

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AMERICAN FEDERATION OF STATE :
COUNTY AND MUNICIPAL EMPLOYEES :
DISTRICT COUNCIL 85 :
v. : Case No. PERA-C-11-443-W
PLEASANT RIDGE MANOR (ERIE COUNTY) :

PROPOSED DECISION AND ORDER

On November 15, 2011, American Federation of State County and Municipal Employees, District Council 85 (AFSCME or Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that Pleasant Ridge Manor (Manor or Employer) violated sections 1201(a)(1) and (5) of the Public Employee Relations Act (PERA) by unilaterally changing the terms of the pension plan without bargaining with the Union.

On December 6, 2011, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on March 1, 2012, in Harrisburg before Thomas P. Leonard, Esquire, a hearing examiner of the Board. On February 24, 2012, the Examiner continued the hearing to June 22, 2012 at the request of the Employer and without objection from the Union.

The hearing was held on the rescheduled date at which time the parties were afforded a full opportunity to present testimony, cross examine witnesses and introduce documentary evidence. At the hearing, the parties agreed to a stipulation of 41 facts not in dispute and 28 joint exhibits.

The hearing examiner, on the basis of the evidence presented by the parties at the hearing and from all other matters of record, makes the following:

FINDINGS OF FACT

1. American Federation of State, County and Municipal Employees, District Council 85 (AFSCME or Union) is an unincorporated association and an employe organization within the meaning of Section 301(3) of PERA, 43 P.S. §1101.301(3). AFSCME is the collective bargaining agent for a bargaining unit of employees working at Pleasant Ridge Manor (Manor) as certified by the Pennsylvania Labor Relations Board at PERA-R-2075-W. (Stipulation of Facts)
2. Pleasant Ridge Manor (formerly known as the Erie County Geriatric Center), is a nursing care facility which is owned and operated by Erie County (County). Erie County Council serves as the Board of Trustees for the Manor. The Manor has two business locations, one, known as Pleasant Ridge Manor-East, at 4728 Lake Pleasant Road, Erie, PA 16504, and the other, known as Pleasant Ridge Manor-West, at 8300 West Ridge Road, Girard, PA 16417. Erie County and the Manor are public employers within the meaning of Section 301(1) of the PERA, 43 P.S. §1101.301(1). (Stipulation of Facts)
3. The Union and the County have had a collective bargaining relationship for decades. AFSCME represented the bargaining unit when the facility at which the employees work was known as the Erie County Hospital. (Stipulation of Facts)
4. Prior to July 1, 1976, bargaining unit employees were County employees and participants in the Erie County Pension Plan which was established and created pursuant and subject to the County Pension Law, 16 P.S. §11651 et seq. (Stipulation of Facts)
5. Effective July 1, 1976, County Council for Erie County determined that it was in the best interest of the County to create a non-profit corporation to operate

the Erie County hospital. The Erie County Geriatric Center, as a Pennsylvania non-profit corporation was created and assumed the operation of the former Erie County Hospital. The former County employees of the Erie County Hospital became employees of the Erie County Geriatric Center. (Stipulation of Facts)

6. Effective July 1, 1976 AFSCME bargaining unit employees were separated from the Erie County pension plan and a new pension plan was created to apply to the county nursing home employees. The new pension plan was created pursuant and subject to the County Pension law, 16 P.S. §16151 et seq. An interim trust agreement was entered into between the Erie County Geriatric Center and Security-Peoples Trust Company for the administration of an interim pension while the pension plan document was developed. (Stipulation of Facts)
7. Prior to 1980, the State Reimbursement Rates changed and were more favorable to County-owned facilities. As a result, in 1980, Erie County Council changed the Bylaws of the Erie County Geriatric Center and established Erie County Council as the Board of Trustees for the Erie County Geriatric Center. By Resolution No. 21 of 1980, Erie County Council adopted a Statement of Agreement by which it agreed to assume full financial control and responsibility for the operation of the Erie County Geriatric Center as a component unit of Erie County. County Council further adopted Resolution No. 22 of 1980 which established the ultimate financial control of the Erie County Geriatric Center in Erie County. (Stipulation of Facts, Joint Exhibits 1 and 2)
8. Prior to the adoption of the Erie County Geriatric Center Pension Plan in 1977, the Board of Trustees of the Erie County Geriatric Center determined to seek the input of Angelo Criscone, Business Agent for AFSCME, as evidenced by its meeting minutes of January 24, 1977. Thereafter, the Board of Trustees of the Erie County Geriatric Center adopted the Erie County Geriatric Center Pension Plan at its meeting on March 18, 1977. (Stipulation of Facts, Joint Exhibits 3 and 4)
9. Following the assumption of its control of the Erie County Geriatric Center in 1980, the Erie County Council, acting as the Board of Trustees, amended and restated the pension plan for the Erie County Geriatric Center in 1983 and again in 1985. There was no formal notice given to the employees or the Union of the amendments or restatement. (Stipulation of Facts, Joint Exhibits 5 and 6)
10. In 1989, Erie County Council, acting as Board of Trustees, determined to rename the Erie County Geriatric Center as Pleasant Ridge Manor, which was effective April 1, 1980. At that time, Erie County council also amended and restated the pension plan, renaming the plan the Pleasant Ridge Manor Pension Plan. (Stipulation of Facts, Joint Exhibit 7)
11. In 1998, Erie County Council, acting as the Board of Trustees, amended and restated the 1989 pension documents. A copy of the document is attached hereto as Exhibit 8. Employees were advised that the county was seeking a determination by the IRS that the plan was tax qualified but were not given notice of any changes to the pension plan. (Stipulation of Facts, Joint Exhibits 8 and 9)
12. In 1999, Erie County Council, acting as the Board of Trustees, amended the Pension Plan (Amendment No. 1) to address rollover contributions, benefits payable to participants who retire before age 62 and benefits payable to employees age 65. To the knowledge of the parties, no formal notice was given to the employees or the Union of Amendment No. 1. (Stipulation of Facts, Joint Exhibit 10)
13. In 2000, Erie County Council, acting as the Board of Trustees, amended the Pension Plan (Amendment No. 2) to address benefits payable to a surviving spouse. To the knowledge of the parties, no formal notice was given to the employees or the Union of Amendment No. 2. (Stipulation of Facts, Joint Exhibit 11)

14. In 2002, Erie County Council, acting as the Board of Trustees, amended the Pension Plan (Amendment No. 3) to comply with the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) and addressed maximum permissible benefits distributions and rollover contributions. To the knowledge of the parties, no formal notice was given to the employees or the Union of Amendment No. 3. (Stipulation of Facts, Joint Exhibit 12)
15. In 2008, Erie County Council, acting as the Board of Trustees, amended the Pension Plan (Amendment No. 4) to comply with federal regulations and the Pension Funding Equity Act of 2004. The Amendment limited the maximum permissible benefit allowed participants. To the knowledge of the parties, no formal notice was given to the employees or the union of Amendment No. 4. (Stipulation of Facts, Joint Exhibit 13)
16. In 2009, Erie County Council, acting as the Board of Trustees, amended the Pension Plan (Amendment No. 5) to comply with the Pension Plan Act of 2006 and modification to section 401(a)(9) of the Internal Revenue Code. The amendment addressed lump sum benefits, optional survivor annuities, commencement of benefits and required distributions, and rollovers. To the knowledge of the parties, no formal notice was given to the employees or the union of Amendment No. 5. (Stipulation of Facts, Joint Exhibit 14)
17. When this dispute arose, the parties were in negotiations for a new collective bargaining agreement to replace an agreement expiring December 31, 2011. (Stipulation of Facts, Joint Exhibit 15)
18. The most recent collective bargaining agreement is for the term January 1, 2012 - December 31, 2014. (Stipulation of Facts)
19. AFSCME commenced negotiations with the Manor in June 2011. At that time, AFSCME submitted its proposed changes to the collective bargaining agreement which included demands regarding the pension plan applicable to employees of the Manor. (Stipulation of Facts, Joint Exhibit 16)
20. Negotiations occurred on July 13, 14 and 15. The Manor submitted proposals to the Union. (Stipulation of Facts, Joint Exhibit 17)
21. In or around late September, 2011, AFSCME learned through the news media that the Council, acting in its capacity as the Board of Trustees of the Manor, was considering making changes to the retirement plan for current and future employees. Although AFSCME and the Manor were engaged in contract negotiations at the time, no one from the Manor or the Council had notified AFSCME of any proposed changes to the retirement plan, nor sought to bargain with AFSCME over any such proposed changes. (Stipulation of Facts)
22. On September 29, 2011, AFSCME Staff Representative Zollie Rayner sent a letter to Robert Smith, the Manor's Executive Director, advising the Manor, *inter alia*, that any proposed changes to the retirement plan for AFSCME-represented employees must be negotiated with the Union and stating AFSCME's opposition to any changes to the retirement plan for current or future AFSCME-represented employees. (Stipulation of Facts, Joint Exhibit 18)
23. On or about October 12, 2011, AFSCME received a letter dated October 7, 2011 from the Manor's attorney George Joseph, responding to Mr. Rayner's September 29, 2011 letter. Mr. Joseph stated that it is the view of the Manor and its Board of Trustees (i.e., the Council) that any proposed changes to the retirement plan need not be bargained with the Union. (Stipulation of Facts, Joint Exhibit 19)
24. The Manor asserts that the Pleasant Ridge Manor Pension Plan was promulgated pursuant and subject to the County Pension Law, 16 P.S. §11651 et. seq., and

that pension plans established pursuant to the County Pension Law are not subject to collective bargaining. (Stipulation of Facts)

25. On November 16, 2011, Erie County Council, acting in its capacity as the Board of Trustees of the Manor, adopted a resolution authorizing certain changes to the retirement plan for current and future employees of the Manor, including those employees represented by AFSCME. (Stipulation of Facts, Joint Exhibit 20)
26. Specifically, the November resolution authorized and approved the following changes to the Pleasant Ridge Manor pension plan, effective January 1, 2012:
 - (a) That the current, defined benefit retirement plan be frozen with only certain current employees (i.e., those whose age plus years of service at the Manor is equal to or greater than 65) being "grandfathered" and thereby permitted to continue participating in the existing plan;
 - (b) That a new defined contribution plan be established to provide retirement benefits to employees who are not "grandfathered" and those "grandfathered" employees who choose to waive continued participation in the existing pension plan.

(Stipulation of Facts, Joint Exhibit 20)

27. Following the November 16, 2011 meeting, AFSCME representative Mr. Rayner wrote a letter to the Manor's personnel director requesting, among other things, "a complete copy of the current [pension] plan along with all revisions and changes to said plan ..." (Stipulation of Facts, Joint Exhibit 21)
28. A few weeks later, Mr. Rayner received a copy of a document that purported to be a copy of the Pleasant Ridge Manor Pension Plan. (Stipulation of Facts, Joint Exhibit 22)
29. Additionally, Mr. Rayner received a document dated December 6, 2011, entitled "Pleasant Ridge Manor 401(k) Plan, Plan Design Discussion outline - December 6, 2011." (Stipulation of Facts, Joint Exhibit 23)
30. Finally, Mr. Rayner received a third document entitled "Notice of Plan Amendment Reducing Future Benefit Accruals Under the Pleasant Ridge Manor Pension Plan", addressed to the Pension Plan Participants from the Pleasant Ridge Manor Pension Plan Administrator. (Stipulation of Facts, Joint Exhibit 24)
31. AFSCME made a demand of the Manor to not implement the changes to the Pension Plan pending resolution of the dispute regarding whether the Manor could make unilateral changes to the pension benefits without bargaining with the Union and the dispute regarding whether the County could make unilateral changes to the pension benefits while labor relations were ongoing and negotiations were not at impasse. Erie County Council, acting as the Board of Trustees, refused to forego making changes. AFSCME then filed an action in the Erie County Court of Common Pleas seeking a **Mazzie** injunction against the County. (Stipulation of Facts, Joint Exhibit 25)
32. On December 29, 2011, the Erie County Court of Common Pleas entered an order enjoining the County Council of Erie County acting in their capacity as the Board of Directors of Pleasant Ridge Manor from implementing changes to the pension benefits for bargaining unit employees. (Stipulation of Facts, Joint Exhibit 26)
33. The Manor subsequently filed an answer to the complaint. (Stipulation of Facts, Joint Exhibit 27)

34. After consideration of the answer and briefs submitted by AFSCME and the Manor, the Erie County Court of Common Pleas issued an opinion and order continuing the preliminary injunction pending resolution of this unfair labor practice charge. (Stipulation of Facts, Joint Exhibit 28)
35. As a result of the Court's ruling, the Manor has not implemented any changes to the pension benefits for bargaining unit employees. (Stipulation of Facts)
36. According to the documents provided by the Manor, the current existing plan has the following features:
- (a) The Pleasant Ridge Manor Pension Plan is a voluntary defined benefit plan, funded by mandatory employee contributions, voluntary employee contributions, and employer contributions. **See** Exhibit 22, at Sections 1.14, 8.2.
 - (b) Employees vest in their pension benefits after five (5) years of service. **See id.**, at Section 6.1
 - (c) The basic pension benefit has two parts: (i) a monthly benefit of 1.25% of - average salary multiplied by years of service; plus (ii) a monthly benefit equal to the actuarial equivalent of accumulated mandatory and voluntary employee contributions. **See id.**, at Section 5.1.
 - (d) This basic benefit is payable upon normal retirement at age 60, or early retirement at age 55 with 20 years of service. **See id.**, at Sections 1.19, 1.33, 5.1.
 - (e) The Plan also contains provisions for monthly disability retirement benefits, monthly surviving spouse benefits, and other survivor benefits for eligible single participants. **See id.**, at Sections 5.6, 5.9, 7.3.
 - (f) The County believes that the plan is a governmental pension plan created pursuant to the County Pension Plan Law, 16 P.S. §11651 et seq. As a governmental plan, it would not be subject to ERISA and other private sector laws.
- (Stipulation of Facts)
37. According to documents provided by the Manor, the following changes to the retirement plan were scheduled to go into effect on January 1, 2012:
- (a) The Manor intends to stop benefit accruals under the Plan entirely on December 31, 2011 for all employees who have not yet reached a combined age and years of service of 65 as of that date (so-called "grandfathered employees"). "Grandfathered" employees will have the option to stay in the Pension Plan, or to go into a new plan described below. See Exhibit 20 (Board of Directors Resolution 3-2011).
 - (b) In the place of the Pension Plan, the Manor intends to create a defined contribution plan. **Id.**
 - (c) The proposed defined contribution plan would permit all employees to defer a portion of their income into an individual account. See **Id.**
 - (d) The Manor will make dollar for dollar matching contributions on such deferrals up to 3% of compensation, but only for those employees who do not still participate in the Pension Plan. **Id.**
 - (e) Employees will vest in these matching contributions over a five year period (in 25% increments over their second through fifth year of service). See Exhibit 23 (401(k) Plan Design Discussion Outline).

(f) The retirement benefit from the proposed defined contribution plan would be the vested account balance as of the employee's retirement, whatever that amount is. Further, employees will have the responsibility to invest their account balances. **Id.**

(g) Employees subject to the new defined contribution pension plan will not have a guaranteed monthly benefit upon retirement.

(Stipulation of Facts)

38. Employees who meet the rule of 65 (combination of age of employee and length of service) are grandfathered employees under the Employer's proposed changes to the pension plan. (Stipulation of Facts)

39. Employees who do not meet the rule of 65 will have their current benefit in the existing retirement plan frozen and any future contributions by the employer or the employees to the pension plan will be to the new defined contribution plan. (Stipulation of Facts)

40. The Employer did not propose any changes to the pension plan in negotiations. (Stipulation of Facts)

41. None of the employees have agreed or acquiesced in any changes to the pension plan applicable to them. (Stipulation of Facts)

42. In 1985, the Employer proposed to the Union that the employees "give up their voluntary retirement program and enter into a defined benefit program which has compulsory contributions of the bargaining unit in the area of six percent (6%)." This proposal was included in the PLRB fact finding process at PERA-F-85-86-W. On March 20, 1985, the PLRB Fact Finder issued his report on the unresolved issues in the parties' negotiations. His report found the employer's pension issue to be moot. (N.T. 66, 126, Union Exhibit 2)

43. AFSCME negotiators proposed enhancements of the pension benefits in the last three negotiations, including the 2011 negotiations. The Employer's response to the 2011 proposals was to laugh about how unrealistic the proposals were because of the costs entailed. (N.T. 55-57, 70, 78-80, 91-92, 98-99, Joint Exhibits 16 and 19)

DISCUSSION

The Union charged that Pleasant Ridge Manor committed unfair practices under Sections 1201(a)(1) and (5) of PERA by unilaterally changing the terms of the pension plan without bargaining with the Union.

On November 16, 2011, Erie County Council, acting in its capacity as the Board of Trustees of the Manor, enacted a resolution to authorize certain changes to the retirement plan for current and future employees of the Manor with the intention to transition to a defined contribution plan. Specifically, the resolution stated that effective January 1, 2012, the current defined benefit retirement plan would freeze participation for any non-grandfathered employees; discontinue allowing any future employees to participate in the plan after December 31, 2011; and provide those grandfathered employees (those whose age plus years of service equaled 65 or more as of December 31, 2011) the option to remain in the plan.

Is the Change a Mandatory Subject of Bargaining?

As a threshold matter, the Board and the courts have held that a public employer has an obligation to bargain over changes in pension plans, as pensions are a mandatory subject of bargaining of "terms and conditions of employment" under Section 701 of PERA.

Pennsylvania Labor Relations Board v. State College Area School District, 306 A.2d 404 (Pa. Cmwlth. 1973), rev'd on other grounds, 461 Pa. 494, 337 A.2d 262 (1975).¹

The Employer argues that the change is a matter of inherent managerial prerogative under the **State College** balancing test and not a valid subject of bargaining. However, the Employer's argument does not find support in the case law. Subsequent to the 1975 Commonwealth Court decision in **State College Area School District, Id.** the Board and the courts have restated the principle that a change in a pension plan is a mandatory subject of bargaining.

In **City of Pittsburgh v. PLRB**, 20 PERA ¶ 20115 (Final Order, 1989), the Board applied the **State College** balancing test and determined that retirement benefits are a mandatory subject of bargaining.

It cannot be doubted that pensions fall within the items made expressly bargainable in Section 701 of PERA. **Inland Steel Co. v. NLRB**, 170 F.2d 247, 22 LRRM 2506 (7th Cir. 1948), cert. den., 336 U.S. 960 (1949). Thus, pensions are a mandatory subject of bargaining under PERA. ...²

In **AFSCME District Council 33 v. City of Philadelphia**, 598 A.2d 256 (Pa. 1991) the Supreme Court upheld an injunction against the City of Philadelphia to prevent it from imposing a revised pension plan on newly hired civilian employees. In **City of Philadelphia, Id.**, it is worth noting what was at issue in that case was another revision to the pension plan:

"Philadelphia Ordinance 1107, passed on January 8, 1987, was designed to comply with the Act 205 requirement of establishing a revised benefit plan. The ordinance contained new benefit provisions, known as Plan 87, which differed significantly from the Plan J provisions then currently in effect. Plan 87 changed the eligibility requirements making it more difficult to be eligible for benefits, altered the benefits calculation formula as to reduce benefits and eliminated service-connected disability benefits for newly hired employees."

598 A.2d 256, at 258.

In the present case, the pension plan unilaterally imposed by the Employer applies to incumbent employees, some of whom may have worked for Pleasant Ridge Manor for fifteen years. Joint Exhibit 23. Stipulation at paragraphs 36-39.

In **Association of Pennsylvania State College and University Faculties v. State System of Higher Education**, 505 Pa. 369, 479 A.2d (1984), the Supreme Court ruled that the contractual pension rights of Pennsylvania public employees became fixed upon the employee's entry into the system and cannot be subsequently adversely affected.

¹ "The words 'other items and conditions of employment' are no doubt susceptible to varying interpretations...We believe they refer to such things as the various physical conditions of one's working surroundings; what quantity and quality of work is required during one's work period; what safety practices prevail at and near the job site; what sick and hospital benefits are available; *what retirement benefits will be provided and how eligibility will be determined.*" **Labor Relations Board v. State College Area School District**, 9 Pa. Cmwlth. at 243, 306 A.2d at 412 (Emphasis in original footnote)

² Affirmed on appeal, 621 A.2d 1224 (Pa. Cmwlth. 1993) reversed on other grounds, 539 Pa. 535, 653 A.2d 1210 (1995). At issue in **City of Pittsburgh** was whether an Employer was obligated to bargain over creation of a pension plan pursuant to the Municipal Pension Plan Funding Standard and Recovery Act (Act 105) which established procedures whereby municipalities with financially distressed pension plans could avail themselves of the Act's special relief. Based on the language of Act 205, the Court ruled that where a municipal pension plan had been declared "severely distressed" the employer could create a pension plan for newly hired employees and that it did not have to bargain over creation of the plan. However, the court confirmed that collective bargaining was required once the plan was established. In the case at bar, the new Pleasant Ridge Manor pension plan was not created pursuant to Act 205 and therefore, bargaining is required.

In the present case, neither the Union nor the employees consented to the changes to the pension plan. The pension changes at issue involve the elimination of a defined benefit pension plan for all existing Pleasant Ridge Manor employees who do not meet age and service requirements and substitution of the 401(k) type defined contribution plan. These unilateral changes violate the Employer's duty to bargain.

Furthermore, the trustees enacted Resolution 3-2011 while the parties were still negotiating a successor collective bargaining agreement. It is well established in Pennsylvania that a public employer cannot change the status quo and take unilateral action with regards to a mandatory subject of bargaining while negotiations are ongoing. **Philadelphia Housing Authority v. PLRB**, 620 A.2d 594 (Pa. Cmwlth. 1993) alloc. denied, 637 A.2d 294 (Pa. 1993). In the absence of an impasse in negotiations, an employer is required to maintain the status quo. A bona fide impasse in bargaining is the completion of all mandatory steps in the bargaining process set forth in law, **Snyder County Prison Board v. PLRB**, 912 A.2d 356 (Pa. Cmwlth. 2006) and the point in bargaining "at which the parties have exhausted the prospects of concluding an agreement and further discussion would be fruitless". **Norwin School District v. Belan**, 510 Pa. 225, 268, 507 A.2d 373.

In the present case, the parties stipulated that the Employer adopted a new defined contribution pension plan in November to take effect January 1, 2012. The Employer further refused to hold off on changes pending bargaining notwithstanding the Union's request. At that time, the parties were not at impasse. In fact, collective bargaining continued until late January 2012 when the agreement was reached. In light of the fact that impasse had not been reached when the Employer acted, the Employer has violated its duty to bargain and committed an unfair practice.

County Pension Law Defense

The Employer next argues that it has no obligation to bargain over retirement benefits because the Pleasant Ridge Manor pension plan was promulgated pursuant to the County Pension Law and pension plans established pursuant to the County Pension Law, 16 P.S. §11651 et seq, are not subject to collective bargaining.

The County Pension Law was enacted in 1971 and applies to second Class A, and third through eighth class Pennsylvania Counties "which has or hereafter established a County pension retirement system." 16 P.S. §11651. The Employer argues that the County Pension Law is the same as laws creating the Public School Employees Retirement System ("PSERS") 24 P.S. §8101, et seq. and the State Employees Retirement System ("SERS") 71 P.S. §5101, et seq.

However, the statutes creating SERS and PSERS both include provisions which specifically prohibit collective bargaining over public school and state pensions. The pertinent section of the State Employee's Retirement Code states:

Regardless of any other provision of law, pension rights of State employees shall be determined solely by this part or any amendment thereto, and no collective bargaining agreement nor any arbitration award between the Commonwealth and its employees or their collective bargaining representatives shall be construed to change any of the provisions herein ...

71 Pa. C.S. §5955. Likewise, Act 88 of 1992 provides:

Nothing in this act or in any other law shall be construed to permit, authorize or require collective bargaining, mediation or binding arbitration to create, alter or modify pension or retirement benefits set forth in 24 Pa. C.S. Pt. IV (relating to retirement of school employees) or administered by the Public School Employees' Retirement Board. Further, nothing in this act or in any other law shall be construed to permit, authorize or require an employer through collective bargaining, mediation, binding arbitration or otherwise, to establish, create, alter or

modify a pension or retirement plan or pay pension or retirement benefits or other compensation that modifies or supplements in any way the benefits set forth in 24 Pa. C.S. Pt. IV or administered by the Public School Employees' Retirement Board.

Act 88 of 1992, §7; **see also** 24 P.S. §11.1111-A. In contrast, the County Pension Law has no such prohibition against collective bargaining. Accordingly, the Employer's suggestion that one be "implied" must be rejected. The Employer's argument that the County Pension Law removes the matter from bargaining is not accepted.

Waiver Defense

The Employer next argues that even if the Board is to find there was an obligation to bargain, AFSCME has waived that right over the course of the years. Pleasant Ridge Manor points out that it has revised the Pension Plan on multiple occasions since its implementation in 1976 including amended and restated plans in 1978, 1983, 1985 and 1989. Also, it points out that there have been five technical plan amendments to the 1989 plan since that time. AFSCME, the Employer argues, has never demanded to bargain over any of the amendments or restatements to the plan.

The Employer further argues that even if it were determined that AFSCME had requested to bargain over the pension, it had done so only in the context of Article XX of the Collective Bargaining Agreement with Pleasant Ridge Manor. It argues that article provides for the establishment of a Pension Committee, consisting of equal representation of members of management and the employes to review the Pension Plan and to make recommendations to the employer. It further argues that the language of Article XX makes it clear that AFSCME has conceded that making unilateral changes to the Pension Plan is an employer right that does not have to be bargained, that Article XX does not specify the level of benefits.

Although a union can waive the right to bargain over a mandatory subject, Pennsylvania appellate courts and this Board have determined that the waiver must be explicit and cannot be implied from ambiguous language or past conduct. In order to establish that a union waived its right to bargain, the Employer must show a "clear and unmistakable waiver" of bargaining on the matter at issued. **School District of the City of Erie v. PLRB**, Court of Common Pleas of Erie County, 10 PPER 10112 (1979); **Venango County Board of Assistance**, 11 PPER ¶ 11223 (Final Order, 1980), **aff'd sub nom. Commonwealth of Pa. v. PLRB**, 459 A.2d 452 (Pa. Cmwlth. 1983); **Jersey Shore Area School District**, 18 PPER ¶ 18117 (Final Order 1987).

The record must establish that the matter was "fully discussed and consciously yielded." **Philadelphia School District**, 28 PPER ¶28177. **See also Crawford County**, 25 PPER ¶25001 (Final Order, 1993), **aff'd sub nom. Crawford County v. PLRB**, 659 A.2d 1078 (Pa. Cmwlth. 1995), **alloc. dismissed** 543 Pa. 482, 672 A.2d 1318 (1996); **Harrisburg School District**, 13 PPER ¶ 13077 (Final Order, 1982) (party asserting waiver must demonstrate that other party "consciously yielded or clearly and unmistakably waived its interest" in bargaining over specific area in which change is sought); **Jersey Shore Area School District**, 18 PPER ¶18061 (Proposed Decision and Order), **aff'd** 18 PPER ¶ 18117 (Final Order, 1987) (in absence of clear and specific language, no waiver can result). See also **City of Erie v. PLRB** 32 A. 3rd 625 (Pa. 2011) wherein, a unanimous Supreme Court upheld a Union's right to bargain over pension benefits even when the contract was silent. In this case, based on this record, the Employer cannot establish a clear and unmistakable waiver.

The Union has a history of involvement in the pension plan's creation and evolution. Joint Exhibit 3 at page 2 notes that Angelo Criscione, the Union representative, was involved in the creation of the new pension plan prior to its approval. (Finding of Fact 8). Joint Exhibit 3 rebuts the Employer's argument that the Union was not involved in creation of the plan. Furthermore, in 1985, the Employer proposed to the Union that the employes "give up their voluntary retirement program and enter into a defined benefit program." This proposal was considered under the PLRB's fact

finding procedures. On March 20, 1985, the PLRB Fact Finder issued his report on the unresolved issue and found the pension issue to be moot.

The Employer offered no evidence to establish that the Union "consciously yielded or clearly and unmistakably waived its interest" in the retirement benefits. **Harrisburg School District, supra**. With regards to subsequent amendments and restatements of the Pension Plan, the parties stipulated that neither employer nor the union received notice of any of the changes. (Stipulation of Facts 9-16). It is difficult to conclude that the Union waived its interest on that issue absent the receipt of notice of the amendments or restatements.

The testimony further established that contrary to assertions by the Employer, the Union had proposed changes to the pension benefits in 2005, 2008 and in the 2011 negotiations. In fact, in the 2011 negotiations, the three union witnesses, all of whom were present at the negotiations, testified that the Employer's response to the 2011 proposals was to laugh about how unrealistic the proposals were because of the costs entailed. The mere fact that the Union did not achieve its demands cannot be construed to constitute waiver.

Additionally, even in instances where this Board determines that a waiver of bargaining rights has occurred, the Union is not bound by that waiver in perpetuity. Here the parties were in contract negotiations for a successor contract which means that all mandatory subject of bargaining are open for negotiations. Notwithstanding the contract negotiations, the Employer has refused to bargain over pension benefits. Stipulation at Paragraph 24. In refusing the Union's timely and lawful demand to bargain, the Employer violated PERA.

Furthermore, the Employer's argument that the Pension Plan grants it the power to modify the plan does not negate the obligation to bargain. If that were the case, it would mean that every public employer in Pennsylvania could avoid bargaining over pension benefits merely by a recitation in the Agreement and Declaration of Trust establishing the pension plan. Such a result would violate PERA and must be ruled unlawful.

Based on this record, the Employer's waiver arguments will not be accepted.

CONCLUSIONS

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

1. That Pleasant Ridge Manor is a public employer within the meaning of Section 301(1) of PERA.
2. That the American Federation of State County and Municipal Employees, District Council 85 is an employe organization within the meaning of Section 301(3) of PERA.
3. That the Board has jurisdiction over the parties hereto.
4. That Pleasant Ridge Manor has committed unfair practices in violation of Sections 1201(a) (1) and (5) of PERA.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the Employer shall:

1. Cease and desist from interfering with, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of PERA;
2. Cease and desist from refusing to bargain collectively in good faith with an employe representative of employes in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative.
3. Take the following affirmative action:
 - (a) Rescind Resolution 3-2011, dated November 16, 2011;
 - (b) Rescind any changes made to the pension plan as a result of Resolution 3-2011 and restore the status quo that existed before November 16, 2011;
 - (c) Post a copy of this decision and order within five (5) days from the effective date hereof in a conspicuous place readily accessible to its employes and have the same remain so posted for a period of ten (10) consecutive days; and
 - (d) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this decision and order by completion and filing of the attached affidavit of compliance.

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 become and be absolute and final.

SIGNED, DATED AND MAILED from Harrisburg, Pennsylvania this fifth day of April, 2013.

PENNSYLVANIA LABOR RELATIONS BOARD

Thomas P. Leonard, Hearing Examiner