

Commonwealth of Pennsylvania
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE, LODGE 83 :
 :
v. : Case No. PF-C-13-51-E
 :
CITY OF WARREN :

PROPOSED DECISION AND ORDER

On May 20, 2013, the Fraternal Order of Police Lodge 83, Warren Police Officers Association (FOP or Union) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) charging that the City of Warren (City) violated Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA) as read *in pari materia* with Act 111.

On June 13, 2013, the Board issued a Complaint and Notice of Hearing, in which January 16, 2014, in Pittsburgh was assigned as the time and place of hearing.

The hearing was continued to May 13, 2014, on the FOP's motion without objection from the City. The hearing was held on the rescheduled date, at which time all parties were afforded an opportunity to present testimony, cross examine witnesses and introduce documentary evidence.

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

FINDINGS OF FACT

1. That the City of Warren is a public employer within the meaning of Act 111.
2. That the Fraternal Order of Police Lodge 83, Warren Police Officers Association is a labor organization within the meaning of Act 111.
3. That the FOP is the exclusive representative of a unit of the police officers employed by the City.
4. That the City and the FOP have been parties to several collective bargaining agreements (CBAs) over the years, covering the police officers employed by the City. When the parties bargained the 2009-2011 CBA, they exchanged several proposals, including an FOP proposal that would eliminate the age 50 requirement for pension eligibility. (N.T. Union Exhibit 1)
5. The 2009-2011 CBA was formed when the parties executed a document entitled, "Memorandum of Understanding Agreed to Terms for Revisions to Agreement between City of Warren and Warren Police Officers Association F.O.P., Lodge #83." (2008 MOU or MOU) on September 11, 2008. (N.T. 15, Union Exhibit 3)
6. The 2009-2011 CBA included pension language at Article XIII, Section 6, which states that police officers are eligible for retirement after twenty (20) years of service with full retirement benefits *as stated within the Pension Plan.*" (N.T. 15, Union Exhibit 3, Emphasis added by Hearing Examiner)
7. The City of Warren Police Pension Plan (Pension Plan or Plan) was amended and restated effective January 1, 2002. (N.T. 54 , City Exhibit 4)
8. The Plan as amended and restated effective January 1, 2002 was in effect during the collective bargaining negotiations in 2008 which resulted in the 2008

Memorandum of Understanding that gave rise to the 2009-2011 CBA cited in Finding of Fact 5. (N.T. 54)

9. Both before and after the 2008 MOU, Section 1.17 of the Plan provided as follows:

“Service” shall mean any specified period for which An Eligible Employee is directly or indirectly compensated or entitled to compensation by the City for the performance of duties as a full-time permanent police officer or receives, or is entitled to receive, payment for:

- (a) the time actually worked for the City as an Eligible Employee;

(N.T. 54, 62, City Exhibit 4 at 4)

10. Both before and after the 2008 MOU, Section 1.08 of the Plan provided as follows:

“Eligible Employee” shall mean a regularly scheduled, full-time, permanent police officers (sic) who shall participate herein as of the date of his appointment to such permanent position. Any police officer employed as a temporary, *probationary*, special or part-time, or permanent part-time officer of the City shall not be considered an Eligible Employee for purposes of this Plan.

(N.T. 62, City Exhibit 4 at 3. Emphasis added by hearing examiner)

11. Police officers employed by the City serve a one year probationary period after they are hired. (N.T. 53)
12. The City has never counted the probationary year as a year of service. (N.T. 55, 56-57)
13. The City does not deduct pension contributions from the wages of police officers during their probationary year and no current City police officers paid any pension contributions during their probationary year. (N.T. 30, 45, 57)

DISCUSSION

The FOP’s charge alleges that the City committed unfair labor practices on April 22, 2013, when City Manager, Nancy Freenock, issued a letter to Officer Jeffrey Dougherty, President of the FOP, stating that the City would not acknowledge an officer’s one (1) year probationary period as part of the twenty (20) years of service under the pension plan. The FOP alleges that this is a refusal to follow a binding settlement agreement from September, 2008, for a new CBA, and constitutes an unfair labor practice within the meaning of Section 6(1)(a) and (e) of the PLRA.

Under Section 1 of Act 111, 43 P.S. § 217.1 et seq. pensions are one of the enumerated subjects of bargaining between public employers and their police employees. The case law has affirmed that pensions are a mandatory subject of bargaining. **City of Coatesville**, 12 PPER ¶ 12247 (Final Order, 1981), *aff’d* 465 A.2d 107 (Pa. Cmwlth. 1983).

The City defends its action by raising the defense of contractual privilege. The Board has “recognized ‘contractual privilege’ as an affirmative defense to a charge of unfair labor practices alleging a failure to bargain in good faith.” **Pennsylvania State Troopers Association v. Pennsylvania Labor Relations Board**, 761 A.2d 645, 851-52 (Pa. Cmwlth. 2000). Thus, a charge will be dismissed “where the employer establishes a ‘sound arguable basis’ in language of the parties’ collective bargaining agreement, or other bargained for agreement, for the claim that the employer’s action was permissible under the agreement.” *Id.*, citing **Ellwood City Borough**, 29 PPER ¶ 29213 (Final Order, 1998), *aff’d*

736 A. 2d 707 (Pa. Cmwlth. 1999); **Prospect Park Borough**, 27 PPER ¶ 27222 (Final Order, 1996); **Jersey Shore Area School District**, 18 PPER ¶ 18117 (Final Order, 1987).

In support of its contractual privilege argument, the City points to the pension language of the parties' CBA, at Article XIII, Section 6, which states that police officers eligible for retirement after twenty (20) years of service with full retirement benefits as *stated within the Pension Plan.*" (emphasis added by hearing examiner). The Pension Plan, in turn, has specific language that defines eligible employees and specifically excludes "probationary employees" from the definition of eligible employees.

The FOP can point to nothing in the CBA or the Pension Plan that allows the first year of probation to count as service for the "twenty (20) years of service" for pension eligibility. For years, the 20 years of service requirement has been in place and applied to exclude the first year of probation from the years of service.

The FOP has not made a persuasive case that the parties came to an agreement so as to count the probationary year toward the 20 years of service for pension eligibility. Meanwhile, the record does show that the parties did arrive at one agreement on pensions. When the parties last addressed pensions in their collective bargaining in 2008, they agreed to amend the Pension Plan to remove the age 50 requirement, which was a fundamental and significant change to the City's retirement requirements under the Police Pension Plan. That change was also preceded by the mandated Act 205 Cost Study, which showed that such a change would benefit 9 of the 13 Plan participants. No similar Act 205 Study was done for the issue in this case. Had a study been done, it would have shown that if the City began counting the probationary year, it would have benefitted all 13 of the participants in light of the fact that the City had never counted the probationary year as a year of service before.

To support its case, the FOP offered the testimony of the former City Manager and two members of the FOP's bargaining team for the 2009-2011 CBA, that during the negotiations for that CBA, the parties understood that the probationary period was to be included as one of 20 years of service for determining pension eligibility. However, their understanding did not make its way into the eventual MOU or the Pension Plan itself so as to correct the definition of eligibility. Absent proof of such an agreement, the FOP is unable to rebut the City's proof that a written agreement exists to exclude the probationary year from the 20 years of service.

Given this, the FOP's argument that there is a binding settlement agreement for a new CBA that includes the probationary year in the 20 years of service must be dismissed.

CONCLUSIONS

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

1. The City of Warren is a public employer within the meaning of Act 111.
2. Fraternal Order of Police, Lodge 83, Warren Police Association is a labor organization within the meaning of Act 111.
3. The Board has jurisdiction over the parties.
4. The City has not committed unfair labor practices under Sections 6(1)(a) and (e) of the PLRA.

ORDER

In view of the foregoing and in order to effectuate the policies of the PLRA as read *in pari materia* with Act 111, the hearing examiner

HEREBY ORDERS AND DIRECTS

that the charge of unfair labor practices 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-ninth day of January, 2015.

PENNSYLVANIA LABOR RELATIONS BOARD

Thomas P. Leonard, Hearing Examiner