[J-9-2009]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

CITY OF PHILADELPHIA,	:	No. 39 EAP 2008
	:	
Appellee	:	
	:	Appeal from the Order of the
	:	Commonwealth Court entered on 8/24/07
v.	:	at No. 1906 CD 2006 affirming in part,
	:	reversing in part the order of the Court of
	:	Common Pleas, Philadelphia County, Civil
INTERNATIONAL ASSOCIATION OF	:	Division entered on 9/6/06 at No. 3316
FIREFIGHTERS, LOCAL 22,	:	July term 2006
	:	
Appellant	:	ARGUED: March 3, 2009

CONCURRING AND DISSENTING OPINION

MR. JUSTICE SAYLOR **DECIDED: July 23, 2010**

I join Parts I, II, III, IV(B), and IV(C) of the Majority Opinion, and respectfully dissent from Part IV(A), pertaining to Paragraph 12 of the arbitration award (the "Award").

As the majority develops, the parties' disagreement over Paragraph 12 involves whether the arbitration panel exceeded its powers by mandating that the City reach agreement with the Union over the effects of a fire company closure before implementing the closure. I would hold that this aspect of the Award is valid: as the majority explains, Paragraph 12 reasonably relates to firefighter health and safety, see Majority Opinion, slip op. at 25; in my view, moreover, it does not unduly burden the City's managerial responsibilities. My reasoning follows.

The parties agree that final decisions concerning the size of a municipality's fire department, the creation, continuance, and closure of companies, and the redistribution of the City's workforce, are essentially managerial in character and, therefore, beyond the scope of Act 111 interest arbitration. See generally Int'l Ass'n of Fire Fighters, Local 669 v. City of Scranton, 59 Pa. Cmwlth. 235, 237-38 & n.3, 429 A.2d 779, 780-81 & n.3 (1981) (surveying jurisdictions and suggesting that the requirement to arbitrate relative to employee health and safety would justify an award increasing the number of firefighters on duty at a given time at a specific fire station, but that forcing management to negotiate general questions of manpower deployment under the guise of safety would fall beyond the arbitration panel's powers, as such questions implicate basic policy decisions of the governing body). The contested issue here is whether, as a prerequisite to fire company closure, the arbitration panel may require the City to reach an agreement with the Union regarding the effects of such closure and, in the event an agreement is not reached, follow a prescribed course of action to settle differences.

As a general principle, an interest arbitration award under Act 111 may include a mechanism for binding arbitration of grievances and disputes. See Moon Twp. v. Police Officers of Moon Twp., 508 Pa. 495, 508, 498 A.2d 1305, 1312 (1985). In Moon Twp., the award included a mandatory procedure for binding arbitration of grievances arising under any of the terms and provisions contained in the award, see id. at 499 n.2, 498 A.2d at 1306 n.2 (setting forth the disputed provision), whereas, here, the procedures are more specific and are directed to an area of decision-making that, as noted, is admitted to be part of the managerial task of the employer. Paragraph 12 modifies the decision-making process concerning fire company closure by adding procedural mechanisms designed to vindicate the Union members' safety interests. These procedures include discussion, impact study, negotiations, and dispute resolution

through "the grievance procedure pursuant to the Safe Workplace provision of this Award." Award at 22, ¶12(4); see Majority Opinion, slip op. at 31-32 (Appendix).[1]

Paragraph 12 appears intended to facilitate the labor relations process on significant issues involving firefighter safety. It regulates working conditions, for Act 111 purposes, as worker safety is integrally related to the circumstances under which the work is performed. Accord Majority Opinion, slip op. at 25. See generally City of Erie v. Int'l Ass'n of Firefighters, Local 293, 74 Pa. Cmwlth. 245, 247-48, 459 A.2d 1320, 1321 (1983). It is also consistent with Act 111's overall objective "to alleviate labor strife in occupations involving critical government functions by, inter alia, providing an expedited means of dispute resolution, with limited judicial intervention." Borough of Ellwood City v. Ellwood City Police Dep't Wage & Policy Unit, 573 Pa. 353, 360, 825 A.2d 617, 621 (2003); see Moon Twp., 508 Pa. at 507, 498 A.2d at 1311 ("[T]he purpose of the legislature's promulgation of Act 111 was to provide a vehicle to permit police and fire personnel, who render so vital a service to the public, to effectively resolve employment disputes with their employers as an alternative to a disruptive work stoppage.").

While I agree with the majority that Paragraph 12 intrudes into an area of decision making that can reasonably be characterized as implicating managerial prerogatives, I consider such intrusion to be an acceptable one, particularly as it is essentially in the nature of a review. As well, it should be remembered that some overlap in this regard is not untoward, as Act 111 employees are statutorily precluded from striking, see 43 P.S. §215.2; Moon Twp., 508 Pa. at 502-03, 498 A.2d at 1308-09;

[1] Paragraph 7(A) of the Award, entitled "Safe Workplace," requires the City to provide bargaining unit members with safe and healthful conditions of employment "free from recognized hazards that cause or are likely to cause death or serious physical harm[.]" Award at 17-18. Grievance procedures are delineated in Paragraph 7(B) (relating to health and safety disputes), and provide for a "contract reopener" in the event that disputes cannot be resolved through negotiations.

Phila. Fire Officers Ass'n v. PLRB, 470 Pa. 550, 553-54, 369 A.2d 259, 260 (1977), and, to compensate, the General Assembly provided such employees with the ability to bargain collectively and submit unresolved disputes to binding arbitration. See Pa. State Police v. Pa. State Troopers Ass'n (Smith), 559 Pa. 586, 591-92, 741 A.2d 1248, 1251 (1999). Notably, this legislative compromise is upset to some extent by the judicial adoption of narrow certiorari review -- which this Court has viewed as a necessary means of resolving the inherent tension between the legislative command of finality and the residual need to avoid "investing Act 111 arbitrators with limitless powers." City of Phila. v. FOP, Lodge No. 5, 564 Pa. 290, 299, 768 A.2d 291, 296 (2001).

As applied presently, I find it relevant that Paragraph 12 indicates that its procedures are intended to reach a resolution "as quickly as possible," and specifies that the "requirement to conduct [a pre-closure] impact study is not intended to circumvent the City's managerial right to implement [its closure] plan," but to "provide for a complete and meaningful review of staffing and safety impact issues before such managerial prerogative may be exercised." Award at 15. It appears to me, therefore, that the City would be able to implement its reorganization plan subject to the delineated mechanism for resolving disagreements concerning the safety effects of the planned fire company closures.

I recognize, of course, that the City's plan could be delayed somewhat -- as compared to a situation in which the plan's safety effects are addressed only after the closures are complete -- and that this may impact the City's budget to some degree. In this respect, the City highlights a series of Commonwealth Court decisions emphasizing that "certain ultimate policy decisions, i.e., those related to overall service levels and budget, cannot be made by labor arbitrators, so that the arbitrable health and safety

issues may not impede implementation of the decision but should proceed subsequently." Brief for Appellee at 26 (emphasis in original). I am not convinced, however, that making dispute resolution concerning the safety effects of the plan a prerequisite to company closure automatically converts Paragraph 12's mandates into an undue infringement upon the City's managerial prerogatives. Rather, that aspect of the Award was evidently devised to assure that the bargaining unit members' interests in workplace safety -- a matter of particular concern given the dangers inherent to their work -- would be protected, while still allowing the City to implement its reduction plan within a reasonable time frame.

Still, the City avers that the underlying purpose of the mandated pre-closure bargaining is to permit the Union to influence and ultimately alter the City's decision concerning which fire companies to close, inasmuch as such decisions could not be made upon the City's analysis alone, but only after what the Union considers a proper evaluation, and eventual arbitration, of the impacts of the closures. The City proffers that allowing the Union to interfere with its organizational plan in this way would render its "right" to implement fire company closures meaningless. While I do not consider this to be a trivial concern, I would interpret the substance of Paragraph 12 as allowing the closures the City deems necessary to proceed, albeit with any settled-upon modifications to the conditions of employment so that the legitimate safety needs of the bargaining unit members are more likely to be met. The same closures could proceed as would be possible if post-closure negotiations and bargaining were mandated, but in a delayed timeframe. The City might ultimately decide to alter its plan as the process unfolds, but that would be the City's decision in the end.

I am also aware -- as the City argues -- that the Union could potentially misuse Paragraph 12's procedural mechanisms to unduly delay the implementation of the City's

plan and, thus, to interfere with the City's managerial prerogatives as a de facto matter. However, the present record does not reflect any basis to conclude that the provision would become a license for the Union to engage in dilatory or vexatious behavior. Given that our present review is by nature substantially restricted, see generally Twp. of Sugarloaf v. Bowling, 563 Pa. 237, 241, 759 A.2d 913, 915 (2000) ("To ensure that resolution of labor disputes [between police and firefighters and their public employers is] both swift and certain, involvement by the judiciary in the resolution of Act 111 disputes is most severely circumscribed."); Town of McCandless v. McCandless Police Officers Ass'n, 587 Pa. 525, 544, 901 A.2d 991, 1003 (2006), I believe that we would overstep our own limited role under the narrow certiorari doctrine to presume such an eventuality as a factual matter at the present juncture.[2]

[2] Additionally, the Union is obliged to abide in good faith by the provisions of the collective bargaining agreement as modified. See generally 43 P.S. §217.7(a). While the question of the City's remedy for dilatory behavior on the part of the Union is not presently before the Court, I note in passing that, if the City suspects the Union is utilizing Paragraph 12's procedures in a manner designed solely to delay the inevitable, it may have a cause of action to enforce the contract, see Hollinger v. DPW, 469 Pa. 358, 365 n.10, 365 A.2d 1245, 1249 n.10 (1976), or it may be able to file a complaint with the PLRB if, indeed, the Union's conduct amounts to an unfair labor practice. See, e.g., 43 P.S. §211.6(2)(d) (providing that it is an unfair labor practice under the PLRA for a labor organization to, inter alia, "hinder or prevent by any means whatsoever, the . . . disposition of materials, equipment or services" (emphasis added)). See generally Phila. Fire Officers Ass'n, 470 Pa. at 555, 369 A.2d at 261 (holding that the PLRA and Act 111 are in pari materia and should be read together as a single statute); City of Bethlehem v. PLRB, 153 Pa. Cmwlth. 544, 548, 621 A.2d 1184, 1186 (1993) (finding that the PLRB has jurisdiction to entertain such complaints in the Act 111 context). In either venue, the City would have an opportunity to make a record in support of its position that the Union is acting in bad faith, and the adjudicative body's determination of whether relief is warranted would have to account for the Award's general stipulation that the Union may not circumvent the City's managerial right to implement its plan. See Award at 15.

Thus, I would ultimately conclude that the pre-closure negotiation and bargaining mechanism outlined in Paragraph 12 is rationally related to firefighter health and safety, and does not unduly infringe upon the City's managerial responsibilities.

I also do not find Paragraph 12 to represent an excessive assertion of power by the panel because the topic of the safety effects of the fire company closures was an issue in dispute before the arbitrators, see Phila. Firefighters' Union, Local 22 v. City of Phila., 901 A.2d 560, 564 (Pa. Cmwlth. 2006) (reciting that the grievance arbitration award at issue there made the "health and safety impact of the [City's] Redeployment Plan an 'Issue in Dispute' during" the City's interest arbitration for a new "Agreement to become effective July 1, 2005"), and the provision does not obligate the City to perform an illegal act. See Lodge No. 5, 564 Pa. at 299, 768 A.2d at 296-97 ("[I]f the acts the arbitrator mandates the employer to perform are legal and relate to the terms and conditions of employment, then the arbitrator did not exceed her authority.").

Accordingly, because the arbitrators did not, in my view, exceed their power in formulating Paragraph 12, I would uphold that portion of the Award.

Mr. Justice Baer joins this concurring and dissenting opinion.