

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

AMERICAN FEDERATION OF STATE :  
COUNTY AND MUNICIPAL EMPLOYEES :  
DISTRICT COUNCIL 89 :  
 :  
v. : Case No. PERA-C-11-28-E  
 :  
LANCASTER COUNTY :

**FINAL ORDER**

Lancaster County (County) filed timely exceptions and a supporting brief<sup>1</sup> with the Pennsylvania Labor Relations Board (Board) on December 30, 2011, challenging a December 12, 2011 Proposed Decision and Order (PDO). In the PDO, the Hearing Examiner concluded that the County violated Section 1201(a)(1) and (5) of the Public Employee Relations Act (PERA) by refusing to implement the financial terms of an interest arbitration award for 2011 for the County's prison guard employees. The American Federation of State, County and Municipal Employees, District Council 89 (AFSCME) filed a timely response to the exceptions on January 6, 2012. Pursuant to extensions of time granted by the Secretary of the Board, AFSCME timely filed a brief in opposition to the exceptions on February 21, 2012. The facts, for purposes of the exceptions, are as follows.

AFSCME is the exclusive representative of a bargaining unit of prison guards employed by the County. (FF 1). Prison guards cannot strike under PERA, and instead have been afforded interest arbitration under Section 805<sup>2</sup> to resolve their bargaining disputes.

The County and AFSCME were unable to reach a successor agreement to the 2006 - 2008 collective bargaining agreement for the prison guards, and therefore the parties proceeded to interest arbitration. On April 16, 2009, a panel of arbitrators issued an interest arbitration award for 2009 - 2011. The interest arbitration award provided in pertinent part as follows:

**"DIFFERENTIALS**

"Article 15, Section 1 (A) [of the parties' 2006-2008 collective bargaining agreement] shall be amended to provide:

Section 1. Shift Differential

(A) A shift differential of seventy cents (\$.70) per hour shall be paid to employees working the 4:00 p.m. to midnight or the midnight to 8:00 a.m. shifts. The shift differential shall be increased to seventy five cents (\$.75) per hour effective January 1, 2010 and to eighty cents (\$.80) per hour effective January 1, 2011.

<sup>1</sup> The County also requested oral argument. The County's request for oral argument is denied, as the exceptions present no novel question of law and the arguments have been thoroughly addressed in the briefs.

<sup>2</sup> Section 805 of PERA provides, in relevant part, as follows:

Notwithstanding any other provisions of this act where representatives of units of guards at prisons or mental hospitals or units of employees directly involved with and necessary to the functioning of the courts of this Commonwealth have reached an impasse in collective bargaining and mediation as required in section 801 of this article has not resolved the dispute, the impasse shall be submitted to a panel of arbitrators whose decision shall be final and binding upon both parties with the proviso that the decisions of the arbitrators which would require legislative enactment to be effective shall be considered advisory only.

Article 15, Section 2 shall be amended to list all permanent posts and commitment posts. Additionally, the job shift differentials in Section 2(A), (C), (D) and (E) shall increase to seventy five cents (\$.75) per hour effective January 1, 2009; to eighty cents (\$.80) per hour effective January 1, 2010; and, to eighty-five cents (\$.85) per hour effective January 1, 2011.

\* \* \*

#### WAGES AND LONGEVITY

Article 23, Section 1 shall be amended to provide:

##### Section 1. Salary - New Hires

- (A) Effective January 1, 2009, the starting rate for new corrections officers will be \$14.38 per hour.
- (B) Effective January 1, 2010, the starting rate for new corrections officers will be \$14.88 per hour.
- (C) Effective January 1, 2011, the starting rate for new corrections officers will be \$15.88 per hour.

Article 23, Section 2 shall be amended to provide:

##### Section 2. Salary - Current Employees

- (A) Effective January 1, 2009, all employees will receive a salary increase of \$.75 per hour.  
Effective July 1, 2009, all employees will receive a salary increase of \$.50 per hour.
- (B) Effective January 1, 2010, all employees will receive a salary increase of \$.75 per hour.  
Effective July 1, 2010, all employees will receive a salary increase of \$.50 per hour.
- (C) Effective January 1, 2011, all employees will receive a salary increase of \$.75 per hour.  
Effective July 1, 2011, all employees will receive a salary increase of \$.50 per hour."

(FF 3). The County did not appeal the award, and implemented the award for 2009. (FF 4).

On November 18, 2009, the County's Board of Commissioners passed a resolution (No. 88 of 2009) providing as follows:

"WHEREAS, The Board of Commissioners has met and considered the interest arbitration award issued in the Matter of the Interest Arbitration between AFSCME District Council 89 and Lancaster County, concerning the correctional officers bargaining unit at the Lancaster County Prison; and

WHEREAS, In conjunction with its budgeting hearings and processes, the Board of Commissioners has determined that the financial terms of the award for calendar years 2010 and 2011 would require the appropriation of funds and/or the levying of taxes,

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COMMISSIONERS OF LANCASTER COUNTY, PENNSYLVANIA, to reject the financial terms of the award for 2010 and 2011, including the provisions concerning Wages and Longevity, Insurance and Retirement, and Differentials."

(FF 5). The County projected the cost of the financial terms of the prison guards' interest arbitration award to be up to \$650,000 for 2010, and \$1,317,873 for 2011. (FF 9).

On January 12, 2010, AFSCME filed a Charge of Unfair Practices alleging that the County violated Section 1201(a)(1) and (5) of PERA by refusing to implement the financial terms of the interest arbitration award for 2010 and 2011. (PERA-C-10-10-E). The Board dismissed as premature AFSCME's allegations regarding 2011. In addressing the claim regarding 2010, the Board found that the County had budgeted \$3,089,201 unreserved in the general fund from which to pay its projected cost of approximately \$650,000 for the prison guards' interest arbitration award for 2010, without the need to raise taxes. The Board thus concluded that the County committed unfair practices in failing to implement the interest arbitration award for 2010. The County appealed the Board's Final Order to the Commonwealth Court. In a reported Opinion issued on January 12, 2012, the Commonwealth Court affirmed the Board's Final Order in all respects. Lancaster County v. PLRB, 35 A.3d 83 (Pa. Cmwlth. 2012), *petition for allowance of appeal pending*.

While that charge was pending with the Board, in December 2010, the County Board of Commissioners passed a resolution (No. 117 of 2010) adopting an operating budget for 2011 of \$263,467,757 without a tax increase. The 2011 operating budget included an anticipated year-end fund balance of \$3,891,981. (FF 6).

On January 1, 2011, the County did not pay the differential and salary increases provided for in the award for 2011. (FF 7). On January 24, 2011, AFSCME filed a Charge of Unfair Practices alleging that the County violated Section 1201(a)(1) and (5) of PERA by refusing to pay the wage and differential increases that were effective January 1, 2011 under the third year of an interest arbitration award covering the prison guards. On September 6, 2011, AFSCME filed an amended charge alleging that the County also violated PERA by refusing to pay the wage increases that were to be effective July 1, 2011.

Following a hearing and submission of post-hearing briefs, the Hearing Examiner found that AFSCME's January 24, 2011 Charge of Unfair Practice, and the September 6, 2011 amendment, were timely under Section 1505 of PERA. The Hearing Examiner also found that for fiscal year 2011, the County had an available unreserved fund balance of \$3,891,981, which was sufficient to cover the County's projected cost of \$1,317,873 for the prison guards' interest arbitration award for 2011, without the necessity for a tax increase. Accordingly, the Hearing Examiner found that the County failed to establish that the award was advisory for 2011, and thus concluded that the County violated Section 1201(a)(1) and (5) of PERA by refusing to implement the financial terms of the prison guards' interest arbitration award for 2011.

On exceptions, the County argues that the Hearing Examiner erred in finding that AFSCME timely filed its Charge of Unfair Practices, and the amendment, within the four-month statute of limitations under Section 1505 of PERA. Section 1505 of PERA provides that "[n]o ... charge shall be entertained which relates to acts which occurred or statements which were made more than four months prior to the filing of the ... charge." 43 P.S. §1101.1505.

The County argues that the statute of limitations for a failure to comply with an arbitration award commences to run when the charging party knew or should have known of the employer's refusal to comply with the award. The County asserts that AFSCME knew that the County would not comply with the prison guards' interest arbitration award on November 18, 2009, when the County decided to declare the award advisory for 2011, and thus the charge is untimely.

The cases cited by the County for this proposition however are inapposite. In United School District, 13 PPER ¶13170 (Final Order, 1982),<sup>3</sup> North Wales Borough, 13 PPER ¶13243 (Final Order, 1982), and Commonwealth of Pennsylvania v. PLRB, 438 A.2d 1061 (Pa. Cmwlth. 1982), the provisions of the awards at issue were immediately applicable to the employees at the time of the employer's stated refusal to comply.<sup>4</sup> Thus, in those cases there was no delay between the employer's decision not to comply, and the impact on the employees' wages, hours and working conditions. However, in situations where, as here, the employer merely announces a future intent to engage in an unfair practice, or not comply with an award, the Board has consistently held that a charge of unfair practices is not ripe until the employer's decision actually has an effect on employee wages, hours or working conditions. Harrisburg Education Association v. Harrisburg City School District, 43 PPER 10 (Final Order, 2011); Officers of the Upper Gwynedd Township Police Department v. Upper Gwynedd Township, 32 PPER ¶132101 (Final Order, 2001).

As relevant to this case, the Board held in Upper Gwynedd Township, as follows:

Mere statement of future intent to engage in activity (which arguably would constitute an unfair practice) does not constitute an unfair practice for engaging in that activity.

Accordingly, the Board normally looks to the date of implementation of a unilateral change in evaluating timeliness of a claim that a policy was unlawfully, unilaterally implemented.... Implementation accordingly is the date when the directive becomes operational and serves to guide the conduct of employees....

Upper Gwynedd Township, 32 PPER at 264. Likewise, the Commonwealth Court has expressly held that "the mere announcement and subsequent approval of a policy change is not tantamount to its implementation. The actual impact of the policy change upon the employees cannot be determined until the [employer] effectuates a change in the employees' working conditions." Association of Pennsylvania State College and University Faculties v. PLRB, 40 PPER ¶113 at 384, 263 C.D. 2009 (Pa. Cmwlth. 2009); Association of Pennsylvania State College and University Faculties v. PLRB, 661 A.2d 898, 901 (Pa. Cmwlth 1995), *petition for allowance of appeal denied*, 542 Pa. 649, 666 A.2d 1058 (1995) ("[a] refusal to bargain charge will be dismissed as premature when the action at issue has not been implemented, leaving the [Board] ... unable to dispositively rule upon whether an unfair practice has occurred"). Although the County made a decision in 2009 to declare the prison guards' interest arbitration award advisory for 2011, it was not until 2011 that the employees' wages and working conditions were impacted. Accordingly, the Hearing Examiner did not err in finding that AFSCME's charge and amendment were timely filed within four months of the County's failure to effectuate the terms of the interest arbitration award for 2011.

The County further argues that the Hearing Examiner misapplied County of Lehigh v. AFSCME, District Council 88, Local 543, 505 A.2d 1105 (Pa. Cmwlth. 1986), to find that the Charge was timely. The County argues that County of Lehigh holds that an employer may summarily declare future years of a multi-year interest arbitration award for prison guards and court employees to be advisory. The County therefore argues that under Lehigh County, the statute of limitations would have commenced to run in 2009 when the County declared the award advisory for 2011. However, reading Lehigh County to hold that the County may declare an interest award advisory for a future fiscal year when the county is not even considering the allocation of funds or taxation for that year, is directly contrary to Franklin County Prison Board v. PLRB, 491 Pa. 50, 417 A.2d 1138 (1980) and County of Allegheny v. Allegheny Court Association of Professional Employees, 517 Pa. 505, 539 A.2d 348 (1988) (ACAPE). See Lycoming County v. PLRB, 38 PPER 178, No. 474 C.D. 2007 (Pa. Cmwlth. 2007) (the dictates of the Supreme Court in ACAPE must be followed);

<sup>3</sup> United School District was a split decision issued by a two-member Board.

<sup>4</sup> Likewise the County's reliance on FOP, Haas Memorial Lodge #7 v. PLRB 696 A.2d 873 (Pa. Cmwlth. 1997) is misplaced. In that case as well, the employer's announced change to the pension terms would have been immediately applicable to the employees.

Pursuant to Franklin County and ACAPE, in order for a public employer to declare an interest award advisory under Section 805 of PERA, two criteria must be met. First, legislative enactment must be required -- that is, taxes would need to be levied in order to have funds to appropriate for implementation of the award, and second, there must be consideration and rejection of the award. By statute, taxes are set and funds are allocated annually for a particular fiscal year during the legislative budget process. 16 P.S. §§1780-1783. Thus, in accordance with ACAPE and Franklin County, the Commonwealth Court's *dicta* in Lehigh County cannot stand for the proposition that AFSCME's charge over the County's failure to implement the award for 2011, filed within four months of the County's adoption of the 2011 budget and start of the 2011 fiscal year, is untimely.

Notably, to act in accordance with Franklin County, ACAPE and the County Code, a public employer must meet and consider an interest arbitration award issued under Section 805 of PERA during the current fiscal year after taxes have been levied and funds appropriated for that fiscal year, or during and in connection with the budget adoption process, where taxes are assessed and funds appropriated among the various departments for the next fiscal year. Upon review of the record, we note that there is no evidence that the County met, considered and rejected the prison guards' interest arbitration award in 2011, or in 2010 during the preparation or adoption of the County's 2011 budget. Accordingly, the County failed to satisfy the requirement that it meet and consider the award for fiscal year 2011.

The Hearing Examiner did not address the meet and consideration requirement, instead finding that the County failed to establish the first criteria under Section 805 of PERA of the need for a legislative enactment to fund the award. With regard to the requirement of showing the need for a legislative enactment, the Pennsylvania Supreme Court held as follows:

Where the funds are available in the subdivision's coffers over and above that required to perform essential services and those funds earmarked to satisfy existing contractual obligations, the award should be considered mandatory.

\* \* \*

It is clear that county commissioners perform complex, multiple roles of mixed legislative, executive and administrative functions. It also seems clear that, as the County argues and [the union] acknowledges, some degree of "legislative action" is involved in transferring funds from one county account (or "line item") to another. However, to equate such "legislative action" with "required legislative enactment" would, as Judge Stranahan suggests, completely emasculate Act 195 and render all arbitration awards dealing with fiscal matters advisory. This we will not do.

ACAPE, 517 Pa. at 517, 539 A.2d at 354-355. The Supreme Court further held in ACAPE that to establish the need for a legislative enactment, the employer's burden is to prove that:

an arbitration award would require the local governmental body to levy further taxes in order to have funds to appropriate to such line item... However, where there is money available in the government's general fund or from other items with surplus funds, we hold that in order to effectuate the

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<sup>5</sup> Moreover, were the County able to summarily reject as advisory the subsequent years of a multi-year interest arbitration award under Section 805 for its prison guards and court employes, then the exclusive representative of those employes would have no recourse but to insist on one-year awards, resulting in continuous, non-stop bargaining and annual interest arbitrations for the County. Such a result would hardly enhance the orderly and constructive labor relationships that PERA was enacted to promote.

policy and intent of [PERA], such money must administratively be transferred to fund a legally binding arbitration award.

ACAPE, 517 Pa. at 515, 539 A.2d at 353. The Supreme Court's decision is consistent with a trilogy of *en banc* decisions of the Commonwealth Court recognizing the employer's burden to establish the lack of sufficient funds in the county's budget necessary to invoke the proviso of Section 805 of PERA. Butler County Correctional Officers v. Butler County, 505 A.2d 1110 (Pa. Cmwlth. 1986); County of Lehigh, supra; AFSCME, District Council 83 v. Pennsylvania Labor Relations Board (Indiana County), 505 A.2d 1041 (Pa. Cmwlth. 1986). Indeed, in rejecting the County's similar attempt to declare the prison guards' interest arbitration award advisory for 2010, the Commonwealth Court held that "given the expansive language quoted above, we agree with the Board that ACAPE controls, and transfers of available unencumbered funds are not legislative acts within the meaning of Section 805 of the PERA..." Lancaster County, 35 A.3d at 90.

The Hearing Examiner found as fact that the 2011 operating budget included an anticipated year-end fund balance of \$3,891,981, without the need to raise taxes. (FF 6). The Hearing Examiner's finding was based on the County's adopted 2011 budget, which included a remaining unmarked balance of \$940,173 in the "general fund", and \$2,951,808 in unmarked "other funds" for 2011, for a total fund balance remaining at the end of fiscal year 2011 of \$3,891,981. (Union Exhibit U-25).<sup>6</sup>

The County argues that the Hearing Examiner erred in including the "other funds" as being available to pay the prison guards' interest arbitration award. In this regard, the County argues that the "other funds" are reserved for things like state-mandated services that require a match by the County, annual retirement contributions, bonds for capital projects, and certain court-ordered restrictions. (County's Brief in Support of Exceptions at 41). However, the testimony upon which the County relies for this assertion is that such "things" are paid from the "general fund". County Commissioner Scott Martin testified for the County as follows:

Obviously, a lot of our General Fund isn't just discretionary funds. As I mentioned before, much of our dollars are tied up with State-mandated services where we have a percent local match that we have to provide. And then you have things like I mentioned just a little while ago that are court order restricted accounts, certain revenue streams; those that are set aside and other reserves, like for the [annual retirement contribution] payment; things like that, that you can't take and spend on other things.

(N.T. 115).

Indeed, there is absolutely no evidence, testimonial or documentary, that the County's "other funds" could not be used directly or indirectly to fund the prison guards' interest arbitration award for 2011. As held in Franklin County, ACAPE, Lehigh County, Butler County, Indiana County, Lycoming County, and Lancaster County, to satisfy the required showing of a need for legislative enactment for purposes of Section 805 of PERA, it is the County's burden to establish that it lacks unmarked funds in the County budget sufficient to cover the expense of an interest arbitration award. The record evidence establishes that the County had \$3,891,981 in unencumbered funds in its reserves for fiscal year 2011, which is sufficient to cover the County's projected \$1,317,873 cost of the prison guards' interest arbitration award for 2011.<sup>7</sup>

The County further asserts that the Hearing Examiner erred in rejecting the County's assertion that a tax increase would be necessary to fund the prison guards'

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<sup>6</sup> Accordingly, Finding of Fact 6 is supported by substantial evidence of record.

<sup>7</sup> AFSCME presented evidence that the County's projected cost of the award for 2011 was in error and involved double counting (N.T. 236), and that the actual costs of the award for 2011 would be \$507,457. (N.T. 228). However, as noted by the Hearing Examiner, we need not address this dispute as the County's 2011 budget includes \$3,891,981 in reserves, of which at least \$2,951,808 consists of unencumbered "other funds", which are sufficient to cover the County's projected \$1,317,873 cost of the award.

interest arbitration award because the County's reserves have been dwindling,<sup>8</sup> and bond rating agencies prefer 12 to 15 percent to be kept in reserves.<sup>9</sup> The County also argues that reserves are necessary to carry over to pay expenses during the beginning of the next fiscal year until tax revenues are received. The County further argues that the 2011 budget year was difficult, requiring cuts to services, such as the elimination of the County's Human Relations Commission.

However, these arguments were similarly raised in the County's unsuccessful attempt to declare the award advisory for 2010. In concluding that the County's arguments were insufficient to excuse it from complying with the arbitration award, the Commonwealth Court held as follows:

The County cogently argues that the use of general fund reserves are needed to maintain a good bond rating and to have sufficient reserves, and that the implementation of the Award makes for naught all the cutting of salaries, laying off of employees and cutting of programs and services. However, under ACAPE that is not sufficient to overcome the fact that there were sufficient funds available to implement the Award.

Lancaster County, 35 A.3d at 90-91.

On this record, where the County had a remaining balance of \$3,891,891 in unmarked funds in its 2011 budget, the County failed to sustain its burden of proving that it lacked sufficient unmarked funds in the County budget to pay its projected \$1,317,873 cost for the financial provisions of the prison guards' interest arbitration award for 2011. Thus, the County failed to prove the need for a legislative enactment within the meaning of Section 805, and the prison guards' interest arbitration award was final and binding for 2011. See ACAPE, *supra*; Lancaster County, *supra*.

After a thorough review of the exceptions and all matters of record, the Hearing Examiner did not err in concluding that the County violated Section 1201(a)(1) and (5) of PERA by refusing to implement the fiscal terms of the prison guard's interest arbitration award for 2011. Accordingly, the County's exceptions shall be dismissed and the PDO made final.

#### ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employee Relations Act, the Board

#### HEREBY ORDERS AND DIRECTS

that the exceptions filed by Lancaster County are hereby dismissed, and the December 12, 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 seventeenth day of April, 2012. 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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<sup>8</sup> We note that contrary to the County's assertion in this regard, the record evidence actually established that the County has been underestimating its reserves for the past few years. (Union Exhibit U-26). Indeed, for fiscal year 2010 the County projected a general fund balance of \$3,089,201, and had an actual general fund balance at the end of that year of \$9,041,105.

<sup>9</sup> The County argues that its bond rating was changed recently from "Aa" to "Aa with a negative outlook".

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**AFFIDAVIT OF COMPLIANCE**

The County hereby certifies that it has ceased and desisted from its violations of sections 1201(a)(1) and (5) of the PERA, that it has paid the increases provided for in the interest arbitration award for 2011 with interest as set forth in the proposed decision and order, that it has posted the final order and proposed decision and order as directed and that it has served an executed copy of this affidavit on AFSCME.

\_\_\_\_\_  
Signature/Date

\_\_\_\_\_  
Title

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

\_\_\_\_\_  
Signature of Notary Public