

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

SCHUYLKILL-CARBON FRATERNAL ORDER :
OF POLICE LODGE 13, POLICE :
DEPARTMENT OF MAHONING TOWNSHIP :
 : Case No. PF-C-09-128-E
v. :
 :
MAHONING TOWNSHIP :

PROPOSED DECISION AND ORDER

On November 12, 2009, the Schuylkill-Carbon Fraternal Order of Police Lodge 13, Police Department of Mahoning Township (Complainant or FOP) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) alleging that Mahoning Township (Respondent or Township) violated Sections 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA) as read in pari materia with Act 111.

On December 23, 2009 the Secretary of the Board issued a complaint and notice of hearing assigning the case to a conciliator to resolve the matters in dispute by mutual agreement of the parties and setting a hearing for February 18, 2010, in Harrisburg, if necessary.

The hearing was necessary, but was continued to April 2, 2010 on the motion of the FOP without objection from the Township. At the hearing, all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Both parties filed post-hearing briefs.

The examiner, on the basis of the testimony and exhibits presented at the hearing and from all other matters and documents of record, makes the following:

FINDINGS OF FACT

1. The Schuylkill-Carbon Fraternal Order of Police Lodge 13, Police Department of Mahoning Township is a labor organization within the meaning of the PLRA as read in pari materia with Act 111 of 1968 (Act 111).

2. Mahoning Township is an employer within the meaning of the PLRA as read in pari materia with Act 111.

3. The FOP is the exclusive representative of the Township's police officers. (N.T. 6)

4. The FOP and the Township have been parties to several collective bargaining agreements (CBAs). The most recent CBA is for the term January 1, 2009 through December 31, 2012, which sets forth the terms and conditions of employment for the bargaining unit members. (N.T. 11,24, Complainant's Exhibit 1)

5. That the CBA includes a provision for pensions at Article XVI, Retirement Benefits, which states, in relevant part:

1. Retirement benefits shall be provided as set forth in Ordinance No. 95-1 and Ordinance No. 74-4, dated January 25, 1995 and June 12, 1974. Copies of said ordinances are attached hereto as Exhibit "A" and incorporated herein by reference.

(N.T. 11, 24, Complainant's Exhibit 1)

6. Ordinance No. 74-4 provides in Section 3 for employes' contributions of 5% to the pension fund. The specific language is:

3. Contributions.

A. Each participant shall contribute monthly into the pension fund established hereunder an amount equal to (a) 5% of his total monthly compensation in the event this ordinance shall provide for no off-set under subclause (ii) of paragraph A, section 2 of this ordinance, or (b) if an off-set is provided under subclause (ii) of paragraph A, section 2 of this ordinance, the sum of (i) the product determined by multiplying the amount of total monthly compensation on which Social Security taxes are payable, if any, by 5%. All such contributions by participant shall be deducted by the Municipality from the participant's salary. Any balance of needed annual contributions shall be paid to the pension fund by annual appropriations.

Any payments made by the Commonwealth of Pennsylvania to the Municipality for police pension purposes shall be used as follows:

(i) To reduce the unfunded liability of the Municipality on account of pensions payable hereunder, and after such liability has been funded,

(ii) To apply against the annual obligation of the Municipality for future service cost or, to the extent that the payment may be in excess of such obligation,

(iii) To reduce participants' contributions.

(N.T. 11, 24, Complainant's Exhibit 1)

7. In 1995, the Township enacted Ordinance No. 95-1, which amended Ordinance No. 74-4 but kept the contribution section of Ordinance No. 74-4. (N.T. 11, 24, Complainant's Exhibit 1)

8. That on March 14, 2001, the Township enacted Ordinance No. 2001-3 which amended Ordinance No. 74-4. The Ordinance kept the 5% contribution but allowed for the reduction or elimination of the contribution "when an actuarial study demonstrates that such reduction is feasible and can be effected without impairing the soundness of the plan." Specifically, the ordinance states:

Section 1. Required Contribution

The following section is hereby added to the ordinance:

§ 12-20 - Contributions

Each participant shall contribute monthly into the pension fund established hereunder an amount equal to 5% of his/her total monthly compensation. (Note there are no social security offsets, therefore it is a flat 5%).

All such contributions by the participant shall be deducted by the Municipality from the participant's salary. Any balance of needed annual contributions shall become the obligation of the Municipality and shall be paid to the pension fund by annual appropriations.

The Township may, on an annual basis, reduce or eliminate employee contributions to the fund when an actuarial study demonstrates that such reduction is feasible and can be effected without impairing the soundness of the plan.

(N.T. 22, 32, Respondent Exhibit 2)

9. From 2001 to 2009, bargaining unit members did not contribute to Police Pension Fund. (N.T. 12-13)

10. In 2009, the actuary for the police pension fund conducted a study of the pension plan and advised that the employees' contributions to the fund in the amount of 5% should be resumed. (N.T. 22, Complainant's Exhibit 2)

11. On October 1, 2009, the Township began deducting contributions from bargaining unit members' paychecks for the Police Pension Fund at the rate of 5%. (N.T. 13)

DISCUSSION

The FOP's specification of charges alleges that on October 1, 2009, the Township "unilaterally modified the previously existing terms and conditions of employment and/or implemented new terms and conditions of employment constituting mandatory subjects of bargaining including Member Contributions to the Police Pension Fund." The FOP alleges that the Township violated Sections 6(1)(a) and (e) of the PLRA as read in pari materia with Act 111 by unilaterally imposing a 5% employee contribution to the pension fund.

The subject of pensions is one of the enumerated mandatory subjects of bargaining under Section 1 of Act 111. Therefore, a public employer commits an unfair labor practice in violation of Section 6(1)(e) by unilaterally changing the terms of a police pension plan. See, Wilkes-Barre Township, 35 PPER ¶ 137 (Final Order, 2004), aff'd 878 A.2d 977 (Pa. Cmwlth. 2005).

The Township defends the charge by contending that it has bargained the matter in dispute. The Township also contends that there has been no unilateral change in terms and conditions of the pension plan's contribution rate. The Township contends that its October 1, 2009 order is consistent with the parties collective bargaining agreement, specifically Article XVI, "Retirement Benefits" which incorporates by reference two township ordinances, Ordinance No. 74-4 and Ordinance No. 95-1. Ordinance 74-4 provides for a 5% contribution rate.

The Township's defense is that it acted with contractual privilege when it issued its October 2009 order imposing a 5% contribution rate to the police pension fund. In Pennsylvania State Troopers Ass'n v. PLRB, 761 A.2d 645 (Pa. Cmwlth. 2000) the Commonwealth Court affirmed the Board's use of this defense and stated,

The PLRB has recognized "contractual privilege" as an affirmative defense to a charge of unfair labor practices alleging a failure to bargain in good faith. The defense calls for the dismissal of such charges where the employer establishes a "sound arguable basis" in the language of the parties' collective bargaining agreement, or other bargained for agreement, for the claim that the employer's action was permissible under the agreement.

Id. at 651.

The Township has presented sufficient facts to sustain its burden of proving an affirmative defense of contractual privilege. The Township introduced the collective bargaining agreement which specifically incorporates the Township's pension ordinance. The ordinance requires a 5% employee contribution, an amount that may be reduced or eliminated if an actuarial study determines that an elimination or reduction of the contribution could be done "without affecting the soundness of the plan." There is nothing in the record to indicate that the actuary made such a determination to allow elimination or reduction of the contribution.

Accordingly, the Township has shown that it had a sound arguable basis in the parties' contractual language allowing for a 5% employee contribution. There will be no finding that the Township has unilaterally imposed a 5% contribution rate on the police officers.

The FOP argues that the Board should find that the pension plan's true terms should instead be found through a past practice analysis. Specifically, the FOP argues that the parties' past practice is of the Township not imposing a contribution rate on police employees to fund the pension plan, as evidenced by the Township not imposing a contribution since 2001.

The FOP's past practice argument misses the point that the parties' CBA itself allows for the imposition of a 5% contribution rate. Where a CBA addresses the alleged change in terms and conditions of employment, the past practice analysis is not appropriate. County of Allegheny v. Allegheny County Prison Employees, 476 Pa. 27, 34 n. 12, 381 A. 2d 849, 852 n. 12 (1978).

In the present case, the CBA incorporates an ordinance that provides for a contribution rate of 5% and for the elimination or reduction of this contribution if the plan was actuarially sound. However, the actuary did not determine that the rate could be reduced or eliminated for 2009. Instead, the actuary recommended a contribution rate of 5%. In Montgomery Township 37 PPER 140 (Final Order, 2006), the Board was faced with a similar set of facts and dismissed the union's argument to find a change in past practices. The same result will apply here.

CONCLUSIONS

The examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds:

1. That Mahoning Township is an employer within the meaning of the PLRA and Act 111.
2. That the Schuylkill-Carbon Fraternal Order of Police Lodge 13, Police Department of Mahoning Township is a labor organization within the meaning of the PLRA and Act 111.
3. That the Board has jurisdiction over the parties hereto.
4. That the Township has not committed unfair labor practices in violation of Sections 6(1)(a) and (e) of the PLRA and Act 111.

ORDER

In view of the foregoing and in order to effectuate the policies of the PLRA and Act 111, the examiner

HEREBY ORDERS AND DIRECTS

that the charge of unfair labor practices is rescinded and the complaint dismissed.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed pursuant to 34 Pa. Code 95.98(a) within twenty (20) days of the date hereof, this Decision and Order shall be and become absolute and final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this thirty-first day of January, 2011.

PENNSYLVANIA LABOR RELATIONS BOARD

Thomas P. Leonard, Hearing Examiner