

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PALMER TOWNSHIP POLICE ASSOCIATION :
: :
v. : :
: : Case No. PF-C-12-23-E
: :
PALMER TOWNSHIP :

PROPOSED DECISION AND ORDER

On February 3, 2012, the Palmer Township Police Association (Association or Complainant) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) alleging that Palmer Township (Township or Respondent) violated Sections 6(1)(a), (c) and (e) of the Pennsylvania Labor Relations Act (PLRA), as read *in pari materia* with the Policemen and Firemen Collective Bargaining Act (Act 111) by unilaterally imposing a five per cent (5%) pension contribution deduction from the wages of the Association members for 2012.

On March 7, 2012, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on August 9, 2012 in Harrisburg. The hearing was continued to September 17, 2012, at the request of the Township without objection from the Association. At that time, the parties were afforded a full opportunity to present evidence and cross-examine witnesses.

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

FINDINGS OF FACT

1. Palmer Township is an employer within the meaning of section 3(c) of the PLRA as read *in pari materia* with Act 111.
2. Palmer Township Police Association is a labor organization within the meaning of Section 3(f) of the PLRA as read *in pari materia* with Act 111.
3. The Association is the exclusive representative of a unit of all full-time and regular part-time police Captains, Lieutenants, Sergeants, Corporals, and Patrolmen but excluding the Chief of Police, Deputy Chief and Dispatchers. The unit was certified by the Board at Case No. PF-R-80-26-C. (N.T. 19, 144, Joint Exhibit 1)
4. The Township and the Association have been parties to a series of collective bargaining agreements including the one that covered the years 2006-2010. (N.T. 151, Township Exhibit G)
5. All of the CBAs provide for a pension plan for the police with language similar to the language in the latest CBA (2006-10), at Article IX, Pension, that states,
 - 9.0 All full-time police officers shall participate in the Police Pension Plan established by the Board of Supervisors of Palmer Township and are subject to its provisions and shall be entitled to all benefits therein as set forth in the Police Pension Ordinance.

(N.T. 19, 144, Joint Exhibit 1)

6. The Police Pension Plan at Section 6.2 states

Section 6.2 - Mandatory Employee Contribution

(a) Mandatory Contribution Amount - As a condition of participation in this plan, each active participant must contribute, on an after-tax basis a percentage of his compensation as established each year. In general, this mandatory contribution shall be 5.00% to 8.00% of the participants' compensation. The Township Board of Supervisors shall set the rate annually within this range by resolution.

The employer may reduce or eliminate the contribution required provided any reduction or elimination of contributions is authorized on an annual basis by an ordinance or resolution by the employer.

(N.T. 19, 147, Joint Exhibit 6)

7. In 2010, the parties entered into negotiations for a successor collective bargaining agreement. On August 9, 2010, at the beginning of the negotiations, the Township set forth its "Issues in Dispute" in a letter to the Association. One of the issues in dispute was the Township seeking a 5% pension contribution by the members of the Association. The Township's letter stated:

10. **Article 9 Pension:** Without waiving its right under The Palmer Township Police Retirement Pension Benefits Ordinance to impose police pension contributions, the Township submits that the police should contribute five percent (5%) of salary to the police pension plan in contract years 2011, 2012, 2013, 2014 and 2015. Article 9.4 Refunds will be removed. The Township further submits that overtime, shift differential and longevity shall not be included in the Section 9.1 Benefit Basis calculation. The Benefit Basis shall solely be the average of base salary for the last 36 months of employment.

(N.T. 11, 50, Union Exhibit 1)

8. The police officers have made no pension contributions since at least 2001.
(N.T. 47, 51, Union Exhibit 3)
9. The parties were unable to reach agreement on a successor CBA. Pursuant to Act 111, the parties proceeded to binding arbitration. The Township listed a 5% pension contribution as one of its "issues in dispute" in advance of the arbitration hearing. (N.T. 12, 144, Joint Exhibit 2)
10. On May 4, 2011, an arbitration hearing was held before an Act 111 interest arbitration panel chaired by Steven Wolf. During the Township's presentation, it once again asked the arbitration panel to award a 5% pension contribution.
(N.T. 13, 50, Union Exhibit 2)
11. On November 28, 2011, the arbitration panel issued the award (Wolf Award).
(N.T. 14, 144, Joint Exhibit 3)
12. The Wolf Award did not contain any mention of the pension contribution. It provided that, "All existing benefits not modified by this Award shall remain 'as is.'" (N.T. 14, 144, Joint Exhibit 3)
13. On November 30, 2011, the Township Board of Supervisors met and openly discussed implementing a 5% pension contribution on the police officers. On December 27, 2011, the Board of Supervisors passed Resolution #2011-17 imposing a 5% pension contribution for the year 2012. (N.T. 47, 51, Union Exhibit 3)

DISCUSSION

The Association's charge alleges that the Township committed unfair labor practices under sections 6(1)(a), (c) and (e) of the PLRA as read *in pari materia* with Act 111 by unilaterally imposing a five percent (5%) of wages contribution toward a pension plan. The pension contribution resolution fixing a five percent of salary rate is the first time in over ten year that the Township imposed a pension contribution on the police bargaining unit members. The Association seeks a rescission of the contribution resolution and a cease and desist order prohibiting the Township from implementing a rate contribution until it bargains with the Association.

An employer commits an unfair labor practice under sections 6(1)(a) and (e) of the PLRA as read *in pari materia* with Act 111 when it unilaterally changes a mandatory subject of bargaining. The issue of pension contributions is a mandatory subject of bargaining. **Wilkes-Barre Twp. v. PLRB**, 878 A.2d 977 (Pa. Cmwlth. 2005), citing Section 1 of Act 111, 43 P.S. § 217.1

In its defense, the Township argues that its decision was the result of contractual privilege, that it had a sound arguable basis in the collective bargaining agreement to impose a pension contribution. The Township points to language in the police collective bargaining agreement at Article 9, which in turn references language in the police pension plan at Section 6.2.

This case is similar to **Swatara Township**, 22 PPER ¶ 22021 (Final Order, 1991). The Board found no violation of PLRA and Act 111 when the employer increased the employees' pension contribution to eight percent (8%) relying on the parties CBA that allowed the employer to set a contribution rate between zero and eight percent, saying this gave the employer a sound arguable basis in the parties' collective bargaining agreement. **Jersey Shore Area School District**, 18 PPER ¶ 18061 (Proposed Decision and Order, 1987), 18 PPER ¶ 18117 (Final Order, 1987). The record contained no evidence of bargaining over the terms of a pension contribution for the CBA in place.

The Association argues that the Township's defense is at odds with its statement of issues before an Act 111 interest arbitration panel, in which it stated "the Township submits that the police should contribute five percent (5%) of salary to the police pension plan in contract years 2011, 2012, 2013, 2014 and 2015." The Association questions why the Township would seek a pension contribution in Act 111 interest arbitration if it possessed that right by contractual privilege. The Association further argues that it is bad faith bargaining for an employer to seek a pension contribution from the arbitration panel, and when the panel did not award it, proceed to impose a contribution anyway.

However, the Association does not mention that when the Township placed the pension contribution in dispute it also stated that it was doing so "without waiving its right under the Palmer Township Police Retirement Pension Benefits Ordinance to impose police pension contributions." The Association admits that it found no cases in support of its argument. In light of the Board's decision in **Swatara Township, supra.**, the Association's argument will be dismissed and there will be no finding that the Township violated sections 6(1)(a) and (e) of the PLRA.

Retaliation and Discrimination Allegations

The Association also argues that the Township's passage of a resolution increasing the pension contribution violated section 6(1)(c) of the PLRA which makes it an unfair labor practice for an employer "[b]y discrimination in regard to hire or tenure of employment, or any term or condition of employment to encourage or discourage membership in any labor organization." 43 P.S. 211.6(c).

An employer commits an unfair labor practice under section 6(1)(c) if it discriminates against an employe for having engaged in an activity protected by the PLRA. **Duryea Borough Police Department v. PLRB**, 862 A.2d 122 (Pa. Cmwlth. 2004). If the charging party presents a prima facie case during its case-in-chief, a charge under

section 6(1)(c) is to be sustained unless the employer shows that it would have taken the same action even if the employee had not engaged in the protected activity. **Brentwood Borough**, 35 PPER 112 (Final Order 2004), **citing Perry County v. PLRB**, 634 A.2d 808 (Pa. Cmwlth. 1992). The discriminatory motivation creates the offense. **Id.** A valid non-discriminatory reason for the employer's action may rebut any inference that the employer was discriminatorily motivated. **Duryea Borough Police Department, supra.**

To support a charge that the Township's enactment of a pension contribution was discriminatory, the Association must establish that the Association members engaged in activity protected by the PLRA, and that with knowledge of that activity, the employer took adverse action against the employee because of union animus. **St. Joseph's Hospital v. PLRB**, 473 Pa. 101, 373 A.2d 1069 (1977). It is the motive for the adverse action that creates the offense under Section 6(1)(c) and (d) of the PLRA. **PLRB v. Ficon**, 434 Pa. 383, 254 A.2d 3 (1969).

The Association proved the first two elements of the test. The dispute in this case is over the third part of the **St. Joseph's** test, the Township's motivation for the action. The Association contends that anti-union motivation can be inferred in this case from the close timing of the Township's adoption of the pension contribution resolution just two days after the Wolf Award and from the failure of the Township to explain the financial reasons for enacting a pension contribution. The Association contends that the pension fund's value increased by 42% from 2009 to 2011. The Association also contends that the Township did not prepare an actuarial study of fund's solvency prior to deciding to enact a contribution rate.

The Association's financial argument is not conclusive. The recent increase in the value of the pension fund came after decreases in prior years. Also, it is unclear from this record whether the CBA or the Police Pension Plan requires that the Township prepare an actuarial study prior to setting a pension contribution rate.

On the other hand, the Township presented convincing evidence that it implemented the pension contribution due to its belief that the Township's overall fiscal condition required such a contribution. Township Manager Christopher Christman started work in 2011 and was not involved in the Act 111 negotiations and arbitration. He testified credibly that anti-union retaliation was not the motivation for the pension contribution resolution. He testified that he advised the Township supervisors that the Township's fiscal condition required a contribution from the police employees to the pension plan if the Township wanted to avoid a property tax increase in 2012. The Township had also made cuts to the budget as well, as admitted by Association member and negotiator Jeffrey Karp. The Township cut the emergency response team and decided not to replace one of the police dogs.

On this record, despite the inferences that could be drawn to conclude that retaliation was the motive of the supervisors, the Township has presented convincing evidence that its motivation was not to retaliate for the Association's exercise of protected activity. **Duryea Borough, supra.** The third part of the **St. Joseph's Hospital** test for discrimination has not been met.

CONCLUSIONS

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

1. Palmer Township is an employer under section 3(c) of the PLRA as read *in pari materia* with Act 111.
2. Palmer Township Police Association is a labor organization under section 3(f) of the PLRA as read *in pari materia* with Act 111.
3. The Board has jurisdiction over the parties hereto.
4. The Township has not committed unfair labor practices in violation of sections 6(1)(a), (c) and (e) of the PLRA as read *in pari materia* with 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 is dismissed and the complaint is rescinded.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty (20) days of the date hereof, this decision and order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this twenty-sixth day of August, 2013.

PENNSYLVANIA LABOR RELATIONS BOARD

Thomas P. Leonard, Hearing Examiner