COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

TEAMSTERS LOCAL UNION NO. 764	:	
	:	
v.	:	Case No. PERA-C-09-23-E
	:	
LYCOMING COUNTY	:	

AMENDED PROPOSED DECISION AND ORDER

On January 26, 2009, Teamsters Local Union No. 764 (Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board). In the charge, the Union alleges that Lycoming County (County) violated Section 1201(a)(1), (3), (4) and (5) of the Public Employe Relations Act (PERA). The Union specifically alleges that the County engaged in unfair practices on or about December 20, 2008, when it unilaterally refused to give bargaining unit employes year-end performance bonuses which they allegedly received every year until December 2008. The Union claims that the County's revocation of year-end performance bonuses constitutes a unilateral change in terms and conditions of employment and that the program revocation was in retaliation for the employes' support of the Union as well as the employes' pursuit of and victory in proceedings before the Board and the Commonwealth Court. (Specification of Charges ¶¶ 1-3).

By letter dated February 18, 2009, the Secretary of the Board informed the Union that no complaint would be issued on the charge. On March 10, 2009, the Union filed, with the Board, exceptions to the Secretary's letter of no complaint and included a supporting brief. The exceptions also included an amended charge that did not include claims under Section 1201(a)(4). By letter dated March 19, 2009, the County filed with the Board a response to the charge. On April 21, 2009, the Board issued an Order Directing Remand to Secretary for Further Proceedings. On April 27, 2009, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on Friday, July 31, 2009 in Harrisburg, Pennsylvania. By letter dated July 28, 2009, I continued the hearing. On or about July 29, 2009, I received a voice-mail message from both parties' attorneys who were on a conference call with each other when they left the message. In the message, the parties' attorneys requested permission to submit factual stipulations in lieu of participating in a hearing. By letter dated July 29, 2009, I approved the submission of factual stipulations and established a briefing schedule. On August 11, 2009, the Board received the joint stipulations of fact and a bound book of ten (10) joint exhibits. On August 31, 2009, the Union filed its brief, and on September 29, 2009, the County filed its brief. Both briefs were timely filed in accordance with the briefing schedule.

The examiner, based upon all matters of record, makes the following:

FINDINGS OF FACT

1. The County is a public employer within the meaning of Section 301(1) of PERA. (PERA-R-03-102-E, Order and Notice of Election & Nisi Order of Certification, 2003).

2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (PERA-R-03-102-E, Order and Notice of Election & Nisi Order of Certification, 2003).

3. The parties stipulated and agreed that the Union represents two separate bargaining units of County employes. (Stipulations of Fact, ¶ 1).

4. The parties stipulated and agreed that the bargaining unit at issue in this matter consists of assistant district attorneys, assistant public defenders and special counsel (ADA Unit). (Stipulations of Fact, ¶ 2).

5. The parties stipulated and agreed that the other bargaining unit represented by the Union consists of detectives in the district attorney's office (Detective Unit). (Stipulations of Fact, ¶ 3).

6. The parties stipulated and agreed that, in 2004, the County and the Union bargained for the terms and conditions of employment for both bargaining units. (Stipulations of Fact, ¶ 4).

7. The parties stipulated and agreed that the County and the Union were unable to reach collective bargaining agreements for either of the bargaining units. (Stipulations of Fact, ¶ 5).

8. The parties stipulated and agreed that the County and the Union proceeded to interest arbitration to obtain initial collective bargaining agreements for each of the bargaining units. (Stipulations of Fact, ¶ 6).

9. The parties stipulated and agreed that, on December 15, 2004, the neutral arbitrator, Ms. Lynne Mountz, sent an email to the other two arbitrators stating that she was removing the participation in the performance reward system from the interest arbitration award for the ADA Unit. (Stipulations of Fact, ¶ 7; Joint Exhibit 9).

10. The parties stipulated and agreed that, on December 20, 2004, the Union' arbitrator, Mr. Robert Curley, responded to the neutral arbitrator's December 15, 2004 email without objection to the removal of the participation in the performance reward system by the ADA Unit employes. (Stipulations of Fact, ¶8; Joint Exhibit 9).

11. The parties stipulated and agreed that the County's performance reward system operates pursuant to County Policy 412, which was submitted as Joint Exhibit 10. (Stipulations of Fact, ¶ 9; Joint Exhibit 10).

12. The parties stipulated and agreed that, on January 4, 2005, an interest arbitration award was issued for the ADA Unit (ADA Award).[1] (Stipulations of Fact, ¶ 10; Joint Exhibit 5).

13. The parties stipulated and agreed that, on February 16, 2005, an interest arbitration award was issued for the Detective Unit (Detective Award). (Stipulations of Fact, ¶ 11; Joint Exhibit 6).

14. The parties stipulated and agreed that the County challenged the economic terms of the ADA Award and the Detective Award and did not implement those terms during the appeal process. (Stipulations of Fact, ¶ 12).

15. The parties stipulated and agreed that, during the appeal period, the County maintained the economic terms that existed prior to the issuance of the ADA Award and the Detective Award for those respective bargaining units. (Stipulations of Fact, ¶ 13).

16. The parties stipulated and agreed that, on December 3, 2007, the Commonwealth Court of Pennsylvania denied the County's challenges to the ADA Award and the Detective Award. (Stipulations of Fact, ¶ 14).

17. The parties stipulated and agreed that, in January 2008, the County agreed to implement the Commonwealth Court's decision and the economic terms of each award. (Stipulations of Fact, ¶ 15).

18. The parties stipulated and agreed that the January 2005 ADA Award did not include the participation in the County's performance reward system. (Stipulations of Fact, ¶ 16).

19. The parties stipulated and agreed that the Detective Award included the participation in the County's performance reward program. (Stipulations of Facts, ¶ 17).

20. The parties stipulated and agreed that, in 2007, the County and the Union participated in negotiations and interest arbitration for collective bargaining agreements for the ADA Unit and the Detective Unit. (Stipulations of Fact, ¶ 18).

21. The parties stipulated and agreed that, on November 14, 2007, an interest arbitration award for the period of 2008 through 2010 was issued for the ADA Unit. (Stipulations of Fact, ¶ 19).

22. The parties stipulated and agreed that the 2008-2010 interest arbitration award for the ADA Unit did not include the participation in the County's performance reward program. (Stipulations of Fact, ¶ 20).

[1] The neutral arbitrator signed the ADA Award on January 3, 2005. (Joint Exhibit 5).

23. The parties stipulated and agreed that the ADA Unit employes continued to participate in the County's performance reward program for the years 2004 through 2007. The ADA Unit employes did not receive any annual bonus payment under the County's performance reward program for the year 2008. (Stipulation of Facts, ¶ 21).

24. The parties stipulated and agreed that, on January 31, 2008, an interest arbitration award for the period of 2008 through 2010 was issued for the Detective Unit. (Stipulation of Facts, ¶ 22).

25. The parties stipulated and agreed that the 2008-2010 interest arbitration award for the Detective Unit included the participation in the County's performance reward program. (Stipulation of Facts, ¶ 23).

26. The parties stipulated and agreed that the Detective Unit employes did participate in the County's performance reward program for the year 2008. (Stipulation of Facts, ¶ 24).

27. The parties specifically discussed the performance reward program during negotiations and interest arbitration. (Joint Exhibit 2).

DISCUSSION

The Union argues that, "[i]gnoring the fact that the County engaged in a continuing practice of including the performance bonus in the attorneys' annual wage package after 2005, it now claims it is free to unilaterally eliminate that recognized existing term and condition of employment enjoyed by all Lycoming County employees because the bonus was not specifically included in the collective bargaining agreement." (Union Brief at 1-2). The Union further contends that the County's elimination of the year-end bonus program for the ADA Unit constituted a unilateral change in a past practice regarding a mandatory subject of bargaining and, therefore a refusal to bargain in good faith. (Union's brief at 4-9). The Union also maintains in the alternative that, even if the County lawfully exercised its managerial right to eliminate the rewards program, the County failed to negotiate the impact of the decision to eliminate the program. (Union Brief at 10).

In addition to the bargaining violations claimed, the Union also argues that the County's elimination of the performance bonus program for the ADA Unit employes was unlawfully and discriminatorily motivated as evidenced by the fact that the County removed the bonus from the ADA Unit and not from any other County employes. (Union Brief at 11-12).

1. Refusal to Bargain Claim

The County's performance reward program is governed by County Policy No. 412. (F.F 11; Joint Exhibit 10). Policy No. 412 is entitled the "EMPLOYEE EVALUATION PLAN FOR THE LYCOMING COUNTY." (Joint Exhibit 10). The first page of the plan contains a section defining its scope and applicability entitled "APPLICABILITY OF PLAN." Id. The applicability section provides as follows:

> All full-time, non–temporary employees of all work-units of the County, ***except for those employees covered by union contract or a professional services contract***, are subject to this plan, provided that some discretion in setting and assessing goals to reflect specific departmental priorities is accorded departments. For probationary employes, no "Employee Action Summary" form (nor the process described on that form) shall be required during the period of probation prior to the evaluation period beginning October 1st.

(Joint Exhibit 10 at 1 of 11)(emphasis added). This policy was last revised and placed in its current form on February 25, 2003. (Joint Exhibit 10 at 1 of 11). Since early 2003, the County's policy was to apply the performance reward program to non-union employes. The ADA Unit employes and the Detective Unit employes were non-union employes at the time, and the County, true to Policy No. 412, applied the plan to those employes.

The issue presented here is whether the County's maintaining of the performance reward program during the court appeals of the economic issues contained in the ADA Award, where the neutral arbitrator expressly eliminated the applicability of that program from the ADA Unit, created a binding past practice in the ADA Unit revived by the County post Award.

It is undisputed that the County had an obligation to maintain the status quo while it was negotiating with the Union for a first contract and engaged in interest arbitration for the Detective and ADA units. PLRB v. Williamsport Area Sch. Dist., 486 Pa. 375, 406 A.2d 329 (1979); Teamsters, Local 764 v. Milton Regional Sewer Authority, 36 PPER 15 (Final Order, 2005). The Commonwealth Court and the Board have consistently held that an employer is required to implement only those provisions of an interest arbitration award that are not subject to challenge on appeal of the award. Derry Township v. PLRB, 571 A.2d 513 (Pa. Cmwlth. 1989); Dunmore Police Ass'n v. Borough of Dunmore, 528 A.2d 299 (Pa. Cmwlth. 1987); Northampton Township PBA v. Northampton Township, 35 PPER 138 (Final Order, 2004). The record shows that the County appealed and challenged the economic terms of the ADA Award. The performance reward program, under County Policy No. 412, is an economic term of employment.[2] Accordingly, the County was entitled to delay the elimination of the program and the implementation of the economic terms of the ADA Award while it was on appeal.

In determining whether an employer engages in unfair practices for unilaterally changing a past practice, the Board must first determine whether the alleged practice constitutes a mandatory subject of bargaining. South Park Police Ass'n v. PLRB, 789 A.2d 874 (Pa. Cmwlth. 2002). An employer may not act unilaterally regarding a mandatory subject of bargaining without satisfying its statutory bargaining obligations with its employes' union representative. PLRB v. Mars Area Sch. Dist., 480 Pa. 295, 389 A.2d 1073 (1978); New Britain Township Police Benevolent Association v. New Britain Township, 33 PPER ¶ 33069 (Final Order, 2002).

The Board may rely on precedent in determining whether a matter is a mandatory subject without conducting the balancing test set forth in PLRB v. State College Area Sch. Dist., 461 Pa. 494, 337 A.2d 262 (1975), every time. Bucks County Security Guard Ass'n v. Bucks County, 38 PPER 99 (Final Order, 2007); Wilkes-Barre Police Benevolent Ass'n v. City of Wilkes-Barre, 33 PPER ¶ 33087 (Final Order, 2002)(holding that the Board "properly relies on precedent to determine whether a matter constitutes a mandatory subject rather than reinventing the wheel ... merely to arrive at the same result as the established precedent"); Teamsters Local 77 & 250 v. PLRB, 786 A.2d 299 (Pa. Cmwlth. 2001) (holding that the Board need not apply the balancing test to determine whether a matter constitutes a mandatory subject of bargaining or a managerial prerogative where the matter has already been determined by decisional law). Financial rewards or incentives are part of the overall salary structure and constitute a mandatory subject of bargaining. Pennsylvania State Park Officers Ass'n v. PLRB, 854 A.2d 674 Pa. Cmwlth. 2004). Accordingly, the performance reward program in this case constitutes a mandatory subject of bargaining. As a mandatory subject of bargaining, the performance reward program was bargained during initial contract negotiations and through the interest arbitration process. Through the collective bargaining process, the program was lawfully removed as a term and condition of employment.[3] The question remains, however, whether the performance reward program, lawfully eliminated through collective bargaining, can be reinstated as a binding past practice. I conclude that in this case it cannot. Although an employer may revive a lawfully eliminated term of employment by applying the term after a negotiated agreement or a post appeal interest award, where the employer implements the agreement or post appeal award and thereby lawfully eliminates the term, a binding past practice is not created during the status quo period of lawfully delayed implementation due to appeals.

The Supreme Court of Pennsylvania has adopted the following definition of a past practice:

> A custom or practice is not something which arises simply because a given course of conduct has been pursued by [m]anagement or the employees on one or more occasions. A custom or a practice is a usage evolved by [individuals] as a normal reaction to a recurring type of situation. It must be shown to be the *accepted* course of conduct characteristically repeated in response to the given set of

[2] The record does not contain facts indicating whether the County specifically challenged the elimination of the performance reward program in the ADA Award or challenged the inclusion of the performance reward program in the Detective Award. Absent such facts, I am obligated to include the reward program under the umbrella of economic terms as challenged on appeal.

[3] Dunmore, supra; SEIU, Local 668, PSSU v. Westmoreland County, 39 PPER 28 (Final Order, 2008)(holding that interest arbitration is an extension of the collective bargaining process).

> underlying circumstances. This is not to say that the course of conduct must be *accepted* in the sense of both parties having agreed to it, but rather that it must be *accepted* in the sense of being regarded by the [individuals] involved as the *normal* and *proper* response to underlying circumstances presented.

County of Allegheny v. Allegheny County Prison Employees Independent Union, 476 Pa. 27, 34 n. 12, 381 A.2d 849, 852 n.12 (977)(emphasis original). In Ellwood City Police Wage and Policy Unit v. Ellwood City, 29 PPER ¶ 29214 (Final Order, 1998), aff'd, 731 A.2d 670 (Pa. Cmwlth. 1999), the Board stated that "[t]he definition of past practice requires that the parties must develop a history of similar responses or reactions to a recurring set of circumstances." Ellwood City, 29 PPER at 507. "The Board has also opined that the nature of the underlying circumstances[] . . . governs the frequency and character of an employer's response to those circumstances." Wilkes-Barre Police Benevolent Ass'n v. City of Wilkes-Barre, 33 PPER ¶ 33087, 193 (Final Order, 2002).

The underlying principle supporting an employer's obligations to honor past practices is that the employes come to expect, and thereby depend on the employer's provision of those practices under a given set of circumstances. The expected employer response is as much a term and condition of employment as if it were included in the parties' collective bargaining agreement. County of Allegheny, supra. On this record, the Union did not establish that the employes would expect the County to consistently provide a bonus contradicting the ADA Award when the appeals expire.

The Union also failed to establish that providing an economic benefit in contravention to an interest award was a recurring set of circumstances. The County cannot be said to have created a past practice that survived the ADA Award by maintaining the status quo during the appeal process. When the appeals expire or are denied, the ADA employes would not reasonably expect the County to continue to apply the rewards program contrary to the terms of the ADA Award. The Union's claims would place the County in the untenable position of maintaining the status quo regarding matters on appeal which would, in turn, bind the County to a past practice that contradicts the Award being appealed. The County's right to appeal and challenge the economic terms of the Award, combined with its right to maintain the status quo regarding those same terms would force unbargained for, unwanted and unintentional terms on the County. Such a conclusion is contrary to the policies of PERA as well as the engaging relationships and communicative interactions fostered by the collective bargaining scheme of PERA.

The County was not responding to a recurring set of circumstances, as required by the definition of past practices, when it implemented the ADA Award and the 2008-2010 award. The given set of circumstances has changed. The County's appeals, which provided the temporary circumstances of giving the bonus by way of maintaining a status quo contravening the ADA Award, were finally denied. The Union did not show that contravening the Award's elimination of the program post appeal and implementation was a recurring circumstance. For the Union to establish a past practice, the record in this case must show that the County continued to apply Policy 412 after the appeals were denied and the County implemented the ADA Award. Then and only then could employes expect the County to contradict the interest arbitration awards (ADA and 2008-2010). In that event, a past practice that contravenes the collectively bargained for elimination of the program could arise and bind the County. Rather, the record here shows that the County did the opposite; that is the County implemented the ADA Award post appeal and thereby revoked the program. The program revocation was not realized by the Union until year's end in December 2008. The Union is attempting to litigate back the quid in the quid pro quo of collective bargaining to obtain quid et quo.

2. Impact Bargaining Claim

The Union alternatively claims that the County did not bargain the impact of its elimination of the performance rewards program. In Lackawanna County Detectives Ass'n v. PLRB, 762 A.2d 792 (Pa. Cmwlth. 2000), the Commonwealth Court held that a union must establish the following four elements in an impact bargaining case: (1) The employer must lawfully exercise its managerial prerogative; (2) there must be a demonstrable impact on wages, hours, or working conditions, which are severable from the managerial decision; (3) ***the union must demand to negotiate these matters following management's implementation of its prerogative***;

and (4) the public employer must refuse the union's demand. Id. (citing Borough of Ambridge, 30 PPER ¶ 30218 (Final Order, 1999). This record, however, is devoid of any evidence that the Union demanded that the County engage in impact bargaining following the elimination of the rewards program for the ADA Unit. Absent such evidence, the Union is unable to meet both the third and the fourth elements of the four-part conjunctive standard in Lackawanna.[4]

Moreover, although the County's implementation of the ADA Award has a demonstrable impact on wages of the ADA Unit employes, it is not severable. The implementation of the ADA Award resulted in the elimination of the performance reward program for the ADA Unit employes and the concomitant elimination of year-end bonus payments thereby reducing annual income. The managerial decision to implement the ADA Award is a wage reduction. The elimination of wages is the same as the impact on wages. The managerial decision to implement the ADA Award eliminating bonus payments is not severable or distinct from the reduction in wages. Requiring the County to bargain the impact of eliminating the program would allow the Union to force the County to bargain the original, legitimate and managerial decision to implement the ADA Award and allow the Union to undermine the Award's elimination of the program. Plains Township Police Officers Ass'n v. Plains Township, 40 PPER 103 (Final Order, 2009).

3. Discrimination Claim

In a discrimination claim, the complainant has the burden of establishing the following three-part conjunctive standard: (1) that the employe engaged in activity protected by PERA; (2) that the employer knew that the employe engaged in protected activity; and (3) the employer engaged in conduct that was motivated by the employes' involvement in protected activity. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). Motive creates the offense. PLRB v. Stairways, Inc., 425 A.2d 1172 (Pa. Cmwlth. 1981). Because direct evidence of anti-union animus is rarely presented or admitted by the employer, the Board and its examiners may infer animus from the evidence of record. Borough of Geistown v. PLRB, 679 A.2d 1330 (Pa. Cmwlth. 1996); York City Employes Union v. City of York, 29 PPER ¶ 29235 (Final order, 1998). An employer's lack of adequate reason for the adverse action taken may be part of the employe's prima facie case. Stairways, supra. Teamsters Local 312 v. Upland Borough, 25 PPER ¶ 25195 (Final Order, 1994). A pre-eminent factor in sustaining a charge of discrimination is a determination that the employes in question were the victims of disparate treatment by the employer. City of Reading v. PLRB, 568 A.2d 715 (Pa. Cmwlth. 1989).

In this case, the Union has not met its burden of establishing a prima facie case of discrimination. Specifically, the Union has not met the third part of the St. Joseph's Hospital standard; it has not established that the County's motivation in refusing to apply the performance reward program to the ADA unit in 2008 was related to the employes' engaging in protected activity rather than the implementation of the ADA Award. There simply is no evidence of unlawful motivation on this record. The Union contends that the County removed the bonus from the ADA Unit and not from any other County employes. (Union Brief at 11-12). However, the other County employes were not similarly situated because the County was implementing the ADA Award at the time, which all parties knew excluded the performance reward program. Other employes' terms and conditions of employment were not governed by the ADA Award or the 2008-2010 award.

The County engaged in interest arbitration for both the ADA and the Detective Units. The County appealed both the ADA Award and the Detective Award, challenging the economic terms in both awards. During the appeal process, the County maintained the economic terms that existed prior to the issuance of the ADA Award and the Detective Award for both bargaining units. After the Commonwealth Court denied the County's challenges to the ADA Award and the Detective Award, the County implemented the economic terms of both awards. The January 2005 ADA Award did not include the participation in the County's performance reward system, however, the Detective Award did include the

[4] The Union raised an impact bargaining claim for the first time in its brief in support of exceptions to the Secretary's letter informing the Union that no complaint would issue on its charge. Although not included in the specification of charges in the Union's original or amended charge, the brief in support of exceptions was filed within the four-month limitations period under PERA. I will, therefore, consider the impact bargaining claims along with the other timely claims and consider the County to have been placed on adequate notice of the impact bargaining claim within the limitations period.

participation in the County's performance reward program. In 2007, the County and the Union again participated in negotiations and interest arbitration for collective bargaining agreements for the ADA Unit and the Detective Unit. The 2008-2010 interest arbitration award for the Detective Unit included the participation in the County's performance reward program, and the Detective Unit employes did participate in the County's performance reward program for the year 2008 pursuant to that award.

Policy 412 by its own terms requires that the performance reward program applies to non-union employes. Consequently, non-union County employes receive the benefit. Also, the Detective Award expressly included the program as a term and condition of employment for employes in the Detective Unit. The ADA Award, in conjunction with correspondence from the neutral arbitrator and acknowledged by the parties, made the Policy inapplicable to the ADA Unit. Therefore, in implementing the clear terms of both awards, the County was required to apply Policy 412 to the Detective Unit and not the ADA Unit by way of honoring their collective bargaining obligations not as a result of anti-union animus. While the Union's observation that some County employes received the benefit of Policy 412 is indeed correct, the different treatment of various County employes in that regard is a function of the different status of those various groups of employes (represented or non-represented) and the requirements of different collective bargaining agreements/interest arbitration awards as applied to those different identifiable groups and separately certified units of employes. There simply is no direct or circumstantial evidence to support the conclusion that the County ceased applying the performance reward program to the ADA Unit for discriminatory or retaliatory reasons when it did so because the implemented Award and the neutral arbitrator for the ADA Award as carried over to the 2008-2010 award eliminated the year-end program as a term and condition of employment for the employes in that Unit.

CONCLUSIONS

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

1. The County is a public employer under PERA.

2. The Union is an employe organization under PERA.

3. The Board has jurisdiction over the parties hereto.

4. The County has not committed unfair practices within the meaning of Section 1201(a)(1), (3) or (5).

ORDER

In view of the foregoing and in order to effectuate the policies of PERA, the hearing 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 days of the date hereof, this order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this eighth day of January, 2010.

PENNSYLVANIA LABOR RELATIONS BOARD

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JACK E. MARINO, Hearing Examiner