

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AMERICAN FEDERATION OF STATE :
COUNTY AND MUNICIPAL EMPLOYEES :
DISTRICT COUNCIL 89 :
v. : Case No. PERA-C-10-10-E
LANCASTER COUNTY :

FINAL ORDER

Lancaster County (County) filed timely exceptions and a supporting brief¹ with the Pennsylvania Labor Relations Board (Board) on January 3, 2011, challenging a December 14, 2010 Proposed Decision and Order (PDO), in which the Hearing Examiner concluded that the County violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA) by refusing to implement the financial terms of an interest arbitration award for the County prison guard employes. The American Federation of State, County and Municipal Employees, District Council 89 (AFSCME) filed a timely response to the exceptions on January 14, 2011, and pursuant to extensions of time granted by the Secretary of the Board, timely filed a brief in opposition to the exceptions on March 3, 2011.

Based on the testimony and documentary evidence presented by the parties, the Hearing Examiner made Findings of Fact that are summarized as follows. Since 1975, AFSCME has been the exclusive representative of a bargaining unit that includes prison guards employed by the County. Unable to reach a successor agreement to the parties' 2006-2008 collective bargaining agreement, the parties proceeded to interest arbitration pursuant to Section 805 of PERA. On April 16, 2009, a panel of arbitrators issued an interest arbitration award with the following financial terms:

"DIFFERENTIALS

"Article 15, Section 1 (A) [of the parties' 2006-2008 collective bargaining agreement] shall be amended to provide:

Section 1. Shift Differential

- (A) A shift differential of seventy cents (\$.70) per hour shall be paid to employees working the 4:00 p.m. to midnight or the midnight to 8:00 a.m. shifts. The shift differential shall be increased to seventy five cents (\$.75) per hour effective January 1, 2010 and to eighty cents (\$.80) per hour effective January 1, 2011.

Article 15, Section 2 shall be amended to list all permanent posts and commitment posts. Additionally, the job shift differentials in Section 2(A), (C), (D) and (E) shall increase to seventy five cents (\$.75) per hour effective January 1, 2009; to eighty cents (\$.80) per hour effective January 1, 2010; and, to eighty-five cents (\$.85) per hour effective January 1, 2011.

* * *

WAGES AND LONGEVITY

Article 23, Section 1 shall be amended to provide:

Section 1. Salary - New Hires

- (A) Effective January 1, 2009, the starting rate for new corrections officers will be \$14.38 per hour.

¹ The County also requested oral argument. The County's request for oral argument is denied, as the exceptions present no novel question of law and the arguments have been thoroughly addressed in the briefs.

- (B) Effective January 1, 2010, the starting rate for new corrections officers will be \$14.88 per hour.
- (C) Effective January 1, 2011, the starting rate for new corrections officers will be \$15.88 per hour.

Article 23, Section 2 shall be amended to provide:

Section 2. Salary - Current Employees

- (A) Effective January 1, 2009, all employees will receive a salary increase of \$.75 per hour.
Effective July 1, 2009, all employees will receive a salary increase of \$.50 per hour.
- (B) Effective January 1, 2010, all employees will receive a salary increase of \$.75 per hour.
Effective July 1, 2010, all employees will receive a salary increase of \$.50 per hour.
- (C) Effective January 1, 2011, all employees will receive a salary increase of \$.75 per hour.
Effective July 1, 2011, all employees will receive a salary increase of \$.50 per hour."

The County did not appeal the award.

During its deliberations for a 2010 budget, the County's Board of Commissioners calculated the cost of implementing the financial terms of the award for 2010 to be "up to \$650,000.00." On November 18, 2009, the Board of Commissioners passed Resolution No. 88 of 2009 providing as follows:

"WHEREAS, The Board of Commissioners has met and considered the interest arbitration award issued in the Matter of the Interest Arbitration between AFSCME District Council 89 and Lancaster County, concerning the correctional officers bargaining unit at the Lancaster County Prison; and

WHEREAS, In conjunction with its budgeting hearings and processes, the Board of Commissioners has determined that the financial terms of the award for calendar years 2010 and 2011 would require the appropriation of funds and/or the levying of taxes,

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COMMISSIONERS OF LANCASTER COUNTY, PENNSYLVANIA, to reject the financial terms of the award for 2010 and 2011, including the provisions concerning Wages and Longevity, Insurance and Retirement, and Differentials."

Thereafter, in December 2009, the Board of Commissioners passed Resolution No. 96 of 2009 adopting an operating budget for 2010 of \$264,260,964.00 without a tax increase. The operating budget includes an anticipated year-end fund balance of \$4,537,919.00.

The County did not implement the financial terms of the award effective January 1, 2010. On January 12, 2010, AFSCME filed the Charge of Unfair Practices alleging that the County violated Section 1201(a)(1) and (5) of PERA by refusing to implement the financial terms of the interest arbitration award for 2010.²

² AFSCME also alleged that the County violated PERA by refusing to implement the financial terms of the award for 2011. The Hearing Examiner found, however, that AFSCME's Charge, insofar as it pertained to 2011, was premature in that the County had not adopted a 2011 budget. AFSCME has not filed exceptions to this determination, and a subsequent Charge of Unfair Practices was filed on January 24, 2011 and docketed at Case No. PERA-C-11-28-E, concerning the County's refusal to implement the financial terms of the interest award for 2011.

Following the hearing and submission of post-hearing briefs, the Hearing Examiner found that there were sufficient excess funds in the County's 2010 budget to fund the interest arbitration award for 2010 and therefore concluded that the County's refusal to implement the financial terms of the award was an unfair practice. On exceptions, the County asserts, as it did before the Hearing Examiner, that the Commissioners believed that there would be insufficient funds in the County budget to cover the financial terms of the prison guards' interest arbitration award for 2010, without the need to raise taxes, and therefore the award was advisory under Section 805 of PERA.

The County also contends that the Hearing Examiner failed to appreciate the fiscal position of the County. In this regard the County argues that the Hearing Examiner erred in finding that the 2010 operating budget included an anticipated year-end fund balance of \$4,537,919.00. The County asserts that the Hearing Examiner erred in failing to make findings that certain funds included in the year-end fund balance were actually reserved for such expenses as state-mandated services and annual retirement contributions, were restricted bond funds for capital projects, or were restricted by court order. Taking these factors into consideration, the County alleges in its exceptions that "the total unreserved amount budgeted to remain in the general fund at the end of the budget year was \$3,089,201."

In addition, the County asserts that the Hearing Examiner failed to recognize that of the \$3,089,201.00 budgeted to remain in the general fund at the end of 2010, certain funds must be reserved to meet expenses in the following year until tax revenues are received, and that reserved funds are needed to maintain a sound fund balance for bond ratings. The County also claims that obtaining a tax anticipation note to cover those initial expenses in 2011 would cause the County to incur interest payments and affect the County's bond rating, and thus would be legislative action. The County further asserts that the determination of the amount of unreserved funds to be carried over to subsequent fiscal years is a legislative determination for the Board of Commissioners, and that a transfer of funds from the unreserved amounts to the prison budget is a legislative action. Accordingly, the County argues that the Hearing Examiner erred in concluding that the County violated Section 1201(a)(1) and (5) of PERA by declaring the financial terms of the prison guards' interest arbitration award advisory for 2010.

Section 805 of PERA provides as follows:

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.

43 P.S. §1101.805. In Franklin County Prison Board v. PLRB, 491 Pa. 50, 417 A.2d 1138 (1980), the Pennsylvania Supreme Court, finding an interest arbitration award under 805 of PERA to be final and binding, explained the proviso as follows:

If ... legislative enactment is required -- that is, if taxes must be levied or funds appropriated -- then our holding herein cannot be read to override the Constitutional prohibition against improper delegation of legislative powers. Where it is demonstrated by the public employer that the lawmaking body has met, considered and rejected an arbitration award concerning financial items, then Art. III, sec. 31 and the proviso of section 805 become operative, and the award is thereby rendered advisory only.

Id. 491 Pa. at 62, 417 A.2d at 1144. Thus,

Franklin County placed the burden of demonstrating that an arbitration award is advisory only upon the public employer which must establish (1) that "legislative enactment," i.e. the levying of taxes or appropriation of funds,

is necessary to implement the award and (2) if so, that the public employer has, in fact, met, considered and rejected the award.

County of Allegheny v. Allegheny Court Association of Professional Employees, 517 Pa. 505, 513, 539 A.2d 348, 352-353 (1988) (ACAPE).

As noted by the Court in ACAPE, the proviso is a two-part test. With respect to the first element of whether legislative enactment is required, the Pennsylvania Supreme Court noted that:

Where an arbitration award would infringe on the legislative power of the General Assembly or of the lawmaking body of a political subdivision of the Commonwealth, as where the appropriation of funds and/or the levying of taxes is required by the award, then that award is invalid under Art. III, section 31 as an attempted delegation of legislative power to a non-legislative body.... A contrary result would offend the basic constitutional prohibition against taxation without representation and the mandated separation of powers which is embodied in Art. III, sec. 31.

Franklin County, 491 Pa. at 59-60, 417 A.2d 1142-1143 (citations omitted). With respect to the legislative enactment proviso, the Pennsylvania Supreme Court in ACAPE adopted the lower court's rationale, and held as follows:

We assume that any arbitration award which grants increased wages to public employees will require such a line item transfer within the political subdivision's budget. Thus, to find that such a transfer constitutes a legislative enactment produces the exact absurd result which the courts of this Commonwealth have struggled to avoid -- that of emasculating the value of arbitration as a tool to solve conflicts in labor relations, and overriding the legislature's clear intent that arbitration awards be final and binding on the parties.

* * *

Of course, where the implementation of an arbitration award would require the local governmental body to levy further taxes in order to have funds to appropriate to such line item, then the legislature cannot constitutionally be forced to take such action. This would clearly be legislative enactment, and would conflict with Franklin County's expressed concern over taxation without representation. However, where there is money available in the government's general fund or from other items with surplus funds, we hold that in order to effectuate the policy and intent of [Act 195], such money must administratively be transferred to fund a legally binding arbitration award.

The [County] did not submit evidence at the hearing held on September 17, 1984, to show that the Allegheny County budget for the year 1980 did not have sufficient revenues to fund the instant arbitration award. They did indicate that the court's salary account was overdrawn so that more money had to be transferred into that account. However, since it has not been shown that there were no other items in the budget with excess or surplus funds available for administrative transfer to the salary account, we find that the arbitration award . . . must be implemented.

* * *

Such a summary rejection in no way constitutes a "consideration" of the award, and clearly illustrates the very evil about which our Supreme Court has been so concerned -- that all arbitration awards covering public employees can be summarily and automatically rejected.

We agree that it is absurd to suggest that an entire statutory scheme designed to foster fair and peaceful labor relations by providing for binding arbitration in place of disruptive and costly strikes must be frustrated and rendered

totally ineffective by allowing one party to the award to summarily reject it, while the same award is binding on the other party. We cannot believe that the legislature intended such a result, and we will not endorse it.

ACAPE, 517 Pa. at 515-517, 539 A.2d at 353-354.

Under ACAPE, to satisfy the proviso of Section 805, it is the public employer's burden to establish first that sufficient funds are not available in the political subdivision's coffers over and above those funds earmarked to satisfy existing contractual obligations or required to perform essential services. ACAPE, 517 Pa. at 517 n.3, 539 A.2d at 354 n.3; County of Lawrence v. PLRB, 469 A.2d 1145, 1147 (Pa. Cmwlth. 1983). Indeed, the Supreme Court expressly held in ACAPE that legislative enactment is required within the meaning of Section 805 when:

an arbitration award would require the local governmental body to levy further taxes in order to have funds to appropriate to such line item.... This would clearly be legislative enactment, and would conflict with Franklin County's expressed concern over taxation without representation. However, where there is money available in the government's general fund or from other items with surplus funds, we hold that in order to effectuate the policy and intent of [Act 195], such money must administratively be transferred to fund a legally binding arbitration award.

ACAPE, 517 Pa. at 515, 539 A.2d at 353. Thus, where the employer fails to sustain its burden of conclusively demonstrating that the budget amounts are insufficient to effectuate the necessary transfer of funds, thus requiring a tax increase, such award is not advisory under Section 805 and Franklin County, and the County is legally obligated to implement the award. ACAPE, *supra*; Butler County Correctional Officers v. Butler County, 505 A.2d 1110 (Pa. Cmwlth. 1986); Teamsters Local No. 764 v. Lycoming County, 7 PPER 12 (Final Order, 2006), affirmed *sub nom. unreported*, Lycoming County v. PLRB, No. 474 C.D. 2007, 38 PPER 78 (Pa. Cmwlth. 2007).

In its exceptions, the County asserts that this case is distinguishable from ACAPE because here the County considered and rejected the award prior to the adoption of the budget. Initially, we note that the issue of whether the employer has properly met, considered and rejected the award does not arise until the employer first establishes that a legislative enactment is required to fund the award. However, with respect to binding arbitration under Section 805 for prison guards and court employes, the Courts have consistently rejected interpretations of the proviso that swallow up the general rule, and have repeatedly stressed that:

In light of the expressed purposes of Act 195 and the reliance on arbitration as an alternative to striking (especially for those employes prohibited from striking), we cannot accept [an] ... interpretation of section 805 that ... renders all arbitration awards touching upon such items advisory only. Such an interpretation would nullify, for all practical purposes, the "final and binding" provisions of section 805 for all awards regarding salaries or other compensation. Such an interpretation would be contrary to the clearly expressed intentions of the General Assembly, as well as the principles of statutory construction.

Franklin County, 491 Pa. at 60-61, 417 A.2d at 1143; see e.g. ACAPE, *supra*; Lycoming County, *supra*; see also, County of Lehigh v. AFSCME, District Council 88, Local 543, 505 A.2d 1105 (Pa. Cmwlth. 1986). Here, to suggest as the County does, that despite preparing a budget with sufficient funds that are to remain unallocated and available, the County may nevertheless preemptively declare an award advisory, would render all interest arbitration awards for prison guards and court employes merely advisory and never final and binding under Section 805. This is the precise absurd result previously condemned by the Supreme Court in Franklin County, *supra*. To avoid rendering the "final and binding" language in Section 805 superfluous, the analysis of ACAPE must be equally applicable to situations such as the one presented here, where the arbitration award is issued prior to the budget preparation phase, as it is to awards arising after the budget is enacted.

For all practical purposes, this case is indistinguishable from the Commonwealth Court's *en banc* decision in AFSCME, District Council 83 v. PLRB (Indiana County), 505 A.2d 1041 (Pa. Cmwlth. 1986).³ Indiana County asserted, as does the County here, that the establishment of an unreserved general fund balance is legislative action.⁴ The Board in Indiana County had agreed with the county's position and found no unfair practice. A unanimous Commonwealth Court, *en banc*, reversed.⁵

The Commonwealth Court in Indiana County expressly held that it is the county's burden to demonstrate the actual dollar amounts in order to establish that there are, in fact, insufficient unreserved amounts in the budget to fund the award. In Indiana County, the Commonwealth Court held that the county failed to sustain its burden, holding as follows:

[B]ecause the testimony on behalf of the county commissioners was extremely general and vague, containing no numerical specifics nor any explanation of the budget page which the county introduced in its exhibits, the record lacks any substantial evidence as a basis for finding that budgetary amounts were insufficient or that tax anticipation borrowing could not be used to fund the implementation. All the hearing examiner could find was as stated, that the county commissioners did not "believe" that future tax receipts would permit them to undertake the tax anticipation funding process.

The county, in addition to its failure to demonstrate insufficiency of budgetary amounts and inability to fund those amounts, also failed to sustain its burden of showing that implementation could not have been achieved by budget transfers from one category of the year's budget to another. The PLRB, continuing to misplace the burden, stated that "even had the record demonstrated a surplus in the general fund, we would find the act of transferring funds from the general fund to the prison budget to constitute legislative action."

This court has currently decided that precise question otherwise in County of Lehigh, [supra] which we consolidated for oral argument with this case. In that case, we held that the transfer of funds from one line item to another, where there are sufficient funds in the budget to make the transfer, does not require a legislative enactment. However, where there are not sufficient funds in the budget to make such a transfer, implementation would require a legislative enactment. Therefore, the PLRB's conclusion that the transfer of funds from one line item to another necessarily requires legislative enactment is contrary to our holding and therefore is reversed.

Accordingly, because the county has not demonstrated the necessity of a legislative enactment for the implementation of the arbitration award in this case, the county commissioners' unsupported rejection of that award constituted an unfair labor practice. The decision of the PLRB is reversed, and this case is remanded with a direction that the arbitration award be enforced.

Indiana County, 505 A.2d at 1042-1043.

Here, the County offered testimony that portions of its general fund balance were earmarked for such expenses as state-mandated services and annual retirement contributions, were restricted bond funds for capital projects, or were restricted by court order. However, the County, like the employer in Indiana County, failed to offer testimony or evidence of the dollar amounts specifically and actually reserved for those

³ Indiana County was decided as part of a trilogy of cases decided by the Commonwealth Court sitting *en banc* that also included Lehigh County, *supra* and Butler County, *supra*.

⁴ Indiana County also asserted, as does the County here, that securing a tax anticipation note would be legislative action.

⁵ The County here relies on PLRB v. Allegheny County, 15 PPER ¶15095 (Final Order, 1984). Allegheny County, however was issued by the Board on the same day as Indiana County, and was decided on the same basis that was declared invalid by the Commonwealth Court in Indiana County.

purposes. At best, the County's evidence indicates that the 2010 budget reflects \$3,089,201 in the unreserved general fund.

Similarly, the County offered testimony that funds were needed to carry over for expenses during the first two to three months of the next fiscal year, and that it is generally suggested by bond rating agencies that municipalities retain a percentage of the total budget for carry over. However, while the County indicated that some amount of the unreserved general fund balance was needed for carry over to cover expenses until tax revenues were received in the following year, there is no evidence that those funds would not become available during the applicable budget year.

The County's stated belief, unsubstantiated by evidence, that it could not fund the prison guards' interest award for 2010 is not substantial evidence to carry the County's burden of establishing a required legislative enactment under Section 805. *E.g. ACAPE, supra; Indiana County, supra.* On this record, the evidence is insufficient to establish that the County lacks the funds to cover the prison guards' interest arbitration award for 2010. Where the County fails to conclusively establish that its budget for the year at issue has insufficient unreserved funds necessary to cover the expenses of an interest arbitration award for that year, and therefore a legislative enactment to raise taxes would be necessary, then the award is not advisory and is final and binding under Section 805 of PERA. *E.g. Lawrence County, supra.; Indiana County, supra.*

After a thorough review of the exceptions and all matters of record, the Hearing Examiner did not err in finding that the County failed to sustain its burden of proving the necessity of a legislative enactment in order to fund the prison guard's interest arbitration award for 2010. Thus, the Hearing Examiner did not err in concluding that the County violated Section 1201(a)(1) and (5) of PERA, by refusing to implement the financial terms of the prison guards' interest arbitration award for 2010. Accordingly, the County exceptions shall be dismissed and the PDO shall be made final.

ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employe Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed by Lancaster County are hereby dismissed, and the December 14, 2010 Proposed Decision and Order, be and hereby is made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, and James M. Darby, Member, this twenty-sixth day of April, 2011. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within order.

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AMERICAN FEDERATION OF STATE :
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AFFIDAVIT OF COMPLIANCE

The County hereby certifies that it has ceased and desisted from its violations of sections 1201(a)(1) and (5) of the PERA, that it has implemented the financial terms of the interest arbitration award for 2010 with interest as set forth in the Proposed Decision and Order, that it has posted the Final Order and Proposed Decision and Order as directed, and that it has served a copy of this affidavit on AFSCME.

Signature/Date

Title

SWORN AND SUBSCRIBED TO before me
the day and year first aforesaid.

Signature of Notary Public