

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Thomas S. Haines, individually and :
on behalf of all others similarly situated :
and The International Association of :
Firefighters, Local Union 1835, :
Appellants :
v. : No. 2333 C.D. 2006
The City of Warren : Argued: May 8, 2007

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE ROBERT SIMPSON, Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: April 17, 2008

Thomas S. Haines, individually and on behalf of all others similarly situated, and The International Association of Firefighters, Local Union 1835 (Union), appeal from an order of the Court of Common Pleas of the 37th Judicial District (Warren County Branch), sustaining the findings of facts and conclusions of law made by the Warren City Council and denying the request made by Haines and the Union that the City of Warren (City) pay firefighters' pension benefits in

accord with the Third Class City Code¹ rather than as stated in the Collective Bargaining Agreement (CBA) between the parties. We affirm.

In 1975, the Borough of Warren adopted a Home Rule Charter pursuant to the Pennsylvania Home Rule Charter and Optional Plans Law, 53 P.S. § 1-101-1-1309². In 1988, shortly before it reclassified itself as a Third Class City under its existing Home Rule Charter, the City enacted Ordinance No. 1490, which, in pertinent part, established the firefighters' pension as "an amount equal to 30% of his final thirty-six (36) months average earnings ... but not to exceed a total of 40% of his final thirty-six (36) months average earnings." Reproduced Record (R.R.), p. 269a. On September 14, 1992, the City enacted Ordinance No. 1551, which amended Ordinance No. 1490, but kept intact the same retirement benefit calculation as stated in Ordinance 1490. The City and the Union then entered into a Memorandum of Understanding, signed by Haines, on behalf of the Union, in his capacity as Union president, in which the parties agreed that the firefighters' pension benefits would be calculated pursuant to Ordinance No. 1551. In August 2000, an Act 111³ Interest Arbitration Award provided that firefighters' pension benefits were to remain the same until December 31, 2001, at which time there was to be a "pension re-opener." Act 111 Arbitration Award, August 9, 2000, R.R. p. 133a. The Union did not appeal this award.

Two years later, the City adopted Ordinance No. 1668 (hereinafter "the pension plan"), codifying the firefighters' pension plan in its entirety and

¹ The Third Class City Code, Act of June 23, 1931, P.L. 932, *as amended*, 53 P.S. §§ 35101-39701.

² Act of April 13, 1972, No. 62. This Act was repealed and replaced by the Act of December 19, 1996, P.L. 1158, No. 177, 53 Pa. C.S. §§ 2901-2984.

³ Act of June, 1968, P.L. 237, *as amended*, 43 P.S. §§ 217.1-217.10, commonly referred to as "Act 111."

continuing the normal retirement benefits at an amount between 30-40% of the firefighter's final 36 mos. average monthly earnings. On July 27, 2002, Haines, in his capacity as president of the Union, sent a letter to the City with the Union's list of items proposed for 2003 contract negotiations, including:

ARTICLE XV – PENIONS[sic] – The city shall conform to the Optional Home Rule, Third Class City [C]ode, the code which the city of Warren is under.

Hearing of August 11, 2004 before Warren City Council (Hearing), Exhibit C-3, R.R. p. 293a. The City and the Union met on August 1, 2002 to discuss the negotiation list, at which time the Union reiterated its request that the City comply with the Third Class City Code with respect to firefighters' pension benefits and that it was prepared to go to court to force the City to do so.

Meanwhile, the Office of Auditor General completed a financial audit of the City's firefighters' pension plan and in its report dated November 26, 2002, directed the City to comply with the Third Class City Code for all employees who began full-time employment on or after January 24, 2001. However, on April 23, 2003, the City and the Union entered into a Memorandum of Understanding regarding the collective bargaining agreement (CBA) for the years January 1, 2003 to December 31, 2005, which provided at Article XV, entitled "Pension Plan," as follows:

Effective October 1, 1992, the computation of monthly pension benefits payable to an employee shall be based on the employee's last 36 months average earnings. The normal retirement benefit shall be calculated as detailed by Ordinance No. 1551 adopted by City Council at its regular meeting on September 14, 1992

R.R. p. 198a.⁴ The Union approved the CBA by majority vote.

On February 2, 2003, Haines retired after 38 1/2 years of service, including 26 years as Captain and 32 years as President of the Union. Haines received his first pension check on or about March 1, 2003. By letter dated August 6, 2003, Haines and the Union, through counsel, requested that the City pay Haines and other retirees in accordance with Section 4322 of the Third Class City Code. Section 4322 provides:

[t]he basis of the pension of a member shall be determined by the monthly salary of the member at the date of vesting . . . or retirement, or the highest average annual salary which he received during any five years of service preceding retirement, whichever is the higher, . . . and . . . shall be one-half the annual salary of such member at the time of vesting . . . or retirement

53 P.S. § 39322. The City responded that as a home rule municipality, it was not required to pay benefits in accordance with the Third Class City Code. Thereafter, on September 12, 2003, Haines sent a letter to the City invoking Section 7.03(c)⁵ of the pension plan, appealing the City's determination not to pay benefits as mandated under the Third Class City Code. The City issued a formal denial in March 2004, at which time Haines and the Union requested a review and hearing before City Council. Following the hearing on August 11, 2004, at which Haines

⁴ What this meant was that the pension was calculated at the rate of between 30-40% of a firefighter's final 36 month average salary. Although the reference is to Ordinance No. 1551, which was amended by Ordinance No. 1668, the calculation of benefits was identical.

⁵ Section 7.03(c) of the pension plan provides:

"Any notice of claim questioning the amount of a benefit in pay status shall be filed by the Claimant with the Administrator within ninety (90) days following the date of the first payment which would be adjusted if the claim is granted, unless the Administrator allows a later filing for good cause shown." R.R. p. 243a.

testified, City Council determined that while the Third Class City Code applied to the City, the Union had waived any argument that its members' pension benefits must be calculated under Section 4322 of the Third Class City Code when it agreed to a different calculation in the 2003-2005 CBA. City Council also determined that Haines's appeal was untimely as it was filed beyond 90 days from the first challenged pension payment.⁶ Haines and the Union filed a Petition for Review in the Court of Common Pleas of Warren County, which upheld the determination of the Warren City Council and denied the petition for review. The present appeal followed.

On appeal⁷ to this court, Haines and the Union raise the following issues for our review; first, whether the notice of claim was timely even though filed more than 90 days following Haines's receipt of his first pension payment, because the language in Section 7.03(c) of the pension plan limits only the amount of time in which the court could look back to adjust a payment if it is to be adjusted and does not limit the time within which a claim must be filed; second, whether the plain language of Article XXII in the CBA entitled "Legality," mandates the automatic adjustment of the CBA to conform with Section 4322 of the Third Class City Code thereby requiring the City to pay pension benefits at the statutory 50%; and third, whether the pension calculation established in the CBA is

⁶ The parties stipulated that of the 16 retired firefighters receiving pension benefits under the plan, Haines is the most recent retiree. Adjudication of the Warren City Council, March 20, 2006, Finding of Facts No. 11, R.R. p. 15a.

⁷ Our review is limited to determining whether an error of law was committed, whether necessary findings of fact are supported by substantial evidence, whether constitutional rights have been violated, and whether the procedure before the local agency was contrary to statute. *Mulberry Market v. City of Philadelphia, Bd. of License & Inspection Review*, 735 A.2d 761 (Pa. Cmwlth. 1999).

void as against public policy because it does not conform to Section 4322 of the Third Class City Code.

The primary argument raised on appeal is that the CBA itself requires the automatic adjustment to bring it into conformance with the Third Class City Code because it includes a “legality provision.” Specifically, Article XXII of the CBA provides:

[b]oth parties hereto specifically agree that it is their intent that this Agreement, under all circumstances and in every respect, shall comply with all applicable statutes, governmental regulations and judicial decisions; and if it shall be determined by proper authority that this Agreement, or any part thereof, is in conflict with said statutes, governmental regulations or judicial decisions, this Agreement shall be automatically adjusted to comply with the referred to statutes, governmental regulations or judicial decisions.

R.R. p. 205a. Haines and the Union assert that once City Council determined that the Third Class City Code did apply to the City, they in effect ruled that the pension plan as set forth in Ordinance No. 1668 was illegal and inconsistent with the Code, and therefore, the legality provision of the CBA automatically applies to adjust the CBA and bring it into conformance with the applicable statutory provision. In addition, they argue that not only has the Pennsylvania legislature mandated a minimum pension payable to the firefighters under the Code at 50% of the firefighter’s salary, a 2002 amendment to Section 4322 allowed for pension benefits greater than 50% and, “by omission specifically prohibited the payment of benefits of less than 50%.” Appellant’s Brief, p. 11. We disagree.

While it is true that both City Council and the trial court found that the Third Class City Code did apply to the City, they concluded, however, that Haines

and the Union, through collective bargaining, bargained away their pension rights. Pension benefits are among the enumerated items that public employers and employees are allowed to bargain over. Section 1 of Act 111 states in pertinent part:

Policemen or firemen employed by a political subdivision of the Commonwealth . . . shall, through labor organizations . . . have the right to bargain collectively with their public employers concerning the terms and conditions of their employment, **including . . . pensions and other benefits**

43 P.S. § 217.1 (emphasis added). The record clearly discloses that the parties negotiated the issue of the pension benefit that would be payable upon a firefighter's retirement, and that, after the usual give and take, the parties reached a mutually acceptable compromise which was agreed to by a majority of the Union. Indeed, Haines and the Union negotiated for and received several benefits that they would not have been entitled to under the Third Class City Code. In particular, the Union received a death benefit for individuals who are not eligible to retire, 6% interest on member contributions, a deferred vested benefit for a member who has completed at least 10 years of service, a non-service disability benefit, a contingent annuity provision at 50%, and an optional life annuity set at one-hundred twenty payments. The Code does not provide many of these benefits, which the Union acknowledged at the hearing. R.R. pp. 56a-60a.

Having voluntarily agreed to a pension benefit that is less than that available under the applicable statute, Haines and the Union cannot now claim that that very same provision in the CBA is illegal or void as against public policy. As our Supreme Court noted in *Pittsburgh Joint Collective Bargaining Committee v. City of Pittsburgh*, 481 Pa. 66, 74-75, 391 A.2d 1318, 1322-23 (1978)(footnote omitted):

To permit an employer to enter into agreements and include terms such as grievance arbitration which raise the expectations of those concerned, and then to subsequently refuse to abide by those provisions on the basis of its lack of capacity would invite discord and distrust and create an atmosphere wherein a harmonious relationship would virtually be impossible to maintain. Good faith bargaining would require that questions as to the legality of the proposed terms of a collective bargaining agreement should be resolved by the parties to the agreement at the bargaining stage. For instance, the [legality] question should have been raised by the [public employer] during . . . the contract negotiations.

It is of no moment that here it is the Union rather than the municipality which seeks to disavow its bargain; we believe *Pittsburgh Joint Collective Bargaining Committee* is controlling here.⁸

Finally, we are not persuaded that the “legality provision” compels a different result. A general provision of this sort no more overcomes the principles enunciated in *Pittsburgh Joint Collective Bargaining Committee* than the general language in PERA proscribing effectuation or implementation of provisions in collective bargaining agreements which conflict with statutes. This is particularly true where, as here, the parties negotiated the issue of compliance with the Code and, ultimately, agreed to a contrary provision.

In sum, Haines, as president of the Union for 32 years, participated in the contract negotiations which resulted in the CBA which contained the pension

⁸ In this regard, we note that there is nothing in the Code which precludes either the City or the Union from contractually compromising their pension rights, if either so chooses. This distinguishes the present case from *Borough of Ellwood City v. Ellwood City Police Department Wage and Policy Unit*, 573 Pa. 353, 825 A.2d 617 (2003), in which the court reached a different result because of Act 205’s explicit statutory mandate that “in the event of an actual conflict between the statute and a collective bargaining agreement, the statute must be given effect” *Id.* at 362, 825 A.2d at 622.

provision he now seeks to have this court declare void, illegal, and against public policy. This we decline to do. Haines and the Union were aware throughout the collective bargaining process that if the parties did not agree on the terms of the retirement benefits, they could pursue Act 111 interest arbitration to force resolution of the issue. They did not pursue this avenue of relief and instead, chose to enter a Memorandum of Understanding with the City regarding the CBA for 2003-2005 in which they agreed to the lesser retirement benefits. They are estopped from asserting the illegality of this provision in the CBA now. As a member of the Union, Haines was bound by and benefited from the provisions of the very same CBA, which the Union and the City voluntarily entered into, during the course of his employment, and he is equally bound by its terms, “including any shortcomings and limitations . . . ,” upon his retirement. *Norcini v. City of Coatesville, et. al*, 915 A.2d 1243, 1247 (Pa. Cmwlth. 2007).⁹ Accordingly, we affirm.

BONNIE BRIGANCE LEADBETTER,
President Judge

⁹ In light of this holding, we need not address the timeliness of Haines’ notice of claim.

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ORDER

AND NOW, this 17th day of April, 2008, the order of the Court of Common Pleas of the 37th Judicial District (Warren County Branch) affirming the findings and conclusions of law of the Warren City Council and denying Appellants' petition for review in the above captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge