

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE, :
GENERAL GREENE LODGE 56 :
 :
v. : Case No. PF-C-23-73-W¹
 :
CITY OF GREENSBURG :

FINAL ORDER

On March 18, 2024, the Fraternal Order of Police, General Greene Lodge 56 (FOP) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) challenging a Proposed Decision and Order (PDO) issued on February 27, 2024. In the PDO, the Board's Hearing Examiner concluded that the City of Greensburg (City) did not violate Section 6(1)(a) or (e) of the Pennsylvania Labor Relations Act (PLRA), as read *in pari materia* with Act 111 of 1968, when it refused to bargain over the impact of deducting the Medicare Withholding tax from the bargaining unit officers' pay. Pursuant to an extension of time granted by the Secretary of the Board, the FOP filed a brief in support of its exceptions on April 8, 2024. The City filed a response to the exceptions on April 4, 2024, and a brief in opposition on April 29, 2024.

The facts of this case, as stipulated to by the parties, are summarized as follows. The FOP and the City are parties to a collective bargaining agreement (CBA) effective January 1, 2022 to December 31, 2026. (FF 4). The City's police officers are not enrolled in the Social Security Old Age, Survivors and Disability Insurance Program pursuant to a Section 218 Agreement that permits certain municipal governments to opt out.² (FF 5). While municipal governments are allowed to opt out of the Social Security Retirement System, all municipal employees hired after April 1, 1986 are required to be enrolled in the Medicare System. Under the Medicare System, employees are required to pay 1.45% of their pay into the Medicare Trust Fund, which is withheld from their pay and required by law.³ (FF 6). All current bargaining unit police officers were hired after April 1, 1986. (FF 7).

On February 15, 2023, the Internal Revenue Service (IRS) notified the City that it would be performing a payroll audit for the payroll period of January 1, 2021 through December 31, 2021. (FF 8). By email dated May 2, 2023, the City's Solicitor indicated to FOP President Robert Jones, in relevant part, as follows:

¹ The Case Number has been amended by the Board to reflect that it is a western case.

² 42 U.S.C. § 418.

³ The Internal Revenue Code provides that "[i]n addition to the tax imposed by [the Old Age, Survivors, and Disability Insurance Program], there is hereby imposed on the income of every individual a tax equal to 1.45 percent of the wages ... received by him with respect to employment..." 26 U.S.C. § 3101(b)(1).

The City was recently subject to a payroll audit by the IRS. The IRS determined that the Police Officers should have been paying the Medicare portion of FICA [Federal Insurance Contribution Act] taxes as Medicare Qualified Government Employees (for all officers hired since 1986). Once in receipt of the formal written notice, we will provide a copy of the same.

Police Officers will not be responsible for paying back taxes on Medicare-FICA taxes that were not paid.

This email is being sent to give the Police Officers advance notice that the federally mandated change will occur in the near future. Once in receipt of the formal written notice, we will make the change to payroll resulting in the Police Officer's [sic] having the Medicare portion of the FICA taxes deducted and remitted to the government.

(FF 9). The City had not been deducting the Medicare tax from the pay of the bargaining unit officers since April 1, 1986. (FF 12). By email dated June 15, 2023, the City Solicitor indicated to FOP President Jones that the Medicare tax withholding would begin with the July 14, 2023 payroll. (FF 10). On June 16, 2023, the IRS issued the final audit report, which found that the City did not deduct Medicare taxes from the pay of the bargaining unit officers for the pay period from January 1, 2021 to December 31, 2021. (FF 11).

By email dated June 16, 2023, the City's Fiscal Director/City Treasurer informed the bargaining unit officers, in relevant part, the following:

Due to the recent audit by the IRS, it was brought to our attention that police officers are NOT exempt from the Medicare portion of FICA taxes as Medicare Qualified Government Employees.

Police officers hired after March 31, 1986 are subject to mandatory Medicare coverage and therefore must pay Medicare taxes. Police officer employees will not be responsible for payment of back taxes for amounts that were not withheld.

All police officers remain exempt from Social Security tax.

Effective on 7/14/23 pay date, the Medicare portion of the FICA tax will be withheld from your paycheck.

(FF 13). On June 28, 2023, the City paid \$87,718.28 for the unpaid Medicare tax deduction for the bargaining unit officers for the pay period of January 1, 2021 through December 31, 2021. (FF 14). The first paychecks with the Medicare deductions were distributed on July 14, 2023. The deductions equaled 1.45% of the officers' pay, as required by law. (FF 15). By letter dated July 14, 2023, FOP President Jones requested the City bargain over the effects of the deduction of Medicare taxes on the bargaining unit officers' wages, hours, and working conditions. (FF 16).

On August 7, 2023, the City and FOP representatives had a meeting to discuss the Medicare tax deduction. FOP President Jones requested a commensurate increase in pay to match the Medicare tax deduction. (FF 17). By letter dated August 10, 2023, Mayor Bell indicated that City Council had reviewed the FOP's request to bargain over the Medicare tax deduction and

concluded that "the issue raised is not subject to bargaining, as the application of the federal tax was non-discretionary and required by federal law...". (FF 18).

The FOP filed its Charge of Unfair Labor Practices on August 14, 2023, alleging that the City violated Section 6(1)(a) and (e) of the PLRA by refusing to bargain over the effects of the City's implementation of the Medicare tax deduction. On September 15, 2023, the Secretary of the Board issued a Complaint and Notice of Hearing and assigned this matter to a Hearing Examiner. In lieu of a hearing, the parties submitted joint stipulations of fact and exhibits to the Board's Hearing Examiner on November 30, 2023. Both parties filed post-hearing briefs.

In the PDO, the Hearing Examiner initially noted that the City's decision to withhold the Medicare tax from the officers' pay was within its managerial authority since the City lacks the discretion on whether to withhold the tax and must ensure compliance with federal law, citing AFSCME, Council 13, AFL-CIO v. Commonwealth of Pennsylvania, Office of the Budget, 18 PPER ¶ 18138 (Final Order, 1987). The Hearing Examiner further concluded that the FOP failed to establish a demonstrable severable impact requiring bargaining stating, in relevant part, as follows:

[T]he FOP contends that the Medicare portion of the FICA deductions had a severable impact on the police employees because the City could potentially incur the payment through a wage adjustment or subsequent reimbursement to the employees. However, the police employees still receive the same gross wages they did before pursuant to the CBA. And, the police employees have always been subject to the Medicare tax. In fact, the City correctly points out that, if the tax is not collected by the City, it must be paid by the employees.[] As a result then, the FOP's contention is essentially an argument that the City's managerial decision had a severable impact on the employees because they no longer receive their salary tax free, at least insofar as it relates to the Medicare portion of the FICA deduction. Unfortunately for the FOP, however, the Board previously rejected a very similar argument in Amity Township Police Ass'n v. Amity Township, 39 PPER 131 (Final Order, 2008), wherein the Board found that the township employer's creation of a light duty position, which resulted in the termination of a police officer's Heart and Lung benefits and a net reduction in his pay, did not have a severable impact on that police officer. The Board explained that the termination of the officer's Heart and Lung benefits was a direct and necessary consequence of the township's creation of his light duty position. Therefore, any reduction in his net compensation due to his return to work was not severable from the township's managerial decision to create the light duty position.

In the same vein here, the City's decision, and in reality, its obligation, to withhold the Medicare portion of the FICA deductions from employe pay beginning on July 14, 2023, led to the direct and necessary consequence of a net reduction in pay for the police employees. As such, their net reduction in pay, which is the only demonstrable impact on the employees, is not severable from the City's managerial decision to withhold the Medicare portion of the FICA deductions pursuant to federal law.

... Thus, requiring the City to bargain to restore the net losses in employe pay via a wage adjustment or reimbursement in the instant matter, would be tantamount to requiring the City to bargain the underlying decision to withhold the Medicare portion of the FICA deductions in the first instance.

(PDO at 5-6). Therefore, the Hearing Examiner held that the City did not violate its duty to bargain under Section 6(1)(a) or (e) of the PLRA, rescinded the complaint and dismissed the Charge of Unfair Labor Practices.

Initially, it is noted that the FOP does not challenge that the deduction of the Medicare tax by the City was within its managerial authority. Rather, the FOP in its exceptions asserts that the Hearing Examiner erred in concluding that it failed to demonstrate a severable impact on the officers wages.⁴ Where a public employer is charged with violating its duty to bargain over the impact of implementation of a managerial prerogative, the employe representative must demonstrate that (1) the employer lawfully exercised its managerial prerogative; (2) there is a demonstrable, severable impact on wages, hours or working conditions as a result of implementation of the managerial prerogative; (3) the employe representative made a demand to bargain over the demonstrable impact; and (4) the employer refused the employe representative's demand to bargain. Lackawanna County Detectives' Association v. PLRB, 762 A.2d 792 (Pa. Cmwlth. 2000).

On exceptions, the FOP asserts that the manner in which the Medicare tax is paid by the employer is severable from its decision to comply with the law and deduct the tax because the City could pay these taxes through wage adjustment or reimbursement instead of assigning this tax to the bargaining unit officers.⁵ We note that the FOP's exceptions raise the same claims that it presented to the Hearing Examiner in its post-hearing brief. We have thoroughly reviewed the PDO, and adopt, herein, the Hearing Examiner's discussion of the arguments being raised by the FOP. In this regard, as stated by the Hearing Examiner, any reduction in the bargaining unit officers' net compensation is a direct and necessary consequence of the City's managerial decision to deduct the Medicare tax, as required by law, from the officers' pay. Further, requiring the City to bargain to restore those net losses through a wage adjustment or reimbursement would effectively permit the FOP to bargain over the City's managerial decision in the first instance. Therefore, the FOP failed to establish a severable impact requiring bargaining. Accordingly, the Hearing Examiner properly concluded that the City did not violate Section 6(1)(a) or (e) of the PLRA when it

⁴ The City argues that the FOP's exceptions should be dismissed because they do not comply with Section 95.98(a)(1)(i)-(iv) of the Board's Rules and Regulations, which requires exceptions to be sufficiently specific so as to permit meaningful review. Upon review of the FOP's exceptions, the Board finds that they are adequate to permit the Board's review of the PDO. Therefore, the City's request to dismiss the exceptions on this basis is denied.

⁵ The FOP also alleged that the City's decision to implement the Medicare tax deduction had a severable impact on the FOP's bargaining position. This argument was not raised before the Hearing Examiner and, therefore, it is waived. AFSCME v. PLRB, 514 A.2d 255 (Pa. Cmwlth. 1986); Teamsters Local 776 v. Susquehanna Township School District, 45 PPER 95 (Final Order, 2014).

refused to bargain over the impact of deducting the Medicare tax from the bargaining unit officers' pay. After a thorough review of the exceptions and all matters of record, 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 Pennsylvania Labor Relations Act and Act 111, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed by the Fraternal Order of Police, General Greene Lodge 56 are hereby dismissed, and the February 27, 2024 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, Albert Mezzaroba, Member, and Gary Masino, Member this fifteenth day of October, 2024. 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.