IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Terry Dawley	:	
	:	
v.	:	
	:	
City of Erie,	:	No. 2717 C.D. 2010
Appellant	:	Submitted: June 17, 2011

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: September 13, 2011

The City of Erie (City) appeals from the order of the Court of Common Pleas of Erie County (trial court) which directed the parties to appear before a reconvened 2001 Interest Arbitration Panel for purposes of clarifying the Panel's intention with regard to whether City police officers who were totally disabled in-the-line-of-duty are entitled to a post-retirement Cost of Living Adjustment (COLA). The City appeals and argues that the issue is collateral and ripe for determination by this Court.

Terry Dawley (Dawley) was hired as a police officer for the City on February 1, 1989. On July 7, 2000, while performing his duties as a police officer, Dawley was shot several times and sustained injuries which ultimately rendered him permanently disabled.

On August 13, 2003, upon application to the Erie Police Pension and Relief Board (Board) Dawley was approved for an In-Line-Of-Duty Disability

Retirement Pension, whereby Dawley was entitled to a monthly benefit equal to 75% of his final pay at the time his disability was finally determined. On August 14, 2003, after eleven years of service, Dawley retired and began receiving a monthly pension.

At the time of Dawley's injury and retirement, the City was required to maintain a pension plan to provide benefits to its police officers, which benefits were the subject of collective bargaining with the Fraternal Order of Police (FOP).

On December 17, 2001, as a result of the failure of the City and FOP to reach an agreement on, among other things, the issue of retirement benefits, an Arbitration Award (2001 Arbitration Award) was entered to provide an "enhanced" benefit to officers permanently disabled in the line-of-duty "due to the unique perils of public safety work." Specifically, the Award increased the "existing service-connected disability benefits" to 75% of the disabled officer's final salary:

> 4. **Service-Connected Disability**: Effective January 1, 2002, the existing service-connected disability benefits shall be increased to 75% of final average salary for officers disabled due to the unique perils of public safety work. (Emphasis added).

As a result of the 2001 Arbitration Award, the City amended Article 147.05 of its "Police Pension Ordinance" to mirror the 2001 Arbitration Award's "enhanced benefit":

> 147.05 RETIREMENT BENEFITS
> ***
> (f) **Disability Retirement Pension for Disability in Line of Duty**: Effective as of January 1, 2002, due to the

> unique perils of public safety work, a Disability Retirement Pension shall be provided to any Participant who incurs a total and permanent disability in the line of duty, which shall be equal to seventy-five percent (75%) of the Participant's Final Pay at the time such disability is finally determined, payable at the rate of 1/12 of such amount per month.

City of Erie Official Ordinance, 18-2004, Police Pension Plan, Section 147.05(f).

The Police Pension Ordinance also provided a COLA[1] which increased retirement benefits by the percentage increase in the cost of living index as follows:

> (g) **Cost of Living Adjustments**: Cost-of-Living adjustments shall be provided under either (1) or (2) below, as applicable.
>
> > (1) Participants who were appointed police officers prior to January 1, 1981, or the individuals receiving survivor benefits under the Plan as the result of the death of an individual appointed as a police officer in the City prior to January 1, 1981, and who receive retirement benefits under the Plan by reason of and after the termination of the Service of any such Participant, shall have such retirements increased by the percentage increase in the cost of living index for the month of October 1970, and subsequent Octobers thereafter as compared with the cost of living index for the month of October 1969. The increase shall become effective initially on the first day of the month after the passage of this section (September 1, 1971), and on the first day of January of each and every year thereafter,

[1] A COLA is an annual adjustment in wages to offset a change (usually a loss) in purchasing power, as measured by the Consumer Price Index.

provided, however, that the total of any such allowance shall not at any time exceed one-half of the current monthly salary being paid a patrolman of the highest pay grade. The cost of living index referred to above shall be that published by the United States Department of Labor, Bureau of Labor Statistics, which index shows the changing average cost of living based on the Consumer Price Index, U.S. City Average, all items, for the years 1957-1959 base.

(2) Participants who are appointed police officers of the City of Erie on or after January 1, 1981 … and who retire on or after January 1, 2001, shall in the future years receive such increases in their allowances under the pension plan, so that their pension shall not fall below 50% of the basic monthly salary currently being paid to a Class A Patrolman of the City, except that the monthly pension payable to Participants who qualify for a Disability Retirement Pension for Disability Not in the Line of Duty after less than ten years of Service shall be adjusted for the Cost of Living so that their pensions shall not fall below 25% of the monthly salary currently being paid to a Class A patrolman. Participants receiving a Vested Reduced Benefit pursuant to subsection (d) hereof who are otherwise entitled to a cost of living increase under this subsection (g)(2) hereof shall be entitled to receive only such portion of 50% of the basic monthly salary of a Class A patrolman as his/her years of Service to the date of termination bears to the full twenty years of Service required for a Normal Retirement Pension.

City of Erie Official Ordinance, 18-2004, Police Pension Plan, Section 147.05(g).

In 2006, due to salary increases granted to Class "A" Patrolmen, Dawley's pension benefit fell **below 75% of the basic monthly salary of Class "A" Patrolmen**.

Dawley requested that the Board modify his monthly benefits by a COLA sufficient to maintain his pension at the rate of 75% of a Class "A" Patrolman's basic monthly salary. Dawley understood that the intent of the 2001 Arbitration Award, combined with the City's adoption of the Award into the Police Pension Ordinance, was to provide **all** retirees with a COLA, and to provide those retirees injured in-the-line-of-duty with an "enhanced" COLA to ensure their pensions would not fall below 75% of the basic monthly salary currently being paid to Class "A" Patrolmen. The City disagreed.

On February 18, 2009, Dawley filed a Complaint in Mandamus to compel the City to comply with the 2001 Arbitration Award and calculate and pay him the COLA. Dawley maintained that the City's refusal to authorize such payment violated the 2001 Arbitration Award and Police Pension Ordinance.

The City filed preliminary objections on the grounds that the trial court was without jurisdiction to interpret or add terms to an existing collective bargaining agreement. The trial court sustained the preliminary objections with regards to the 2001 Arbitration Award and collective bargaining agreements, and overruled them as to the Police Pension Ordinance.

Both parties then filed cross-motions for summary judgment pursuant to Rule 1035.2 of the Pennsylvania Rule of Civil Procedure. The issue presented to the trial court was whether, under the Police Pension Ordinance, Dawley was

entitled to an "enhanced" COLA so that his pension did not fall below 75%, rather than 50%, of the basic monthly salary currently being paid to a Class A Patrolman.

Dawley argued that without a COLA, officers who received In-The-Line-of-Duty Disability Retirement Pension would lose their "enhanced" benefit over time. In his case, he lost his "enhanced" pension benefit because after three years, due to salary increases, his benefit fell below 75% of a Class "A" Patrolman's monthly salary.

The City disagreed that Dawley was entitled to any COLA whatsoever. The City argued that Section 147.05(g) of the Police Pension Ordinance which governed COLAs did not specifically refer to officers injured in-the-line-of-duty. The City contended that, consequently, the intent of the Police Pension Ordinance was to provide COLAs only to: (1) officers who retired under normal age/service requirements; and (2) disabled retirees who were not disabled in the line of duty. According to the City, Dawley still received the intended "enhanced" benefit, i.e., 75% of his Final Pay, while officers who retire under normal circumstances were entitled to 50% of their Final Pay.

Argument was heard on November 30, 2010. The trial court found it necessary to determine whether the "existing service connected disability benefits" referenced in the 2001 Arbitration Award included a COLA. The Court also requested that the parties produce the Police Pension Ordinance in effect prior to January 1, 2002.

The City submitted the prior Ordinance which it contended provided a disability pension only to officers who retired not in-the-line-of-duty. The City

Solicitor explained that prior to that date; both the City and FOP followed Section 5.1 and Section 7 of the By-Laws of the Police Relief and Pension Association and Sections 4303.1 and 4303.2 of the Third Class City Code[2] in applying an "In-The-Line-of-Duty" Disability Retirement Pension.[3]

Still unable to decipher the meaning of the Ordinance, the trial court referred the matter back to the 2001 Arbitration Panel under Paragraph 15 of the 2001 Arbitration Award which stated: "this panel shall retain jurisdiction to address questions arising out of the development of the specific contract language required to implement any of the foregoing items." After the parties confirmed that the panel members were available to reconvene,[4] the trial court ordered:

> Over the objection of the Defendant [City] the parties to the within action **shall submit to the panel for its determination relative to its Award of an increase in the Service-Connected Disability, the question: "Whether the language 'the existing service-**

[2] Act of June 23, 1931, P.L. 932, *as amended*, 53 P.S. §§39303.1 and 39303.2.

[3] The By-Laws at Section 5.1 address In-Line-Of-Duty Disability and state "If any police officer is totally disabled due to injuries…received in the line of duty…he/she shall be entitled to a pension of fifty (50) percent of his … annual compensation." The COLA provision of the By-Laws at Section 7.3 limits the pension allowance from, at any time, "exceeding one half (1/2) of the current salary being paid a patrolman of the highest grade."

Section 4303.1 of the Third Class City Code, 53 P.S. §39303.1, addresses the increase of allowance after retirement and mandates that such increases "shall be in conformity with a uniform scale, which may be based on the cost of living, but the total of any such allowance shall not at any time exceed one-half of the current salary being paid patrolmen of the highest pay grade." (Emphasis added). Section 4303.2 of the Third Class City Code which addresses "In-the-Line-of-Duty" disability deems an officer injured in-the-line-of-duty fully vested in the fund regardless of years of service, thereby entitling him to a pension allowance. The City argued that these provisions when read together "cap" total pension allowances for regular retirees and disability retirees to 50% of a patrolmen of the highest pay grade.

[4] Attorney Gregory A. Karle, Solicitor for the City of Erie, who represents the City in the present controversy, was on the 2001 Arbitration Panel as the City's Arbitrator. The trial court entered the order at issue over Attorney Karle's objection to reconvene the Panel.

> **connected disability' which it used, was intended to include both an increase in the basic benefit to 75% of final average salary, and a Cost of Living Adjustment (COLA), equal to the amount necessary to maintain the benefit at no less than 75% of the annual salary of a Class "A" patrolman**. (Emphasis added).

Trial Court Order, December 14, 2010, at 2; Reproduced Record (R.R.) at 79a.

The trial court retained jurisdiction but stayed the proceedings pending the determination of that question by the 2001 Arbitration Panel. The trial court explained in its Memorandum Opinion dated February 14, 2011, that its December 14, 2010, Order was entered "to supplement the record and aid the [trial] court in rendering a final decision with respect to [Dawley's] mandamus action." Trial Court Memorandum Opinion, February 14, 2011, at 1. (Emphasis added).

The City asserts that the referral of this separate question to the Arbitration Panel was in error and that review by this Court is ripe for consideration. This Court ordered the parties to address, in their primary briefs on the merits, whether the trial court's order is a collateral order appealable as of right under Pa.R.C.P. No. 313.

Collateral Order Doctrine

Pa.R.C.P. No. 313(b) restates the traditional three-prong test for determining if an order is appealable under the "collateral order" doctrine. Under Pa.R.C.P. No. 313(b) an immediate appeal is permitted under the "collateral order" doctrine where: (1) the order is separable from and collateral to the main cause of action; (2) the right involved is too important to be denied review, and (3)

the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost.

An order is "separable" for purposes of the collateral order test if the issue raised by the order can be addressed without analysis of the merits of the underlying action. Ben v. Schwartz, 556 Pa. 475, 483, 729 A.2d 547, 552 (1999).

An order involves "a right too important to be denied review" only if it is "deeply rooted in public policy going beyond the particular litigation at hand." Geniviva v. Frisk, 555 Pa. 589, 598, 725 A.2d 1209, 1214 (1999).

An order involves a claim that "will be irreparably lost" if review is postponed only if it can be demonstrated that the issue involved will not be able to be raised on appeal if appeal is delayed. Orders that merely make a trial inconvenient for one party or introduce potential inefficiencies do not meet the threshold for a claim being "irreparably lost." Graziani v. Randolph, 856 A.2d 1212, 1225 (Pa. Super. 2004).

Here, the City argues that all three criteria are met. First, the City contends the referral of the question back to the 2001 Arbitration Panel requires a subsidiary proceeding, separate and collateral to the disposition of the main action. Second, the City argues that given the impact that the referral to the 2001 Arbitration Panel would have on the Act 111 bargaining process, the right the City asserts is too important to be denied. Last, the City argues that if the 2001 Arbitration Panel is permitted to proceed, the City "would be exposed to a process the review of which would require a much more stringent standard of review,

which in effect would place the City in the position where its defense is irreparably lost." City's Brief at 8.

This Court agrees the first prong of the test is met. The question of whether the trial court may request that an arbitration panel clarify its award does not require an analysis of the underlying merits of the action, which is whether retired officers who were disabled in-the-line-of-duty are entitled to a COLA equal to the amount necessary to maintain the benefit at no less than 75% of the annual salary of a Class "A" patrolman. Therefore, the trial court's order at issue is separable from and collateral to the main cause of action.

However, the second and third prongs are more problematical for the City. First, this Court does not agree that the trial court's order is "deeply rooted" in public policy or that its impact will forever change the Act 111 bargaining process. The City claims that the trial court is asking the neutral arbitrator to re-reform a collective bargaining agreement. It argues that the Police Pension Ordinance was clear. There was no mention of a COLA for disabled-in-the-line-of-duty retirees; therefore, there was nothing to clarify.

In attempting to decipher the Police Pension Ordinance, the trial court looked to the 2001 Arbitration Award upon which the Police Pension Ordinance was based and found that "existing service-connected disability benefit" was undefined. The problem the trial court faced was whether the term "existing service-connected disability benefit" may have included a COLA, and the definition of this term was a key element in determining whether Dawley was entitled to mandamus. Further, it was not clear from the Ordinance whether paragraph (g), which made a general reference to "**Participants who are**

appointed police officers of the City of Erie on or after January 1, 1981 … and who retire on or after January 1, 2001," included officers who retired based on age/service, **and** also Dawley who, by all accounts, was a "Participant" who was hired on or after January 1, 1981 and retired after January 1, 2001. The Ordinance made no distinction either way, except to lessen the COLA for those officers who retired because of a non-service related disability.

Both parties submitted conflicting but cogent arguments. The City argued that the Third Class City Code capped pension allowance for all retirees to 50% of the current salary being paid patrolmen of the highest pay grade. Therefore, Dawley could not be entitled to a COLA in the amount necessary to maintain the benefit at no less than 75% of the annual salary of a Class "A" patrolman. On the other hand, Dawley argued that without a COLA the "enhanced" benefit awarded in the 2001 Arbitration Award became essentially obsolete after only three years because it fell below 75% of the annual salary of a Class "A" patrolman. In his Brief, Dawley appears to concede that the maximum percentage he is entitled to is 50%, not 75%, under the Third Class City Code. But, he still contends he is entitled to a COLA to maintain his "enhanced benefit," whereas the City contends he is not entitled to a COLA, regardless of the amount.

Because it was not clear to the trial court whether Dawley was entitled to a COLA, let alone the amount, the trial court referred the question to the 2001 Arbitration Panel for clarification. Requesting the Panel to answer this question does not require the 2001 Arbitration Panel to "reform" its Award and it does not "open the door for non-parties to challenge contracts years after they are settled." City's Brief at 11. The trial court did not direct the 2001 Arbitration Panel to

"revise" or issue a "new" award as the City contends. The trial court simply requested that the parties have the 2001 Arbitration Panel clarify its 2001 Award.

The City contends that the order is "highly unorthodox." City's Brief at 11. Although it does not happen often, it has been done. See Lawrence Park Police FOP Lodge No. 64 v. Lawrence Park Tp. Bd. of Com'rs, 59 Erie C.L.J. 130, 1976 WL 18057, (C.P.Pa. 1976) (no policy behind arbitration will be undermined by referring an ambiguity in an arbitration award to arbitrators for clarification); Pennsylvania State Police v. Pennsylvania State Troopers Ass'n, 917 A.2d 889 (Pa. Cmwlth. 2007) (grievance arbitrator did not exceed his authority when he referred parties back to interest arbitrators to define and clarify the "mandatory generic" features of prescription plan). Compare: Carr v. Joyce, 74 Pa. D. & C.2d 288, (1975) ("clarification" of arbitration award which had inadvertently failed to consider and include officers in the Juvenile Division and Narcotics Division in list of recipients of "night differential increase" was actually an improper "modification" because it was an attempt to add them post award).

Accordingly, this Court must conclude that the City has failed to meet the second prong of the test because it failed to demonstrate that this appeal involves a right "too important to be denied review." Geniviva.

As a final point, the City argues that if review of this issue is delayed until final judgment, the City's right to raise it in a later appeal will be "irreparably lost." According to the City, if the 2001 Arbitration Panel is permitted to reconvene and alters the terms of the agreement, a reviewing court must utilize the much stricter narrow *certiorari* scope of review applicable to Act 111 appeals. The City argues that if this issue is not challenged currently, the trial court's

decision risks evasion under the proper scope of review for abuse of discretion, error of law and sufficiency of the evidence. Philomeno & Salamone v. Board of Supervisors of Upper Merion Township, 882 A.2d 1044 (Pa. Cmwlth. 2005).

Again, this Court must disagree. The City has failed to demonstrate that the issue involved will not be able to be raised on appeal if an appeal is delayed. The trial court requested that the 2001 Arbitration Panel clarify its 2001 Arbitration Award. The City could surely raise, in a subsequent appeal from the trial court's final order on the substantive merits of the mandamus action, the issue of whether the trial court erroneously solicited and relied upon the 2001 Arbitration Panel's response in arriving at its decision. As explained, the 2001 Arbitration Panel's response will not be the equivalent of an Act 111 arbitration "award" from which the City or Dawley may appeal. Therefore, the City's "concern" that it will be held to a stricter standard on appeal is unwarranted.

The trial court's order which directed the parties to obtain clarification from the 2001 Arbitration Panel is interlocutory and not appealable.[5] The City's appeal is dismissed.

BERNARD L. McGINLEY, Judge

[5] Accordingly, the following substantive issues raised by the City will not be addressed: (1) whether Dawley, as a retiree, lacked standing to challenge or modify an arbitration award rendered under Act 111; (2) whether Dawley's mandamus action should have been dismissed because he failed to demonstrate a clear right to relief; and (3) whether the trial court erred because it failed to find either the Award or the Police Pension Ordinance ambiguous before it sought clarification from the 2001 Arbitration Panel.

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Appellant	:	

O R D E R

AND NOW, this 13th day of September, 2011, the appeal by the City of Erie is dismissed as interlocutory. Jurisdiction is relinquished.

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BERNARD L. McGINLEY, Judge