IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Members of the Police Department of the Borough of Boyertown, Petitioner	:	
v.	:	No. 49 C.D. 2008
	:	Argued: September 10, 2008
Pennsylvania Labor Relations Board, Respondent	:	

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE McCLOSKEY FILED: November 10, 2008

Members of the Police Department of the Borough of Boyertown (Union) petitions for review of a final order of the Pennsylvania Labor Relations Board (the Board) that sustained exceptions filed by the Borough of Boyertown (the Borough) to a proposed decision and order of a hearing examiner and dismissed the Union's unfair labor practice charge.[1] In his proposed decision and order, the hearing examiner determined that the Borough, by adopting a resolution that required unit members to contribute to their pension fund, had committed an unfair labor practice in violation of Sections 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA), Act of June 1, 1937, P.L. 237, as amended, 43 P.S. §211.6(1)(a) and (e). We now reverse.

[1] Members of the Police Department of the Borough of Boyertown is the exclusive, recognized bargaining representative for the unit consisting of all police officers of the Boyertown Borough. For purposes of clarity, they will hereafter be referred to as the Union.

In addressing the Borough's exceptions, the Board rendered factual findings which we summarize below. As noted above, the Union is the bargaining representative of the Borough's police officers. The Borough and the Union engaged in collective bargaining for the years 2004 and 2005 and signed a collective bargaining agreement (CBA) to cover that period on December 1, 2003. Although the CBA was silent as to pension contributions, the Borough, on or around December 29, 2003, enacted Resolution No. 12-29-03A (2003 Resolution), which provided, in part, as follows:

> WHEREAS, the Borough and the Police Officers have collectively bargained over wages and benefits for the police officers for the calendar years 2004 and 2005, and
>
> WHEREAS, as a result of such bargaining, the Borough has agreed to eliminate the Police Officers' contributions to the Plan for the calendar years 2004 and 2005.

(R.R. at 23a).

In April, 2005, the Union provided the Borough with notice that it intended to engage in collective bargaining and negotiations for various benefits, including pensions, for the 2006 fiscal year and beyond. During the course of bargaining, neither the Borough nor the Union requested that they address the subject of pension contributions, and, in any event, the parties reached an impasse in the collective bargaining process and proceeded to interest arbitration under Act 111.[2] The parties did not raise the subject of pension contribution before the arbitration panel. While arbitration was on-going, on January 3, 2006, the Borough passed Resolution No. 01-03-06-A,

[2] Act of June 24, 1968, P.L. 1168, as amended, 43 P.S. §§217.1-217.10.

which provided for the elimination of member pension contributions for the year 2006. That resolution, unlike the one the Borough adopted for the 2004-2005 fiscal years, did not indicate that the resolution was the "result" of bargaining. The resolution instead referred to Section 33-2.A of the Code,[3] which specifically relates to the police pension plan and its funding. Section 33-2.A provides, in pertinent part, as follows:

> This plan is to be funded and maintained by any of the following methods, or a combination of each:
>
> A. Contributions by participants. All participants shall make contributions which shall be 5% of their total compensation but no more than 8% of their total compensation. Borough Council may, on an annual basis, by ordinance or resolution, reduce or eliminate contributions into the plan by participants. The Borough may, but need not, have an actuarial study performed prior to reducing or eliminating participants' contributions into the plan ….
> B. State aid ….
> C. Borough contributions ….
> D. Gifts, grants, devises or bequests ….
> E. Any other sums received or contributed to the Borough….

The interest arbitration panel issued an award for the period from January 1, 2006, through December 31, 2008, and provided in pertinent part that "[a]ll existing provisions in Act 111 Awards and collective bargaining agreements not modified by this Award shall remain as is."

[3] The Code refers to the Borough's police pension plan ordinance. The Code was submitted as an exhibit by the Board without objection before the hearing examiner and is included in the original record below.

On November 6, 2006, the Borough adopted Resolution No. 11-06-06 (November 2006 Resolution), pertaining to employee contributions, which directed that members would be required to contribute five percent of their compensation to the pension fund for the 2007 calendar year. Specifically, the November 2006 Resolution provided, in pertinent part, as follows:

> Pursuant to Section 33-2.A of the Code, the Borough shall require the Police Officers to make monthly contributions to the Plan at statutorily allowed rate of five percent (5%) of their monthly compensation for the calendar year 2007, such contribution to be deducted from the Police Officers' compensation on a weekly basis for the calendar year 2007.

(R.R. at 52a).

Following the Borough's adoption of the November 2006 Resolution, the Union filed its unfair labor practice charge.[4] A hearing examiner conducted a hearing on April 12, 2007. On August 31, 2007, he issued a proposed decision in which he concluded that the Borough had committed an unfair labor practice by violating Sections 6(1)(a) and (e) of the PLRA, which provide, in pertinent part, as follows:

> (1) It shall be an unfair labor practice for an employer--
>
> > (a) To interfere with, restrain or coerce employees in the exercise of the rights guaranteed in this act.
> >
> > ....
> >
> > (e) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section seven (a) of this Act.

43 P.S. §211.6(1)(a)(e).

[4] The Borough began deducting contributions from member's weekly compensation in January, 2007.

In reaching his decision, the hearing examiner noted that the interest arbitration award provided specifically that any provisions in previous collective bargaining agreements not modified by the arbitration award remained operative. Accordingly, he reasoned that the 2003 Resolution --- which reflected a previous agreement resulting from the collective bargaining process --- should also remain applicable to the parties' relationship. Hence, the hearing examiner concluded that the Borough's act in adopting a resolution that unilaterally changed a provision he regarded as an existing condition of employment, and one that is a mandatory subject of collective bargaining, constituted an unfair labor practice. The Borough then filed its exceptions to the hearing examiner's decision, asserting that he had erred in relying upon the 2003 Resolution to determine that the terms of that Resolution precluded changes to the pension plan contribution rate.

The Board opined that, despite the specific language in the 2003 Resolution indicating that it was the result of the collective bargaining process, the 2003 Resolution neither constituted a part of the CBA nor a past practice of the parties.[5] Rather, the Board concluded that the Borough merely exercised its right to alter the amount of pension contributions --- in the 2003 Resolution, the 2006 Resolution, and the November 2006 Resolution --- under the authority of Section 33-2.A of the Code, and the application of that Section, rather than the periodic changes in employee contributions reflected in the various Resolutions, constituted a past practice.

[5] As the Board discussed in its opinion, one way a party may establish that an unfair labor practice has occurred is by demonstrating "past practices" of the parties to help determine whether a party has made a unilateral change to a mandatory subject of collective bargaining. Wilkes-Barre Township v. Pennsylvania Labor Relations Board, 878 A.2d 977 (Pa. Cmwlth. 2005).

As reflected above, Section 33-2.A of the Code requires member pension contributions unless the Borough takes affirmative action (such as the 2003 and early 2006 Resolutions) to reduce or eliminate the required contributions, and consequently, the Board concluded, the application by the Borough of that Code provision over the years constitutes the pertinent past practice for purposes of employee pension contributions. Based upon that reasoning, the Board concluded that the Borough's adoption of the new ordinance did not constitute a unilateral change to a mandatory subject of collective bargaining and, consequently, opined that the Borough's action in adopting the November 2006 Resolution was not an unfair labor practice.

On appeal,[6] the Union raises the single question of whether the Board erred by concluding that the Borough did not engage in an unfair labor practice in adopting the November 2006 Resolution requiring member contributions when the parties had previously engaged in collective bargaining negotiations that resulted in the Borough's 2003 Resolution which had eliminated such contributions. We agree.

We begin by noting that Section 1 of Act 111, 43 P.S. §217.1, vests police officers employed by Pennsylvania municipalities, through a properly selected labor representative (or union), with the right to engage in collective bargaining regarding the terms and conditions of their employment. However, because Act 111 lacks detailed provisions regarding the enforcement of collective bargaining rights

[6] In an appeal from a Board decision sustaining objections to a hearing examiner's determination, the Court's review is limited to determining whether the Board's factual findings, both those rendered by the hearing examiner and adopted by the Board and those the Board renders itself, are supported by substantial evidence, and whether the Board erred as a matter of law or committed any constitutional violations. See Wilkes-Barre Township; Kaolin Mushroom Farms, Inc. v. Pennsylvania Labor Relations Board, 702 A.2d 1110 (Pa. Cmwlth. 1997), appeal dismissed, 554 Pa. 171, 720 A.2d 763 (1998).

members enjoy, the Courts have determined that Act 111 should be read in pari materia with the PLRA.[7]

The parties do not dispute the fact that the subject of pension contributions is a mandatory area of collective bargaining. Section 1 of Act 111. Hence, when a party, during the course of the collective bargaining process, seeks to engage in negotiations on the subject, the other party to the negotiations must proceed to negotiate the terms of employment relating to that subject. Once the resulting terms become part of a CBA, neither party can unilaterally change the terms relating to that subject. Wilkes-Barre Township. To make such unilateral changes in the terms of the CBA constitutes an unfair labor practice under Section 6 of the PLRA, 43 P.S. §211.6. Additionally, where particular conditions of work are not addressed in a collective bargaining agreement, but nevertheless constitute a "past practice" of the parties, any unilateral change in such terms will also constitute an unfair labor practice. See Plumstead Township v. Pennsylvania Labor Relations Board, 713 A.2d 730 (Pa. Cmwlth. 1998).

In this case, the Union argues that the 2003 Resolution eliminating member contributions established a term or condition of employment as part of the collective bargaining process and that, although the terms reflected in the 2003 Resolution are not included in the CBA itself, the negotiated agreement as reflected in the 2003 Resolution nevertheless essentially constitutes a CBA itself or is binding as the result of the CBA process. Therefore, the Union argues that the Borough engaged in an unfair labor practice by adopting the November 2006 Resolution which effected a unilateral change in the 2003 Resolution. The Union also argues that, if the 2003

[7] See Commonwealth v. State Conference of State Police Lodges of Fraternal Order of Police, 489 A.2d 317 (Pa. Cmwlth. 1985), reversed, 513 Pa. 285, 520 A.2d 25 (1987).

Resolution is not a CBA, the Borough is nevertheless required to engage in negotiations before altering the members' contribution rate, because the 2003 Resolution was a result of the negotiations that formed the CBA. Alternatively, the Union asserts that the 2003 Resolution represents a past practice of the parties that precluded the Borough from acting unilaterally to alter the practice of eliminating member contributions.

The Union asserts that the Board erred in its narrow view of the import of the 2003 Resolution, and refers us to the United States Supreme Court's decision in Consolidated Rail Corporation v. Railway Labor Executives' Association, 491 U.S. 299 (1989), to argue that the 2003 Resolution is either a CBA itself or controlling in that the Resolution is clearly the result of negotiations. In that case, which involved a claim that a past practice foreclosed the employer's actions, the employer had announced a unilateral change in the scope of periodic and return-from-leave physical examinations to which all employees were required to submit. The enlargement in the scope of the examinations was the employer's decision to include drug screening with the pre-existing urinalysis testing.

As the Union noted in its brief, citing Consolidated Rail Corporation, a CBA may include implied, as well as express, terms. Further, a CBA is different from a contract for goods or services and is more akin to a governing code that is intended to address numerous aspects of the employment relationship, including those that the drafters of a CBA did not anticipate. Id. at 311-312. However, neither party has pointed the Court to any legal authority contrary to the proposition that documents specifically indicating that they are the result of the parties' collective bargaining negotiations themselves have the power and efficacy of a CBA.

We note that the Federal Court of Appeals for the Seventh Circuit has issued an opinion that provides some help to our analysis. In Sprague v. Central States, Southeast and Southwest Pension Fund, 269 F.3d 811 (7th Cir. 2001), the Court considered the question of what peripheral agreements outside of a CBA may be pertinent to questions involving charges that an employer has violated labor relations agreements. The court stated that "[w]hen interpreting a collective bargaining agreement, a court must 'consider the scope of other related collective bargaining agreements, as well as the practices, usage and customs pertaining to such agreement.'" Sprague, 269 F.3d at 815-6 (citation omitted).

While Sprague did not involve an arbitration matter, the Court did consider whether agreements outside the CBA were significant to a question involving an interested party's rights under the CBA. That case involved a charge that a defendant pension fund and an employer, United Parcel Service (UPS), which helped fund the plan, had violated the Employee Retirement Income Security Act (ERISA). The fund was created via a trust and provided benefits for multiple employer-members including those working for UPS. The union members were all affiliated with the International Brotherhood of Teamsters (IBT), which represented UPS employees. UPS began to entertain the possibility of funding its own pension plan during the course of negotiations with IBT over a new collective bargaining agreement.

The issue that prevented the creation of a CBA between IBT and UPS was a dispute over UPS' contributions to the fund. The fund, realizing that the departure of UPS, the largest employer-contributor, would likely affect the fund's financial soundness under ERISA, proposed an agreement with UPS whereby UPS would remain a employer-member of the fund for a five-year period, but would not be required to contribute to the fund for the first six months of that period (the abatement

plan). In the process of negotiating, the parties developed a summary of the proposed CBA for the upcoming period. During discussions concerning the summary, the trustees of the fund agreed orally and in writing that formal acceptance of the proposed CBA was contingent upon the parties' agreement to the abatement plan. Ultimately, UPS employees ratified the CBA, which included the regional Teamsters' UPS agreement. As noted by the federal court, neither the CBA nor the supplement agreement mentioned the abatement plan.

Gerald Sprague was a non-UPS participant in the fund and claimed that the abatement agreement, and particularly that aspect that provided that UPS would not make contributions for the initial six-month period, violated ERISA. Part of his argument before the Court included the contention that the CBA and the Supplemental agreement constituted the "entirety of the governing documents." The term "governing documents" refers to those documents that describe the labor relations responsibilities between a bargaining unit and an employer.

The Court rejected Sprague's argument, stating as follows:

> We agree with the district court's finding … . When interpreting a collective bargaining agreement, a court must 'consider the scope of other related collective bargaining agreements, as well as the practices, usage and customs pertaining to such agreement.' The Kubalanza letter and the letter of agreement, laying out the abatement plan which the parties entered into before the … CBA was created, are key components of the overarching agreement between UPS and IBT, and must be included within the scope of "governing documents." The Fund, UPS, and IBT all clearly intended that the abatement plan be considered in conjunction with the CBA. The terms of the abatement plan were negotiated along with the CBA. Furthermore, each of the three negotiating parties agreed that no abatement plan would exist without the new CBA and, more importantly, no

> new CBA would exist without the abatement plan …. The abatement plan need not have been expressly incorporated into the CBA to be considered part of the overall agreement.

Id. at 815-6 (citations omitted).

In the present case, although the 2003 Resolution is not an agreement such as the abatement plan in Sprague, it is a legislative act and, in a sense, it constitutes a more powerful source of authority for concluding that it is part of the documents that govern the working relationship between the Borough and the Union. The 2003 Resolution undoubtedly suggests that, but for the Borough's enactment of the Resolution, the parties might not have agreed upon the terms in the CBA. For this reason, we believe that the Board erred in concluding that the Ordinance is a "free-standing arrangement." (Board decision, p. 3, n.2).

Further, in this case, the Board was first required to consider whether, as the Union argues, the 2003 Resolution is a CBA itself or, alternatively, is in essence part of the CBA. As we have discussed above, we view the 2003 Resolution as part of the documents that govern the relationship of the parties following the negotiations for the 2004-2005 CBA. Accordingly, the Union was not asking for an interpretation of the CBA, but rather for consideration of whether the documents that govern the parties' relationship as a result of the CBA include the 2003 Resolution. We note that the Court in Sprague concluded that the abatement plan did not have to be expressly incorporated into the CBA to be considered a part of the overall agreement.[8]

[8] The Board argues that it correctly confined itself to consideration initially of what terms could be implied from the CBA. The Board asserts that the Union is actually seeking an interpretation of the CBA and that the law establishes that, where a party alleging an unfair labor practice asserts a charge that requires legal interpretation of the CBA, the Board must dismiss the Union's charge. However, we note, as we did in Wilkes-Barre Township, that interpretation of a CBA is often required in cases involving unfair labor practice charges. As this Court has noted, reviewing bodies such as courts or the Board may by necessity have to engage in such interpretation,
(Footnote continued on next page…)

The Board suggests that this Court's decision in Plainfield Township Policemen's Association v. Pennsylvania Labor Relations Board, 695 A.2d 984 (Pa. Cmwlth. 1997) stands for the proposition that the Union cannot rely upon the Borough's adoption of the resolution to assert that the terms comprised within the resolution are either binding as part of the CBA or as the obvious result of the CBA negotiations.

In Plainfield Township, the municipality had adopted an ordinance pursuant to the Police Pension Fund Act (Act 600).[9] Several years after the Township adopted the ordinance, the bargaining unit representing the Township's police officers negotiated the terms of a CBA that did not address police pensions. Following an audit by the state's Auditor General indicating that the ordinance failed to conform to Act 600's requirements for tenure eligibility, the Township amended the ordinance in order to bring the Township's law into compliance. The bargaining unit then filed an unfair labor practice charge against the Township asserting that it had unilaterally changed a mandatory subject of collective bargaining. A hearing examiner concluded that the Township's act in amending the ordinance constituted an unfair labor practice, based upon his conclusion that, although the parties had not made the pension

(continued…)

because charges of unfair labor practices sometimes require the review of pertinent CBA documents "to determine whether the employer has repudiated [the CBA's] provisions." Wilkes-Barre Township, 878 A.2d at 982 (noting that a repudiation may constitute both an unfair labor practice, subject to the Board's review, and a grievance, subject to arbitration).

[9] Act of May 29, 1956, P.L. (1955) 1804, as amended, 53 P.S. §§767-78. Section 3 of the Act provides that "[e]ach ordinance or resolution establishing a police pension fund shall prescribe a minimum period of total service in the aggregate of twenty-five years in the same borough…." 53 P.S. §769.

provision a part of past CBAs, the tenure resolution constituted a binding past practice.

The Township filed exceptions to the hearing examiner's decision, and the Board concluded that the Township had not engaged in an unfair labor practice. The bargaining unit then appealed to this Court. As phrased by this Court, the issue presented was whether the Township's change in the ordinance, which had been necessitated by the failure of the ordinance to comply with Act 600, constituted a unilateral change in the CBA.

The bargaining unit had argued that the amendment constituted a unilateral change to a mandatory subject of collective bargaining. This Court opined that the expression "unilateral change" was a term of art that is only relevant to the question of whether a change in a CBA has occurred. The Court concluded that the expression "unilateral change" had no bearing on legislative enactments, which, by their nature are the unilateral actions of a legislative body. The Court stated that "amendment of an ordinance is not equivalent to a unilateral change in a collective bargaining agreement." Id., at 986.

The Court characterized the bargaining unit's argument as an attempt to "retroactively incorporate the pre-existing ordinance into the negotiated collective bargaining agreements." Id. The Court concluded the bargaining unit had the right to engage in collective bargaining over the issue and to seek to incorporate the provisions of the ordinance into a CBA, but had to "suffer the consequences of its failure to exercise its right to bargain pension terms for its members." Id. (Emphasis added.)

In addressing the bargaining unit's argument regarding the application of the ordinance, the Court distinguished another decision of this Court, Upper

Chichester Township v. Pennsylvania Labor Relations Board, 621 A.2d 1134 (Pa. Cmwlth. 1993), in which the Court concluded that a municipality's alteration of a pension provision over which it and a union had engaged in collective bargaining negotiations constituted an unfair labor practice even though the municipality had changed the original provision because it was illegal under Act 600. The Court upheld the original provision, even though it was illegal under the Act, because the municipality benefited from the term to which it had agreed. In discussing Upper Chichester, the Court in Plainfield Township noted that the outcome it was reaching was correct despite our holding in Upper Chichester, because the illegal pension term in Plainfield Township **was not bargained for** or incorporated into the collective bargaining agreements, but was merely contained within a preexisting ordinance." Id. (Emphasis added.)

In summary, Plainfield Township involved an ordinance that a municipality adopted as a means to comply with an Act of the General Assembly on a term of employment of the bargaining unit's members that had not been the subject of collective bargaining negotiations. Further, the subject ordinance made no reference to the collective bargaining negotiations between the municipality and the bargaining unit.[10]

In this case, the resolution adopted by the Borough, the employer of the police officers, not only specifically referenced the negotiations between it and the Union, but indicated that it adopted the resolution only as a direct result of the negotiations. Although the Borough in this case operates in one respect as a

[10] We also note that this case involves a resolution rather than an ordinance. Ordinances are the equivalent of legislative acts. Resolutions, as defined by Blacks Law Dictionary at 1313 (7th Ed. 1999), are formal expressions of an opinion, intention, or decision by an official body or assembly.

legislative entity, it is also an employer and, instead of adopting a resolution that simply indicated the zero contribution rate, it included language referencing the basis upon which the resolution was adopted. Based upon these distinctions, we conclude that this Court's holding in Plainfield Township does not apply, and that under these distinct circumstances, the Borough's adoption of the new resolution that altered the terms of the 2003 resolution did constitute a unilateral change in the CBA.

Additionally, the Board's view of the 2003 Resolution is so limited as to render the Resolution essentially meaningless. One could argue that, as a "free-standing arrangement," the Borough would seemingly not even be bound by the terms of the Resolution. Following the Board's view, the 2003 Resolution does not even appear to reflect an enforceable contractual agreement. Taken to the extreme, the Board's view could be seen to support the hypothetical right of the Borough to have elected to revoke the contribution elimination even during the 2004-2005 CBA contract period. For these reasons, we believe that the Board erred in concluding that the 2003 Resolution is not a controlling collective bargaining agreement under the interest arbitration award.

We also find support for the Union's position on a more basic ground. The interest arbitration award retained not simply the "CBA," but rather all interest awards and "provisions of collective bargaining agreements." A reasonable interpretation of that plural language suggests that not only was the underlying CBA included within the meaning of "collective bargaining agreements," but also other agreements between the parties that arose as a result of the collective bargaining process.

Accordingly, the order of the Board is reversed.[11]

JOSEPH F. McCLOSKEY, Senior Judge

[11] Based upon our determination above, we need not reach the issue of whether the 2003 Resolution constituted a past practice.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Members of the Police Department of the Borough of Boyertown, Petitioner	:	
v.	:	No. 49 C.D. 2008
Pennsylvania Labor Relations Board, Respondent	:	

O R D E R

AND NOW, this 10th day of November, 2008, the order of the Pennsylvania Labor Relations Board is hereby reversed.

JOSEPH F. McCLOSKEY, Senior Judge