COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

TEAMSTERS LOCAL UNION NO. 249	:	
	:	
v.	:	Case No. PERA-C-18-140-W
	:	
CITY OF PITTSBURGH	:	

FINAL ORDER

The City of Pittsburgh (City) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) on June 19, 2019, challenging a Proposed Decision and Order (PDO) issued on June 5, 2019. The City excepts to the Hearing Examiner's conclusion that it violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA) by refusing to reopen certain provisions in the parties' collective bargaining agreement pursuant to an August 3, 2016 Memorandum of Understanding. The Teamsters Local Union No. 249 (Union) filed a response to the exceptions on July 8, 2019.

The facts of this case are summarized as follows. The Union represents a unit of blue-collar nonprofessional employes including animal controllers and employes in the City's refuse department. On or about August 3, 2016, the Union and the City entered into a Memorandum of Understanding (MOU), which states, in relevant part, as follows:

> WHEREAS, the Union and the City are signatories to a collective bargaining agreement effective by its terms from November 14, 2011 to December 31, 2015, and continued thereafter through an agreement by the parties, covering a bargaining unit of the City's employees employed in the Bureau of Environmental Services and the Bureau of Animal Control (hereinafter the "CBA"); and
>
> WHEREAS, the Union and the City have reached a Tentative Agreement on the successor CBA (hereinafter the "2016 CBA"); and
>
> WHEREAS, the City is currently in financially-distressed status and is under Act 47 oversight, which the City asserts prevents the negotiation of financial enhancements beyond those provided by the Act 47 Recovery Plan; and
>
> WHEREAS, the Union filed an unfair labor practice charge with the [Board] at Case No. PERA-C-15-339-W regarding the City's bargaining position while under the Act 47 Recovery Plan; and
>
> WHEREAS, the City anticipates that it will exit Act 47 oversight sometime during the term of the 2016 CBA:

> NOW THEREFORE, the City and the Union agree as follows:
>
> 1. In the event that the 2016 CBA is ratified by the City and the Union, the Union will promptly withdraw the above-referenced [Board] charge (Case Number PERA-C-15-339-W) with prejudice.
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> 2. Upon the City's exit from the Act 47 Recovery Plan or Act 47 Oversight during the term of the 2016 CBA the City will notify the Union in writing. The Union will then have the right to reopen certain provisions of the 2016 CBA as set forth in Paragraph 3 below.
>
> 3. Should the Union decide to reopen the 2016 CBA, the Union will provide written notice of same to the City. Upon receipt of the Union's written demand, the City agrees to reopen the 2016 CBA for the sole and exclusive purpose of negotiating over following topics: Life Insurance Coverage, Holidays, Pay for Saturday work (under Article VII, Section A(3)), and Sick Leave.

Contemporaneously with the execution of the MOU, the City submitted the parties' tentative agreement to its Act 47[1] Coordinator for approval. However, the tentative agreement was rejected by the Act 47 Coordinator due to a technical issue with monetary allotments that were considered to be forbidden wage increases. The City and the Union subsequently agreed to a revised tentative agreement, which fixed the issues raised by the Act 47 Coordinator. Specifically, the City and the Union agreed to a bonus payout over a three-year period instead of the initial plan for percentage wage increases. The revised tentative agreement was accepted by the Act 47 Coordinator.

On or about October 27, 2016, the parties executed a collective bargaining agreement (CBA) effective January 1, 2016 through December 31, 2020. The CBA contains an integration or "zipper" clause which provides as follows:

> This Agreement spells out the total agreement in its entirety between the parties, including all wages, salaries, pensions and fringe benefits, and there shall be no other additions or changes during the term of the Agreement.
>
> The parties are aware of the [Board's] revised policy concerning "zipper clauses" Venango County Board of Assistance, 11 PPER 11223 (1980), *aff'd* 14 PPER 14122 (1983), and state unequivocally that the language of this Article is intended to evidence an unmistakable intent to relinquish the right to bargain over any

[1] Municipalities Financial Recovery Act (Act 47), Act of July 10, 1987, P.L. 246, *as amended*, 53 P.S. §§ 11701.101-11701.501.

> mandatory subject of bargaining, whether or not that subject is specifically dealt within this Agreement, during the term of this Agreement, notwithstanding the holdings of the [Board] and the Commonwealth Court in Venango County.

The City was released from Act 47 oversight in February 2018. On May 3, 2018, the Union sent a letter to the City requesting to bargain specific provisions of the CBA pursuant to the MOU. In response, the City refused to reopen negotiations stating that the MOU "was never incorporated by the parties into our Collective Bargaining Agreement…. As such that MOU is a legal nullity pursuant to our agreed zipper clause…."

The Union filed its Charge of Unfair Practices on June 19, 2018, alleging that the City violated Section 1201(a)(1) and (5) of PERA when it refused to negotiate with regard to life insurance coverage, holidays, pay for Saturday work and sick leave pursuant to the reopener provision in the parties' MOU. A hearing was held before the Board's Hearing Examiner on November 19, 2018, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Both parties filed post-hearing briefs.

In the PDO, the Hearing Examiner concluded that the MOU did not have to be expressly incorporated into the CBA to be binding on the City because the MOU explicitly evidenced that its provisions would be applied in conjunction with the parties' CBA. Therefore, the Hearing Examiner held that the City violated its duty to bargain under Section 1201(a)(1) and (5) of PERA by refusing to reopen negotiations on specific provisions per the terms in the MOU. By way of remedy, the Hearing Examiner ordered the City to cease and desist from its violation of Section 1201(a)(1) and (5) of PERA, and to bargain with the Union pursuant to the provisions of the MOU.

In its exceptions, the City challenges the Hearing Examiner's finding that it violated its duty to bargain under Section 1201(a)(1) and (5) of PERA with regard to the MOU. Here, the City and the Union entered into the August 3, 2016 MOU, which settled the charge filed with the Board at Case Number PERA-C-15-339-W. The MOU specifically states that if the City exits from its Act 47 Recovery Plan during the term of the successor CBA, upon demand by the Union, the City "agrees to reopen the 2016 CBA for the sole and exclusive purpose of negotiating over following topics: Life Insurance Coverage, Holidays, Pay for Saturday Work (under Article VII, Section A(3)), and Sick Leave." (Joint Exhibit 1). A public employer is required to comply with the provisions of an agreement which settles an unfair practice charge. *See* Avery v. PLRB, 509 A.2d 888 (Pa. Cmwlth. 1986); *see also* FOP Lodge 27 v. Springfield Township, 42 PPER 20 (Final Order, 2011). An unfair practice will be found where (1) an agreement settling the charge exists; (2) the parties' intent is apparent from the agreement; and (3) the employer has failed to comply with the agreement. Springfield Township, supra.

The record shows that the City was released from Act 47 oversight in February 2018, the Union requested to reopen negotiations pursuant to the MOU and the City refused to do so. The City's refusal to reopen negotiations is a failure to comply with the agreed upon settlement terms in the MOU, which is an unfair practice under Section 1201(a)(1) and (5) of PERA.

The City further asserts that the MOU is unenforceable because it was not incorporated into the parties' 2016 CBA and the "zipper clause" precludes

the Union from reopening negotiations.[2] The City claims that it was a unilateral mistake of the Union to believe that the MOU was incorporated into the CBA. However, as discussed above, the MOU is itself a settlement of an unfair practice charge enforceable by its own right. Indeed, the MOU did not become effective until the parties' ratified the 2016 CBA and the explicit terms of the MOU evidence that the reopener provision was enforceable during the term of the 2016 CBA. Specifically, the MOU states that the Union has the right to reopen negotiations on certain provisions found in the successor agreement in the event that the City exits Act 47 status **during the term of the 2016 CBA.** Therefore, the "zipper clause" in the CBA did not nullify the parties expressed agreement in the MOU granting the Union the right to request reopening negotiations on the provisions concerning life insurance coverage, holidays, pay for Saturday work and sick leave.

The City additionally asserts that the Hearing Examiner erred in relying on Members of the Police Department of the Borough of Boyertown v. PLRB, 39 PPER 154 (Pa. Cmwlth. 2008)(unreported) and Sprague v. Central States, Southeast and Southwest Areas Pension Fund, 269 F.3d 811 (7th Cir. 2001) to conclude that the MOU did not have to be expressly incorporated into the 2016 CBA to be binding on the City because those cases are not precedential. The City's attempt to distinguish these cases is misplaced. In both Boyertown Borough and Sprague, the courts held that side agreements concerning a mandatory subject of bargaining made contemporaneously with collective bargaining agreements were enforceable without being expressly incorporated into the collective bargaining agreement. The courts relied on the language of the side agreements as evidence of the parties' intent that the agreements be applied in conjunction with the collective bargaining agreements in that one would not exist without the other. Similarly, it is clear from the language of the MOU that the parties intended its provisions to apply in conjunction with the 2016 CBA. To hold otherwise would essentially render the provisions of the MOU meaningless. Therefore, the Hearing Examiner did not err in determining that the MOU did not have to be expressly incorporated into the CBA to be binding.

The City also asserts that the parol evidence rule prohibits the Union from relying on the MOU. Under the parol evidence rule, prior alleged representations concerning the meaning or understanding of terms specifically covered by the parties' written contract are inadmissible to prove a contrary intent by the parties. Youndt v. First National Bank of Port Allegheny, 868 A.2d 539 (Pa. Super. 2005); New Britain Borough Police Benevolent Association v. New Britain Borough, 39 PPER 102 (Final Order, 2008). As noted above, the agreement at issue in this case is the MOU. The Hearing Examiner relied on the specific terms of the MOU settlement agreement, and not parol evidence, in making his determination that the City violated Section 1201(a)(1) and (5) when it refused to abide by its agreement to reopen negotiations under the terms of the MOU. Therefore, the City's exception on this issue is dismissed.

Further, the City's argument that the Union failed to exhaust administrative remedies prior to filing of the instant Charge because it only made a "unilateral" request to reopen the CBA instead of a "bilateral"

[2] A "zipper" or "waiver" clause is commonly contained in a collective bargaining agreement to prevent incessant demands by a party seeking to alter the status quo. Commonwealth of Pennsylvania v. PLRB, 459 A.2d 452 (Pa. Cmwlth. 1983).

request is without merit. There were no statutory remedies for the Union other than to enforce the MOU before the Board. The MOU states that the Union will have the right to reopen certain provisions of the 2016 CBA should the City exit Act 47 status and that the City "agrees to reopen the 2016 CBA" upon request of the Union. The record shows that the City refused the Union's request contrary to the terms of the MOU. As a failure to abide by the settlement of an unfair practice is itself a violation of Section 1201(a)(1) and (5) of PERA, the Union did not fail to exhaust its administrative remedies when it filed the instant Charge and the City's exception is dismissed.

Moreover, the City's argument that the MOU is not a legal contract because it was not supported by legal consideration is equally without merit. Specifically, the City asserts that the Union's withdrawal of its charge of unfair practices at case number PERA-C-15-339-E did not constitute legal consideration because the charge was frivolous. The Board determined that the allegations in the Union's previous charge warranted a hearing and issued a complaint. Homer Center Education Association v. Homer Center School District, 30 PPER ¶ 30024 (Final Order, 1998)(Board will issue complaint if allegations support an unfair practice if found to be true). The parties entered into the MOU in order to settle the charge in lieu of litigating the unfair practice. It appears that the City now wishes to renege on its settlement agreement with the Union, in contravention of its statutory obligation of good faith bargaining. Indeed, in Pittsburgh Joint Collective Bargaining Committee v. City of Pittsburgh, 391 A.2d 1318, 1322 (1978), our Supreme Court stated as follows:

> To permit an employer to enter into agreements and include terms … which raise the expectations of those concerned, and then to subsequently refuse to abide by those provisions … would invite discord and distrust and create an atmosphere wherein a harmonious relationship would virtually be impossible to maintain.

Relying on the terms of the MOU, the Union withdrew its charge after the parties' ratified the successor agreement. As stated by the Supreme Court in City of Pittsburgh, the City cannot benefit from the terms of the MOU and then fail to abide by its part of the agreement. Accordingly, the City's exception that the MOU is not a binding agreement between the parties is dismissed.

The City finally alleges what purports to be a sound arguable basis defense to the Charge, arguing that it did not violate the MOU because the MOU only applied to the parties' first tentative agreement. However, to support a contractual privilege defense, the employer must establish that the actions taken are consistent with its interpretation of the express contract terms. FOP, Lodge No. 85 v. Commonwealth of Pennsylvania, 33 PPER ¶ 33078 (Proposed Decision and Order, 2002). The August 3, 2016 MOU, by its terms, did not become effective until the parties ratified a successor agreement, effective January 1, 2016. As found by the Hearing Examiner, the second tentative agreement contained only minor changes from the first tentative agreement that were not material to either life insurance coverage, holidays, pay for Saturday work or sick leave relevant to the reopener provision of the MOU. After the successor agreement was ratified, the Union relying on the MOU withdrew its charge of unfair practices and the City accepted the withdrawal of charges based on the MOU. The City's assertion that the MOU

only applied to the first tentative agreement is not reasonably consistent with the MOU and the settlement of the unfair practice charge. As such, the City's sound arguable basis defense is dismissed.

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 refusing to reopen negotiations per the terms in the parties' August 3, 2016 MOU. Accordingly, the Board shall dismiss the exceptions and make the Proposed Decision and Order final.

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 Pittsburgh are hereby dismissed, and the June 5, 2019 Proposed Decision and Order be and the same is hereby made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, James M. Darby, Chairman, Robert H. Shoop, Jr., Member, and Albert Mezzaroba, Member, this seventeenth day of December, 2019. 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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AFFIDAVIT OF COMPLIANCE

The City hereby certifies that it has ceased and desisted from its violations of Sections 1201(a)(1) and (5) of the Public Employe Relations Act; that it has immediately bargained with the Union pursuant to the Memorandum of Understanding; that it has posted a copy of the Proposed Decision and Order and Final Order as directed; and that it has served a copy of this affidavit on Teamster Local Union No. 249 at its principal place of business.

_____
Signature/Date

_____
Title

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

_____
Signature of Notary Public