COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, DISTRICT COUNCIL 33	:	
	:	Case No. PERA-C-11-324-E
v.	:	
CITY OF PHILADELPHIA	:	

FINAL ORDER

The City of Philadelphia (City) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) on January 7, 2015, to a Hearing Examiner's Proposed Decision and Order (PDO) issued on December 18, 2014. In the PDO, the Hearing Examiner concluded that the City violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA) by unilaterally amending a Deferred Retirement Option Plan (DROP) without negotiating with the American Federation of State County and Municipal Employees, District Council 33 (AFSCME DC 33). The Secretary of the Board granted the City an extension of time to file a brief in support of the exceptions, which the City timely filed on February 20, 2015. AFSCME DC 33 filed a brief in opposition to the exceptions on March 12, 2015.

Following a continuance of the hearing date, the case was submitted to the Hearing Examiner on a stipulation of uncontested facts on November 6, 2012.[1] After a thorough review of the exceptions and all matters of record, the relevant stipulated facts as found by the Hearing Examiner in the PDO, are summarized as follows.

In 1956, the City established a pension and retirement system pursuant to the Pennsylvania Home Rule Charter Section 6-600 by the Ordinance approved December 3, 1956 ("1956 Ordinance"). (FF 5).[2] In 1961 the City, by Ordinance, recognized AFSCME DC 33 as the collective bargaining representative of City employes.[3] Since then the City and AFSCME DC 33 have been signatories to a series of collective bargaining agreements and memoranda of agreement governing the terms and conditions of employment. (FF 6 and 7). The 1968 collective bargaining agreement between the City and AFSCME DC 33 provides that employes in the District Council 33 collective bargaining unit will be covered by the Municipal Retirement System "as approved by the Mayor December 3, 1956 and amended." (FF 8). The parties have negotiated a series of agreements thereafter, including a 1992-1996 Memorandum of Agreement which addressed aspects of the employes' pension entitlements and a 1996-2000 Memorandum of Agreement. (FF 9-12).

In 1999, a Deferred Retirement Option Plan ("DROP") was established by Ordinance No. 990288-A ("DROP Creation Ordinance") and codified under Section 22-310 of Title 22 of The Philadelphia Code. (FF 13). The DROP Creation Ordinance states, "[i]t is the intent of City Council that the design of this test DROP is such that the impact of the Plan will not result in more than an immaterial increase in the City's normal cost of annually funding the Retirement System." (FF 14). The DROP Creation Ordinance provides that "the DROP … will continue under the same terms (except those related to the "test" aspects) indefinitely unless and until further amended by City Council." (FF 15). Although AFSCME DC 33 supported City Council establishing the DROP, the DROP program was not collectively bargained with AFSCME DC 33. (FF 16). After the adoption of the DROP, the parties negotiated successor agreements, but the DROP program was not discussed. (FF 17 – 20).

[1] The City filed a post-hearing brief with the Hearing Examiner by first-class mail on November 30, 2012. AFSCME DC 33's post-hearing brief was filed by first-class mail submitted to the Hearing Examiner on December 3, 2012.

[2] In addition to the 1956 Ordinance, there is also the Municipal Retirement Benefit Plan 1987 Ordinance which became effective January 8, 1987. (FF 5).

[3] 34 Pa. C.S. §1101.2003.

The City received a July 29, 2010 analysis of its DROP program entitled "The Impact of a DROP Program on the Age of Retirement and Employer Pension Costs" that was prepared by the Center for Retirement Research at Boston College. According to the analysis, the City's DROP "results in a substantial increase in pension costs" and estimates that the DROP "has cost the city around $258 million over the period to December 31, 2009." The analysis concludes that "[a]lthough our estimates are somewhat sensitive to the assumptions made regarding interest rates and wage growth, at no plausible combinations is it cost-neutral." (FF 21).[4]

On September 15, 2011, the City amended the DROP by changing eligibility requirements, the interest credited to DROP accounts, and adding a new option for retirees to take a lump sum benefit at retirement in exchange for an actuarial reduction of their regular monthly pension (the "2011 DROP Ordinance"). (FF 23).[5] The 2011 DROP Ordinance was not collectively bargained with AFSCME DC 33.[6] (FF 24). In a letter dated September 15, 2011, AFSCME DC 33 notified the City that it believed that state law does not permit the City to amend the Pension Code absent bargaining. (FF 25).[7]

On exceptions, the City claims that it did not violate its bargaining obligation under PERA because AFSCME DC 33 contractually waived its right to bargain changes to the DROP program. In support the City asserts that the 1968 Agreement between AFSCME DC 33 and the City has a provision titled "PENSION AND RETIREMENT AS APPROVED BY THE MAYOR DECEMBER 3, 1956 AND AMENDED". Relying on the "AND AMENDED" language, the City argues that AFSCME DC 33 thereby waived a right to bargain amendments to the 1999 DROP Creation Ordinance.

As the Hearing Examiner correctly noted, the Board and courts have consistently held that a contractual waiver of the right to bargain must appear in a written agreement between the parties and must evidence the employe representative's express agreement to allow the employer to unilaterally act with respect to a particular mandatory subject of bargaining. *E.g.* **Commonwealth of Pa. v. PLRB (Venango County Board of Assistance)**, 459 A.2d 452 (Pa. Cmwlth. 1983); **Crawford County v. PLRB**, 659 A.2d 1078 (Pa. Cmwlth. 1995), *appeal dismissed*, 543 Pa. 482, 672 A.2d 1318 (1996); **Jersey Shore Area School District**, 18 PPER ¶ 18117 (Final Order 1987); **Temple University Hospital**, 41 PPER 3 (Final Order, 2010). The "AND AMENDED" language in the 1968 Agreement relied upon by the City does not clearly and unequivocally evidence AFSCME DC 33's agreement to allow the City to unilaterally make changes to a 1999 DROP program in 2011. Accordingly, the Hearing Examiner did not err in rejecting the City's reliance on the 1968 collective bargaining agreement to support a waiver of the right to bargain.

The City also claims that because the 1999 DROP Creation Ordinance reserved the City's right to amend the DROP program, the City indefinitely retained the right to unilaterally alter the DROP benefits. However, as noted above, the waiver of a statutory right to bargain must be expressly agreed to by the parties. An employer's unilateral reservation of a right to amend employe benefits is not an express agreement by the employe representative to waive its right to bargain. **Temple University Hospital**, *supra.* With respect to nearly an identical argument raised by the City, the Board in **Temple University Hospital** stated as follows:

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[4] The City also received an analysis dated March 10, 2011 from Cherion, the City's actuary, on the impact of potential changes to DROP that would mitigate the increase in pension costs. (FF 22).

[5] There is no claim by the City, or evidence presented in this case, that the 2011 DROP Ordinance was in any way enacted to bring the DROP into compliance with the Act of September 18, 2009, P.L. 396. No. 44, 53 P.S. §§ 895.1101 – 895.1131, or an audit conducted thereunder by the Auditor General. *See* 34 Pa. Code §95.98(a)(3) ("[a]n exception not specifically raised shall be waived").

[6] There is no argument or evidence that the City and AFSCME DC 33 were at impasse in negotiations for a successor agreement and thus application and discussion of **Philadelphia Housing Authority v. PLRB**, 620 A.2d 594 (Pa. Cmwlth. 1993), *petition for allowance of appeal denied,* 637 A.2d 294 (Pa. 1993), is unwarranted.

[7] On or about October 19, 2011, the parties entered into a stipulation that the 2011 DROP Ordinance will not be enforced in whole or in part as to AFSCME DC 33 employees pending a Final Order of the Board or an agreement by the parties to the contrary. (FF 26).

> Here, Temple points to language in the collective bargaining agreements stating generally that tuition reimbursement shall be "in accordance with" Temple policy, which Temple asserts gives it a sound arguable basis to act unilaterally because Temple, without the agreement of PASNAP, had previously inserted language in the tuition reimbursement policy that reserved to itself the right to make changes to the policy…. However,… general boilerplate language in an agreement incorporating, or providing that some employe benefit will be "in accordance with" a non-negotiated policy, is insufficient to demonstrate that the union even arguably intended to relinquish any statutory right of collective bargaining.

Temple University Hospital, 41 PPER at 10. Thus, the fact that in the 1999 DROP Creation Ordinance the City unilaterally reserved the right to amend the DROP program is ineffective as a matter of law to evidence AFSCME DC 33's express waiver of the right to bargain changes to the DROP benefit.

In a similar vein, the City argues that AFSCME DC 33 waived its right to bargain changes in the DROP program because since the inception of the DROP in 1999, the City has made several unilateral changes to the plan without objection from AFSCME DC 33. However, the Board does not recognize "waiver by inaction" for Pennsylvania's public sector labor statutes. **Crawford County**, *supra*. Indeed, in **Crawford County**, *supra.,* the Commonwealth Court held as follows:

> The County also contends, that because the Union failed to object to the unilateral implementation of a no-smoking ban in various areas of the jail facility over a period of approximately eighteen months, it has waived any right to now request negotiations relating to the County's total no-smoking ban put into effect on July 1, 1991. This argument is unconvincing because it is not true that a right once waived under Act 195 is lost forever. A union's acquiescence to an employer's previous unilateral implementation of a bargainable subject matter does not operate as a waiver of its right to bargain over such changes for all time. *Johnson-Batemen Co.*, 295 N.L.R.B. 180 (1989); *National Labor Relations Board v. Miller Brewing Co.*, 408 F.2d 12 (9th Cir. 1969). An opportunity once rejected does not result in a permanent "close out;" as in contract law, an offer once declined but then remade can be subsequently accepted. *Pacific Coast Association of Pulp and Paper Manufacturers v. National Labor Relations Board*, 304 F.2d 760 (9th Cir. 1962); *Leeds and Northrup Co. v. National Labor Relations Board*, 391 F.2d 874 (3rd Cir. 1968).

Crawford County, 659 A.2d at 1083. The fact that the employer may have previously unlawfully implemented a mandatory subject of bargaining, albeit excused on that instance, does not relieve the employer from ever having to negotiate regarding future changes to those benefits. **City of Erie v. PLRB**, 32 A.3d 625 (Pa. 2011); **Crawford County**, *supra*. The employer seeking to make any changes to employes wages, hours and working conditions[8] has the statutory "duty to seek out its bargaining counterpart and engage in good faith negotiations without prompting or prodding from the [employe representative]". **Snyder County Prison Board v. PLRB**, 912 A.2d 356, 367-68 (Pa. Cmwlth. 2006) *petition for allowance of appeal denied*, 593 Pa. 730, 928 A.2d 1292 (Pa. 2007). Thus, the Hearing Examiner correctly stated the law as follows:

> [I]t is a well-settled legal principle that regardless of an employer's implementation of a policy or program in the past without bargaining first with the union, the employer is not excused from having to bargain over prospective changes to the policy that affect the employees' wages, hours, and terms and conditions of employment. **Crawford County v. PLRB**, 659 A.2d 1078, 1083 (Pa. Cmwlth. 1995), *appeal dismissed*, 543 Pa. 482, 672 A.2d 1318

[8] There is no dispute in this case that pension and retirement benefits are a mandatory subject of bargaining under Section 701. *See* **City of Pittsburgh v. PLRB**, 653 A.2d 1210 (Pa. 1995); **Pennsylvania State Education Association v. Baldwin Whitehall School District**, 372 A.2d 960 (Pa. Cmwlth. 1977).

(1996); **AFSCME Council 85 v. Pleasant Ridge Manor (Erie County)**, 44 PPER 100 (Proposed Decision and Order, 2013).

> The Commonwealth Court has held that it is the public employer's "duty to seek out its bargaining counterpart and engage in good faith negotiations without prompting or prodding from the Union" when the employer is seeking to change wages and other terms and conditions of employment. **Snyder County Prison Board v. PLRB**, 912 A.2d 356, 367-68 (Pa. Cmwlth. 2006) *petition for allowance of appeal denied*, 593 Pa. 730, 928 A.2d 1292 (Pa. 2007) … (noting that shifting the burden to union would permit a municipality to avoid its statutory obligation to bargain and make a unilateral change regarding a mandatory subject, thereby forcing the union to attempt to bargain out from under a *fait accompli* which the municipality has already chosen and implemented).

(PDO at 9 – 10).[9] Accordingly, the fact that AFSCME DC 33 did not demand to bargain previous unilateral changes to the DROP program does not foreclose AFSCME DC 33 from demanding to bargain the changes in the 2011 DROP Ordinance, or excuse the City from fulfilling its statutory obligation to bargain the changes to the DROP program in 2011. *See* **Crawford County**, *supra.*; **Pleasant Ridge Manor (Erie County)**, *supra.*

After a thorough review of the exceptions and all matters of record, the Hearing Examiner did not err in concluding that the City violated Section 1201(a)(1) and (5) of PERA by unilaterally implementing changes to the DROP pension Ordinance. Accordingly, the City's exceptions are dismissed and the December 18, 2014 PDO shall be made absolute and final.[10]

ORDER

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

HEREBY ORDERS AND DIRECTS

that the exceptions filed by the City of Philadelphia are hereby dismissed, and the December 18, 2014 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 Robert H. Shoop, Jr, Member, this twenty-first day of July, 2015. 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.

MEMBER ALBERT MEZZAROBA DID NOT PARTICIPATE IN THE CONSIDERATION OR DECISION OF THIS CASE.

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[9] The City's reliance on **Plainfield Township Policemen's Association v. PLRB**, 695 A.2d 984 (Pa. Cmwlth. 1997), in its brief is misplaced. As the Supreme Court noted in **City of Erie**, *supra.*, **Plainfield Township** involved an illegal contract provision and "[t]he City's novel attempt to extend an exception to legal subjects of bargaining fails to appreciate the … foundational principles of collective bargaining which requires negotiation over mandatory subjects such as pensions…. [T]o the extent **Plainfield Twp.** can be read to hinge solely on whether a term was contained in the parties' collective bargaining agreement, it is hereby disapproved." **City of Erie**, 32 A.3d at 637. Indeed, the requirement that the employer must seek out the employe representative and bargain any changes to mandatory subjects of bargaining, regardless of how those benefits were created, was confirmed by the Pennsylvania Supreme Court in **City of Erie**, *supra.*, where the Court stated that "[t]his fundamental mandate of labor law is applicable regardless of whether the collective bargaining agreement expressly mentions such benefits; whether they have been incorporated into the agreement by reference; or whether the agreement is silent on that mandatory subject of bargaining." **City of Erie**, 32 A.3d at 637.

[10] In its brief in Opposition to the Exceptions, AFSCME DC 33 requests that the Board amend the proposed remedy to include the payment of interest in accordance with **Teamsters Local 764 v. Lycoming County**, 37 PPER 15 (Final Order, 2006), *affirmed sub nom*, **Lycoming County v. PLRB**, 943 A.2d 333 (Pa. Cmwlth. 2007). Upon review, we find that the Hearing Examiner's proposed remedy is adequate under the circumstances to further the purposes and policy of PERA and adopt the same as the Order of the Board.

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AFFIDAVIT OF COMPLIANCE

The City of Philadelphia hereby certifies that it has ceased and desisted from its violation of Sections 1201(a)(1) and (5) of PERA; that it has rescinded the September 15, 2011 Ordinance amending the DROP, restored the DROP to the terms that existed before September 15, 2011, and made whole any employes who were adversely affected as a result of the September 15, 2011 Ordinance; that it has posted a copy of the Proposed Decision and Order and Final Order as directed; and that it has served an executed copy of this affidavit on AFSCME, District Council 33.

_____
Signature/Date

_____
Title

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

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Signature of Notary Public