D E R

AND NOW, this 13th day of December, 2010, the October 27, 2009 order of the Court of Common Pleas of Westmoreland County is affirmed.

JOHNNY J. BUTLER, Judge