

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE :
LODGE 12 CAPITAL POLICE :
 :
v. : Case No. PF-C-10-61-E
 :
CITY OF HARRISBURG :

FINAL ORDER

The Harrisburg City Controller (Controller) and the Harrisburg City Treasurer (Treasurer) filed exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on January 24, 2011, challenging a January 4, 2011 Proposed Decision and Order (PDO) of a Board Hearing Examiner. In the PDO, the Hearing Examiner determined that the City of Harrisburg (City) violated Act 111 and Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA) when the Controller and Treasurer caused direct deposit of paychecks for bargaining unit City police officers to cease. The City filed a response to the exceptions of the Controller and Treasurer on February 14, 2011, along with a request for an extension of time to file its supporting brief, which was granted by the Board Secretary. The Fraternal Order of Police, Capital City Lodge No. 12 (FOP) filed a separate brief in response to the exceptions on February 14, 2011. On March 7, 2011, the Controller and Treasurer filed a reply to the FOP's brief. The City timely filed its brief in response to the exceptions on March 7, 2011.¹

The facts of this case are straightforward and are not in dispute. The City is a political subdivision of the Commonwealth of Pennsylvania, and thus is an employer for purposes of Act 111. In 1997, the City offered all bargaining unit police officers a direct deposit option for paychecks. In March of 2010, the City, through the Controller and the Treasurer, unilaterally stopped the automatic deposit option for City employees, including the bargaining unit police officers.

Before the hearing in this matter, the City sought to join the Controller and Treasurer as parties to the unfair labor practice charge. The Treasurer and Controller objected, asserting that they were neither the employer nor a joint employer of the bargaining unit police officers, and thus the Board had no jurisdiction over actions taken by them in their roles as Treasurer and Controller. In the PDO, the Hearing Examiner expressly denied the joinder of the Treasurer and Controller as separate parties to the unfair labor practice charge.² Based on the undisputed facts, the Hearing Examiner concluded that the City (which includes the offices of Treasurer and Controller) committed unfair labor practices in violation of Section 6(1)(a) and (e) of the PLRA, as read *in pari materia* with Act 111.

Initially, we note that Section 95.98(a) of the Board's Rules and Regulations limits the filing of exceptions to parties. 34 Pa. Code §95.98(a). Although tentatively afforded party status for purposes of the hearing, the Hearing Examiner ultimately denied the Controller and Treasurer party status in the PDO. As such, the Controller and Treasurer, who are not respondent parties or intervenors in the charge of unfair labor practices, lack standing to file exceptions with the Board, and the exceptions must be dismissed.³

¹ On March 16, 2011, the Controller and Treasurer filed a motion to strike portions of the City's brief and an attached exhibit. Said motion is hereby granted. Exhibit A to the City's brief is a letter dated January 10, 2011, which post-dates the PDO and is thus outside of the record made before the Hearing Examiner. As such, Exhibit A to the City's brief and references thereto, have not been considered in addressing the exceptions or the finding of an unfair labor practice. 34 Pa. Code §95.98(a)(2).

² Initially, the Hearing Examiner issued a bench ruling allowing the Treasurer and Controller to be joined for purposes of the hearing.

³ We note that the City, the real party in interest, has not filed exceptions to the PDO, and has, through its solicitor, filed a response opposing the exceptions of the Treasurer and Controller.

Even if we were to address the exceptions of the Treasurer and the Controller, their exceptions to the PDO would nevertheless be dismissed as without merit. The exceptions of the Controller and Treasurer distill down to two major points. First, that automatic direct deposit is not a mandatory subject of bargaining for police officers and thus there is no binding past practice. Second, that no unfair labor practice was committed by the City because the unilateral change of stopping direct deposit of paychecks was not implemented by the Mayor or City Council, but was the result of the Controller and Treasurer acting in their respective capacities as elected City officials.

With regard to the first argument on exceptions, the Treasurer and Controller contend here that direct deposit of employe paychecks cannot be a binding past practice because it was not negotiated into a collective bargaining agreement. It is well established to the contrary that even if a particular subject matter was not previously negotiated, the employer's unilateral change to the *status quo* with respect to a mandatory subject of bargaining is an unfair labor practice. Borough of Ellwood City v. PLRB, ___ Pa. ___, 998 A.2d 589 (2010); Dormont Borough v. PLRB, 794 A.2d 402 (Pa. Cmwlth. 2002). Thus, the dispositive issue here is whether direct deposit of the police officers' paychecks is a mandatory subject of bargaining under Act 111.

Recently in Borough of Ellwood City, the Pennsylvania Supreme Court stated the test to determine whether a matter is a mandatory subject of bargaining under Act 111 as follows:

[W]hen addressing topics which straddle the boundary between ostensibly mandatory subjects of bargaining and managerial prerogatives, we believe once it is determined that ... the topic is rationally related to the terms and conditions of employment, i.e., germane to the work environment, the proper approach is to inquire whether collective bargaining over the topic would unduly infringe upon the public employer's essential managerial responsibilities. If so, it will be considered a managerial prerogative and non-bargainable. If not, the topic is subject to mandatory collective bargaining.

Borough of Ellwood City, 998 A.2d at 600.

Contrary to the arguments of the Controller and Treasurer, direct deposit of employe paychecks is undoubtedly a term and condition of employment and directly related to employe wages. Mid-West Education Association v. Mid-West School District, 18 PPER ¶18131 (Proposed Decision and Order, 1987); Teamsters Local Union 384 v. Owen J. Roberts School District, 35 PPER 5 (Proposed Decision and Order, 2004).⁴ In Mid-West School District the employer had imposed mandatory direct deposit for its employes. The Hearing Examiner in that case noted that employes would be required by mandatory direct deposit to have an account with a financial institution in order to be paid, and that to cash their paycheck employes must visit a financial institution or an automatic teller machine. Accordingly, the Hearing Examiner concluded that imposing mandatory direct deposit had an impact on employe wages and working conditions. See also, Owen J. Roberts School District, *supra*. (same).

The same holds true here for the City's elimination of direct deposit of employe paychecks. Now, rather than having their paycheck deposited directly into their account with the financial institution and being immediately available, in order to receive their wages employes must wait until they are able to get to their financial institution or an automatic teller machine to deposit or cash their paycheck. As such, just as with the institution of direct deposit in Mid-West School District, eliminating direct deposit of employe paychecks is equally related to the employes' wages and working conditions. See Borough of Ellwood City, *supra*.

⁴ Although these cases were decided under the balancing test set forth in PLRB v. State College Area School District, 461 Pa. 494, 337 A.2d 262 (1975), for employes covered by the Public Employe Relations Act (PERA), the first part of that test requires that the subject matter impact upon the employes' interests in wages, hours or working conditions. Matters that impact upon employe wages, hours or working conditions clearly meet the first part of the test announced in Borough of Ellwood City in that they are germane to the work environment for Act 111 employes. See Borough of Ellwood City, *supra*. (Court looked to cases decided under PERA to find that police officers' use of tobacco was germane to the work environment for purposes of the test under Act 111).

With regard to the second part of the Ellwood City test, the Controller and Treasurer make no claim that collective bargaining over direct deposit for the City police officers would unduly infringe upon the City's managerial responsibility to oversee the City budget. At best, the Controller and Treasurer assert that instituting paper paychecks for City employes was done to permit the Controller and Treasurer to fulfill their duty to ensure that the expenditure has been approved by City Council and that it corresponds with the City budget. (Brief of Controller and Treasurer in Support of Exceptions, pp. 4, 30). However, there is no claim here that the salaries of the City police officers were not budgeted by City Council, and the Controller and Treasurer make absolutely no assertion that negotiating direct deposit for the City police officers would have unduly infringed upon their responsibilities on behalf of the City.

Accordingly, under the balancing test announced in Borough of Ellwood City, direct deposit of the police officers' paychecks is rationally related to employe wages and working conditions, and it has not been established on the record that negotiating over direct deposit for the police officers would unduly interfere with the managerial responsibilities of the City. Thus, under Act 111, direct deposit of the City police officers' paychecks is a mandatory subject of bargaining that cannot be altered in the absence of collective bargaining.

Even if there was a unilateral change to a mandatory subject of bargaining, the Controller and Treasurer baldly assert that because they are not the bargaining representatives for the City in negotiations with the police officers, the City cannot be held liable for unfair labor practices that result from their unilateral actions as elected Treasurer and Controller. The Controller and Treasurer cite to Novembrino v. International Association of Machinists and Aerospace Workers, Lodge 2462, 601 A.2d 96 (Pa. Cmwlth. 1992), to support their position that they are not the employer of City police officers. Novembrino, however, only holds that an elected controller or treasurer may be a joint employer when bargaining terms and conditions of employment for employes within their office. With respect to the wage, hour, and working condition matters for employes outside of their offices, the Controller and Treasurer are merely officers of the political subdivision. See Adamo v. Cini, 656 A.2d 576 (Pa. Cmwlth. 1995). As the Commonwealth Court has held "[t]he controller is not an 'overlord of other ... officers.'" Beharry v. Mascara, 516 A.2d 872, 874 (Pa. Cmwlth. 1986) (*quoting* Thayer v. McCaslin, 314 Pa. 553, 556, 171 A. 898, 899 (1934)). Indeed, the argument of the Controller and Treasurer that their official actions taken on behalf of the City can shield the City from unfair labor practice charges, lacks any merit and runs directly counter to the statutory definitions of "employer" under Act 111 and the PLRA.

Act 111 provides that the political subdivision is the employer for police officers working for a political subdivision of the Commonwealth. With full knowledge of the division of authority in city governance and to fulfill the purposes and policies of Act 111, the General Assembly declared that the political subdivision, as a whole, is the employer. Indeed, as the Pennsylvania Supreme Court recognized, a political subdivision, such as the City, is comprised of all officers having control of City governance. Reed v. Harrisburg City Council, ___ Pa. ___, 995 A.2d 1137 (2010). Consistent therewith, Section 3(c) of the PLRA defines an employer to "include[] any person acting, directly or indirectly, in the interest of an employer..." 43 P.S. §211.3(c).⁵ Thus, under Act 111 and the PLRA, any person or officer acting, directly or indirectly, in the interest of the political subdivision, may cause the employer, i.e. the political subdivision, to commit an unfair labor practice.

Here, the Controller and Treasurer are undeniably persons acting in their official capacity on behalf of the City. The actions of the Controller and Treasurer to stop automatic direct deposit for the City's bargaining unit police officers resulted in the City unilaterally ceasing a binding past practice with respect to a mandatory subject of bargaining. The Hearing Examiner, therefore, correctly held that the actions of the

⁵ Act 111 is read in *pari materia* with the PLRA. Philadelphia Fire Officers Association v. Pennsylvania Labor Relations Board, 470 Pa. 550, 369 A.2d 259 (1977).

Controller and Treasurer caused the City to commit an unfair labor practice in violation of Section 6(1)(a) and (e) of the PLRA.

Furthermore, as it is the City that committed the unfair labor practice, it is the City, i.e. the political subdivision as a whole, that is responsible for remedying the unfair labor practice. Accordingly, the Hearing Examiner did not err in refusing to allow the Controller and Treasurer to engage in "finger pointing" over how or by whom the *status quo* may be restored. Any person or officer acting directly or indirectly in the interests of the City, whether it be the Controller, Treasurer, Mayor, or City Council, as part of City governance was responsible for the City committing the unfair labor practice, and is equally responsible for taking any necessary actions to remedy the unfair labor practices of the City.

After a thorough review of the exceptions and all matters of record, because the Controller and Treasurer had been denied joinder as parties to the unfair labor practice charge, the exceptions filed by the Treasurer and Controller are hereby dismissed. 34 Pa. Code §95.98(b). As the exceptions have been dismissed, and because we find that the Hearing Examiner did not err in concluding that the City violated Section 6(1)(a) and (e) of the PLRA by unilaterally ceasing direct deposit of paychecks for bargaining unit police officers, the PDO shall hereby be made final and absolute.

ORDER

In view of the foregoing and in order to effectuate the policies of Act 111 and the Pennsylvania Labor Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed by the City Controller and the City Treasurer are hereby dismissed, and the January 4, 2011 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.

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AFFIDAVIT OF COMPLIANCE

The City hereby certifies that it has ceased and desisted from its violation of Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act and Act 111; that it has returned to the *status quo ante* of offering automatic deposit to all bargaining unit members; that it has posted a copy of the Final Order and Proposed Decision and Order as directed; and that it has served an executed copy of this affidavit on the Union at its principal place of business.

Signature/Date

Title

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

Signature of Notary Public