IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Pennsylvania State Corrections Officers Association, Petitioner	:	
v.	:	No. 1596 C.D. 2012
	:	Argued: December 10, 2012
Commonwealth of Pennsylvania, Department of Corrections, Respondent	:	

BEFORE: HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE COLINS **FILED: January 4, 2013**

The Pennsylvania State Corrections Officers Association (PSCOA or Union) petitions for review of the Supplemental Award issued during the interest arbitration process between the Union and the Pennsylvania Department of Corrections (DOC), pursuant to Section 805 of the Public Employee Relations Act (Act 195, also known as PERA),[1] 43 P.S. § 1101.805. The interest arbitration dealt with the terms of the collective bargaining agreement (CBA) for the 2011-2014 contract cycle.[2]

[1] Act of July 23, 1970, P.L. 563, *as amended*, 43 P.S. §§ 1101.101 to 1101.2301.

[2] "'Interest arbitration' occurs when the employer and employee are unable to agree on the terms of a CBA. This differs from 'grievance arbitration,' which occurs when the parties disagree as to the interpretation of an existing CBA." *West Pottsgrove Twp. v. West Pottsgrove Police Officers' Ass'n*, 791 A.2d 452, 454 n.4 (Pa. Cmwlth. 2002).

In the Supplemental Award, a majority of the Act 195 arbitration panel (Panel) addressed the issue of "overtime equalization." The parties' prior CBA required the DOC to "attempt to equalize" the number of overtime hours available to Union members. At the outset of the interest arbitration, the DOC complained about the overtime equalization provision in the CBA and requested that the provision be deleted in favor of a different process. The DOC introduced evidence that under the then-current rule, thousands of grievances had been filed and the DOC had paid over $3 million in un-worked overtime pay, or what the DOC called "rocking chair overtime."

The Union filed its Petition for Review on August 21, 2012, asking this Court to vacate the Supplemental Award. The Union asserts that the arbitration panel exceeded its jurisdiction and authority in the Supplemental Award by fashioning a "remedy" for the DOC's violations of overtime equalization, rather than focusing on the "process" by which the DOC attempts to equalize overtime among members, because the "remedy" issue is separate and distinct and was never properly placed before the Panel.

For the reasons that follow, the Petition for Review is denied.

I. BACKGROUND

The Union and the DOC have been parties to a CBA since July 1, 2001, through June 30, 2011. The CBA provided that the DOC must "attempt to equalize overtime during each one-half calendar year." (Art. 18, Sec. 5 of CBA effective July 1, 2001, Reproduced Record (R.R.) at 471a-473a.) The CBA also described the detailed process by which the DOC was to identify volunteers for overtime work, assign the work, and record the amount of overtime each member had been offered. (*Id.*) The CBA did not provide any specific remedy for the DOC's failure to "equalize overtime," other than permitting members to file

grievances. Nor did the CBA provide a standard by which the parties could measure whether the DOC had fulfilled its obligation to "attempt to equalize overtime."

The parties developed a custom of using an eight-hour standard during each six-month period. That is, if overtime were offered to each member within eight hours (one shift) of the overtime offered to all other members, overtime would be equalized and the requirements of Art. 18, Sec. 5 of the CBA would be met. If one member were offered eight hours of overtime more than any other member, than the DOC would have failed to "attempt to equalize overtime" for those other members and they could file grievances.

In 2007, a grievance arbitration panel fashioned a remedy for violations of Art. 18, Sec. 5 of the CBA. In the so-called *Mahanoy Award* (for the State Correctional Institution (SCI) at Mahanoy, Pennsylvania), a grievance arbitration panel enforced the eight-hour standard and ordered the DOC to pay each member for any overtime deficiency hours accrued during the six-month period at issue. The parties would subsequently follow the standard and remedy set forth in the *Mahanoy Award* for the remaining CBA period, until June 30, 2011.

The parties negotiated to impasse regarding certain provisions in a successor CBA that was to begin July 1, 2011. The parties ultimately submitted to interest arbitration pursuant to Act 195, Sections 805 and 806, 43 P.S. §§ 1101.805, 806. Relevant to overtime equalization, the DOC placed the following issue in dispute before the panel:

> OVERTIME – ARTICLE 18 – SECTION 5
> Delete (currently requires that Employer attempt to equalize overtime) and replace with a process that hires the most senior volunteer if available.

(DOC's Issues in Dispute at 4, R.R. at 5a.) In other words, the DOC placed at issue the entirety of the overtime equalization system under the prior CBA. The DOC did not specifically identify the eight-hour standard, the *Mahanoy Award*, or the remedy that the parties employed under that CBA provision.

The three-member Panel consisted of the Union-appointed arbitrator (Attorney Sean Welby), the Commonwealth-appointed arbitrator (Attorney Alfred D'Angelo), and the neutral arbitrator and panel chair (Attorney Walt De Treux). The Panel took evidence and heard testimony over nine days of hearings. The DOC submitted evidence and testimony that thousands of members had filed grievances under Art. 18, Sec. 5 of the prior CBA, and that the DOC had paid millions of dollars since 2007 for its supposed failure to "attempt to equalize overtime" in accordance with the eight-hour standard. (Arbitration Hearing Transcript (H.T.) at 186-229, R.R. at 195a-238a.) The DOC presented the Panel with a chart displaying the number of grievances that had been filed and the amount of money the DOC had paid in unworked overtime since the *Mahanoy Award* in 2007. (R.R. at 299a.) The DOC characterized these payments for unworked overtime as "free money" and "rocking chair overtime." (H.T. at 211, R.R. at 220a, 296a.) The exhibits and testimony presented at the hearing make clear that the DOC was seeking to change the text of Art. 18, Sec. 5 of the prior CBA, and also the remedy that was developed under that provision.

On June 29, 2011, the Panel issued its Interest Arbitration Award for a contract effective July 1, 2011, through June 30, 2014. (Award, R.R. at 439a-458a). The Award was broad in scope and addressed many issues. Relevant to overtime equalization and Art. 18, Sec. 5, the Award provided:

> 19. Overtime Equalization: The Commonwealth identified a situation related to the overtime equalization

> process provided for in Article 18, Section 5.a. in the contract, pursuant to which literally thousands of grievances have been filed and payments exceeding $3 million for time not worked have been made. A majority of the Panel recognizes that Article 18, Section 5.a. has failed to provide a fair process for the equalization of overtime or to resolve the parties' mutual concern over the fair assignment of overtime. While the Impartial Chair of the Panel has recommendations for changes in the overtime system that were discussed at length in Executive Session, including a provision that a failure to respond to a call for overtime will result in credited time and the deletion of the provision for a measurement of equalization at a specific interval, a majority of the Panel expressed the need for the parties to first attempt to address the matter. Accordingly, the Panel directs the parties to meet as soon as practicable following the issuance of this Award to discuss changes to make the assignment of overtime fair and equitable. The Panel directs that the parties include in any such agreement a provision that an employee denied or passed over for an overtime opportunity in violation of this contract provision shall be awarded another similar overtime opportunity as remedy for the violation. The parties shall reach agreement on this issue no later than July 22, 2011. If the parties fail to do so, the Panel will issue a supplemental Award addressing this issue.

(Award ¶19, R.R. at 453a.) In short, the Panel directed the parties to work out a solution on their own, specifically instructed the parties to include a remedy in that solution, and informed them that if they were unable to do so, the Panel would fashion its own solution.

As the Panel instructed, the parties met and attempted unsuccessfully to reach an agreement regarding a remedy. Accordingly, the Panel issued its Supplemental Award on a 2-1 vote, with the Union-appointed panel member dissenting.

The Supplemental Award (R.R. at 459a-467a) states that the parties were able to agree on the process for attempting to equalize overtime, but that disagreement remained regarding (1) a remedy and (2) whether "equalization" meant that overtime had to be truly equal. Regarding the issues that remained in dispute, a majority of the Panel found that:

> [T]he Panel agrees that this process does not and cannot 'equalize' overtime. Rather, the purpose of this overtime procedure, as directed in the original Award, was not intended and is not intended to create a process which issues equal overtime among employees. Rather, it was to establish a process whereby overtime is offered in a manner that attempts to equalize opportunities among those who are offered overtime. In no event shall this be construed to entitle any member of the bargaining unit at the end of a six (6) month overtime distribution period to be paid for overtime not worked or to be paid for not being offered as many overtime opportunities or hours as others on the list."

(Supplemental Award at 1-2, R.R. at 460a.)

Further, the Panel majority provided, in Exhibit A to the Supplemental Award, the new language that governs "Voluntary Overtime" in the CBA, Art. 18, Sec. 5. (R.R. at 463a-467a.) Boiled down, the new language, like the old, describes the detailed process by which the DOC is to identify volunteers for overtime work, assign the work, and record the amount of overtime each member actually worked or had been offered.

At Section 5.k of the Panel's Exhibit A (R.R. at 466a), the majority provided a remedy if an error occurs in the distribution of voluntary overtime among Union members. The Panel created a voucher system, whereby a member will receive an overtime voucher for the number of overtime hours missed at the pay rate of the hours that were missed. The vouchers may be redeemed for future

overtime work or, if overtime hours do not become available, the vouchers may be redeemed for compensatory time. The vouchers may never be redeemed for pay.

The Union-appointed Panel member dissented from the "remedy portion" of the Supplemental Award, opining that the remedy created by the majority did not reach far enough to prevent violations of the overtime rule and that only a monetary remedy would be an effective deterrent against DOC violations. (R.R. at 461a.) The dissent did not assert that the Panel lacked authority to create a remedy for the overtime equalization issue.

II. DISCUSSION

The parties agree that the standard of review of interest arbitration awards under Section 805 of Act 195 is narrow, as set forth by the Pennsylvania Supreme Court in *Department of Corrections v. State Corrections Officers Associations,* 608 Pa. 521, 12 A.3d 346 (2011). Borrowing from Act 111[3] case law, the Court stated that "narrow certiorari only allows courts to consider questions relating to [1] the arbitrators' jurisdiction, [2] the regularity of the proceedings, [3] an excess of the arbitrators' powers, and [4] constitutional deprivations." *Id.* at 537, 12 A.3d at 356.

Here, the Union argues that the Panel exceeded its authority in several ways. "[A]n arbitration board exceeds its power when it mandates that the public employer carry out an illegal act – that is, one that it could not have performed voluntarily – or perform an action unrelated to a bargainable term or condition of employment." *Id.* (citations omitted). "However, a 'mere error of law' by an arbitration panel will not support a finding that it exceeded its powers." *Id.* at 537,

[3] Policemen and Firemen Collective Bargaining Act (Act 111), Act of June 24, 1968, P.L. 237, *as amended,* 43 P.S. §§ 217.1-217.10.

12 A.3d at 356. In *dicta*, the Supreme Court has stated that "[a]n award pertaining to an issue that was not placed in dispute before the board also reflects an excess of the arbitrators' powers." *Id.* at 537 n.15, 12 A.3d at 356 n.15 (citations omitted).

The Union first argues that the Panel exceeded its authority by ruling on the remedy issue that was not properly before it. Borrowing from Act 111, the Union explains that interest arbitration can be triggered only by a party giving written notice to the other party containing "specifications of the issue or issues in dispute." *In re: Arbitration Award Between Lower Yoder Township Police and Lower Yoder Township*, 654 A.2d 651, 653 (Pa. Cmwlth. 1995); Act 111 § 4, 43 P.S. § 217.4(a) (permitting arbitration between a public employer and its policemen or firemen employees "after written notice to the other party containing specifications of the issue or issues in dispute"). At the same time, the Union acknowledges that no such provision exists in Act 195. According to the Union, the DOC raised only the issue of removing and replacing the existing overtime equalization process, not what remedy was available to members if the DOC violated that process. (*See* DOC's Issues in Dispute at 4, R.R. at 5, quoted above.) Thus, according to the Union, the Panel was bound to decide only whether the original process for overtime equalization should be discarded and, if so, what process should replace it, and the Panel exceeded its jurisdiction and authority when it set forth a prospective remedy for violations of that new process.

The DOC responds, *inter alia*, that the Union offers an overly narrow reading of the issue placed in dispute, that the issue the DOC raised was broad, and that the remedy the Panel crafted is inherently part of the overtime equalization issue that was before the Panel. The DOC also argues that the requirements of commencing arbitration under Act 195 do not contain the same written notice requirement set forth in Act 111.

We begin by noting that there is no controlling or applicable case law regarding the issue before us. We also note that the statutory notice requirement that the Union relies on is found in Act 111 and is not part of Act 195. Thus, where Act 111 requires the aggrieved party to provide "specifications of the issue or issues in dispute," there is no equivalent provision in Act 195. The applicable provision of Act 195 provides:

> § 1101.805. Guards and court personnel; binding arbitration
>
> Notwithstanding any other provisions of this act where representatives of units of guards at prisons or mental hospitals or units of employes directly involved with and necessary to the functioning of the courts of this Commonwealth have reached an impasse in collective bargaining and mediation as required in section 801 of this article has not resolved the dispute, *the impasse shall be submitted to a panel of arbitrators whose decision shall be final and binding upon both parties* with the proviso that the decisions of the arbitrators which would require legislative enactment to be effective shall be considered advisory only.

Act 195 § 805, 43 P.S. § 1101.805 (emphasis added). Thus, under this section, it is "an impasse in collective bargaining" that shall be submitted to a panel of arbitrators whose decision shall be final and binding. The Act provides no further detail regarding how the impasse shall be submitted.

It is unnecessary to resolve the issue of whether and what notice is required under Act 195, because we find that the Union had notice of the issues to be addressed by the arbitrators. The issue of an appropriate remedy was fairly subsumed within the broader issue that the DOC placed in dispute when it proposed to delete in its entirety Art. 18, Sec. 5 of the prior CBA and replace it with a new system. By seeking to delete Art. 18, Sec. 5 of the prior CBA, the

DOC was also challenging the remedy that the parties and a grievance arbitration panel had developed under an interpretation of that provision. We also find that the Panel resolved the grievance and deemed it necessary to provide the parties with a written remedy to avoid the kinds of problems described during the hearing. It was the Panel's prerogative under the circumstances to do so.

Further, the Union did not object during the hearing when the DOC clearly advocated for a different remedy than the one used under the prior system. Nor did the Union object to the original Award, in which the Panel informed the parties that it would create a remedy if the parties were unable to agree to one. We find that the Union's failure to raise this issue before the arbitrators supports our conclusion that all parties were aware that the issue of what remedy could cure the problems identified about the prior overtime equalization system was squarely before the Panel. We also note that the Union-appointed arbitrator who dissented from the Supplemental Award clearly considered the remedy issue to be properly before the Panel. He opined that the majority's remedy did not go far enough to prevent future disputes and recommended a monetary remedy for the DOC's violations, akin to the remedy that the Panel-majority rejected.

The Union next argues that the Panel exceeded its authority when it stated in the Supplemental Award that the parties "agreed upon much of the process reflected in Exhibit A." (Supplemental Award at 1, R.R. at 459a.) We disagree.

In Exhibit A, the Panel set forth the procedures that the parties will use to distribute voluntary overtime during the next CBA period and also created a remedy to cure the DOC's violations of those procedures, should any violations occur. Even assuming the Panel erred and the Union did not agree to much of the process set forth in Exhibit A, the Union has failed to establish that such an error

would be appealable under the standard of review that our Supreme Court set forth in *Department of Corrections*, 608 Pa. at 537, 12 A.3d at 356. The Union does not explain how the Panel exceeded its authority, and a simple error of law or fact is not appealable. Moreover, the Union admits in its brief that "[a] general meeting of the minds had been reached as to the process, but was subject to continued arms-length negotiations regarding an equitable remedy." (Union Brief at 15.) Thus, the Union confirms that it did, in fact, agree to the process that the Panel created, other than the remedy. That the Union simply disagrees with the remedy that the Panel fashioned is not grounds to vacate the award.

Finally, the Union argues that the Panel exceeded its authority because the voucher remedy permits the DOC to violate the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201-219. An arbitration panel exceeds its authority when it mandates that a public employer carryout an illegal act. *Department of Corrections*, 608 Pa. at 537, 12 A.3d at 356. The Union claims that the FLSA, 29 U.S.C. § 207, prohibits the Panel's voucher remedy, whereby unused overtime work vouchers will be exchanged for compensatory time (comp time) vouchers. More specifically, the Union claims that the voucher remedy violates the FLSA provisions regarding comp time and overtime because: (1) the comp time vouchers are provided in exchange for unused overtime vouchers on a one-to-one hourly basis rather than a one-to-one-and-a-half ratio; (2) the comp time vouchers must be used for time off from work only; and (3) the comp time vouchers will never be paid out in cash. In response, the DOC argues that the FLSA provisions in question are triggered only when overtime hours are actually worked, and that here the vouchers are specifically for unworked overtime.

Neither party cites any cases applying the FLSA in this or any other circumstance, nor do the parties cite any regulation promulgated under the FLSA.

Nonetheless, we find that the FLSA does not apply to the type of comp time described in the Supplemental Award. Section 207(o)(1) of the FLSA provides that:

> Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment *for which overtime compensation is required by this section*.

29 U.S.C. § 207(o)(1) (emphasis added).

The Department of Labor regulations provide that Section 207(o) only applies "to overtime compensation that would otherwise be required under [this section]." 29 C.F.R. 553.20. Overtime compensation under this section triggers only when an employee works hours in excess of the applicable maximum hours standard. *Id.* In other words, overtime hours actually must be worked before Section 207 of the FLSA is triggered. The regulation provides:

> Section 7 of the FLSA requires that covered, nonexempt employees receive not less than one and one-half times their regular rates of pay for hours worked in excess of the applicable maximum hours standards. However, section 7(o) of the Act provides an element of flexibility to State and local government employers and an element of choice to their employees or the representatives of their employees *regarding compensation for statutory overtime hours*. The exemption provided by this subsection authorizes a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, *to provide compensatory time off (with certain limitations, as provided in § 553.21) in lieu of monetary overtime compensation that would otherwise be required under section 7*.

29 CFR § 553.20 (emphasis added); *see also Moreau v. Klevenhagen*, 508 U.S. 22, 23-24 (1993) ("In 1985, Congress amended the FLSA to provide a limited exception to this rule for state and local governmental agencies. Under the Fair Labor Standards Amendments of 1985 . . ., public employers may compensate employees *who work* overtime with extra time off instead of overtime pay in certain circumstances.") (citing 29 U.S.C. § 207(o) (emphasis added)).

Here, the overtime distribution process and remedial voucher system set forth in Exhibit A to the Supplemental Award is the Panel's attempt to create a fair system whereby Union members who desire to work overtime are afforded relatively equal opportunity to do so, as the employer's needs permit. The remedial vouchers are not given for overtime hours actually worked in lieu of payment.[4] Rather, they represent a future opportunity to work. If "an employee receives a third and subsequent voucher during the six-month voluntary overtime period, the employees may choose to redeem such voucher for compensatory time." (Supplemental Award, Exhibit A, Art. 18, Sec. 5(k)(8)(a), R.R. at 467a.) Thus, an employee may elect to use a voucher for compensatory time rather than for future overtime work, but is not compelled to do so. Because the vouchers are not for hours actually worked, Section 207 of the FLSA does not apply.

For the reasons set forth above, the Petition for Review is denied.

JAMES GARDNER COLINS, Senior Judge

Judge Brobson did not participate in the decision in this case.

[4] As the Union notes, there is a separate provision in the CBA, agreed to by both parties, that addresses comp time given in lieu of payment for overtime actually worked. (Union Brief at 16.)

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O R D E R

AND NOW, this 4th day of January, 2013, the Petition for Review is DENIED.

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JAMES GARDNER COLINS, Senior Judge