

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE, LODGE 1 :
 :
 v. : Case No. PF-C-18-34-W
 :
 CITY OF PITTSBURGH :

PROPOSED DECISION AND ORDER

On March 2, 2018, the Fraternal Order of Police, Lodge 1 (FOP) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) against the City of Pittsburgh (City or Employer) alleging that the City violated Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA), as read with Act 111, when the City refused to bargain with the FOP pursuant to the FOP's demand to bargain under a reopener provision.

By letter dated March 20, 2018, the Secretary of the Board declined to issue a complaint on the charge because the Secretary found that the FOP failed to allege sufficient facts for finding a violation under Section 6(1)(a) and (e) because the City's refusal to reopen that parties' collective bargaining agreement was not a clear repudiation of the terms of the agreement. The FOP filed exceptions to the Secretary's decision in which it clarified its charge against the City to include a charge that the City's refusal to proceed to arbitration pursuant to the reopener provision also constituted an unfair labor practice in violation of Section 6(1)(a) and (e). The Board directed the Secretary to issue a complaint by Order dated July 17, 2018. On July 20, 2018, the Secretary issued a Complaint and Notice of Hearing, assigning the charge to conciliation for the purpose of resolving the matters in dispute through mutual agreement of the parties, and designating November 21, 2018, in Pittsburgh, as the time and place of hearing, if necessary.

The hearing was held on November 21, 2018, in Pittsburgh before the undersigned Hearing Examiner, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The FOP submitted a post-hearing brief on July 15, 2019. The City submitted a post-hearing brief on November 12, 2019.¹

The Hearing Examiner, based on all matters of record, makes the following:

FINDINGS OF FACT

1. The City is a public employer and political subdivision under Act 111 as read *in pari materia* with the PLRA. (N.T. 5).

¹ The City included and referenced post-hearing evidence in its Brief. The post-hearing evidence was not considered for this Proposed Decision and Order.

2. The FOP is a labor organization under Act 111 as read *in pari materia* with the PLRA. (N.T. 5).

3. The parties were subject to a collective bargaining agreement (CBA) with a term of January 1, 2010 - December 31, 2014 and were at the time of hearing in status quo. (N.T. 14; Joint Exhibit 1).

4. The CBA contains the following provision at Section 18, Subsection S:

S. If, during the term of this agreement, the Act 47 Plan is terminated or amended, or if the Pennsylvania State Legislature enacts legislation relating to deferred retirement accounts (DROP/IROP pension benefits) or the issue of residency requirements for police officers in cities of the second class, the parties may reopen the contract to negotiate and/or arbitrate under these limited conditions. The Panel shall retain jurisdiction to address such issues if agreement cannot be reached by the parties. *(Part of this paragraph is subject to appeal filed by the City on 1/28/05.)

(Joint Exhibit 1, page 117).

5. In December 2017, as part of interest arbitration proceedings before Arbitrator William Miller, the City proposed to delete Section 18, Subsection S with respect to contract reopeners for Act 47, DROP and residency. The FOP at the time did not agree with the City's proposals for Section 18, Subsection S. (City Exhibit 1).

6. The City left Act 47 oversight on February 12, 2018. (N.T. 14; Joint Exhibit 5).

7. On February 13, 2018, Robert Swartzwelder, President of the FOP, sent a letter requesting reopening the CBA to the Mayor of Pittsburgh, William Peduto. The letter states in relevant part:

Dear Mayor Peduto;

On behalf of the [FOP], the exclusive bargaining representative of the City of Pittsburgh Police Officers, I wish to notify you of our intention to commence collective bargaining pursuant to [Act 111]. Pursuant to Section 18, Subsection S of the [CBA], the FOP seeks to reopen the contract to negotiate and/or arbitrate additional terms for the period January 1, 2015 through December 31, 2018. We will provide you with our bargaining demands at our first bargaining session. If we do not hear from you within 30-days, we will assume we are at impasse. . . .

(N.T. 14-15; Joint Exhibit 3).

8. On February 20, 2018, the City responded to the FOP. Lourdes Sanchez Ridge, Chief Legal Officer and City Solicitor, wrote in relevant part:

Mr. Swartzwelder:

The purpose of this correspondence is to respond to your letter dated February 13, 2018 to Mayor William Peduto.

As you are aware, the status of the Act 47 reopener language is part of an ongoing integration dispute between the City and the FOP. The parties have identified this issue as one to be resolved by the Act 111 Interest Arbitration Panel when it reconvenes next month. The City maintains that this language is not part of the current Working Agreement between the [City] and [the FOP].

(N.T. 15; Joint Exhibit 4).

9. After receipt of the letter from Sanchez Ridge, the FOP filed the instant unfair practice charge. (N.T. 16).

10. At the time of hearing, there was no current consolidated working agreement between the parties. The integration process before Arbitrator Miller was ongoing; however, nothing had happened since July, 2018, and at the time of the hearing, no integrated award had been issued. (N.T. 17, 20).

DISCUSSION

In its charge, the FOP alleges that the City has violated Section 6(1)(a) and (e) of the PLRA when it refused to bargain or arbitrate following the FOP's request to reopen the CBA following the City's discharge from Act 47 oversight.

It is well-established by the Board and the Courts that questions of arbitrability and jurisdiction are to be answered by arbitrators in the first instance. Office of Administration v. PLRB, 528 Pa. 472 (1991); General Teamsters, Chauffeurs & Helpers Local 249 v. Oakmont Borough, 43 PPER ¶ 71 (Final Order, 2011). This is so even where arbitrability or jurisdiction in an interest arbitration proceeding is premised on an interpretation of an existing collective bargaining agreement. Oakmont Borough, supra. In Oakmont Borough, the Board decided that the question of whether the union in that matter properly invoked a contractual reopener provision is properly a question of arbitrability and jurisdiction that must be decided in the first instance by the Act 111 interest arbitration panel. Id.

Recently, in Teamsters Local Union No. 249 v. City of Pittsburgh, PERA-C-18-140-W (Final Order, 2019)², the Board held that the City of Pittsburgh (also a party in that matter) violated Section 1201(a)(5) of PERA (which is analogous to Section 6(1)(e) of the PLRA in Act 111

²A copy of this recent Final Order has been attached to this Proposed Decision and Order for the reference of the parties.

cases) when it refused to reopen negotiations per the terms of an agreement between Teamsters and the City.

Turning to this case, the record is clear that the CBA between the parties contains a reopener provision at Section 18, Subsection S. The reopener contains an express trigger for when the City's Act 47 plan is terminated. The City's Act 47 plan was terminated on February 12, 2018, and thus the FOP had the right, pursuant to the CBA language, to "reopen the contract to negotiate and/or arbitrate".

The City argues in its brief that it believes that it could not proceed to arbitration on the reopener because, in the City's opinion, the issue of the reopener language was already before an arbitration panel. Questions of arbitrability and jurisdiction must be made to an arbitrator in the first instance, and it is an unfair labor practice to refuse to go to arbitration while claiming that an issue is not arbitrable. Oakmont Borough, supra. Thus, the City committed an unfair labor practice when it refused to arbitrate in its February 20, 2018, letter.

With respect to the FOP's claim that the City committed an unfair labor practice when it refused to bargain with the Union when the Union invoked the reopener language, the City argues that it has articulated a sound basis for its interpretation of the CBA and that the bargaining violation charge must be dismissed pursuant to Pennsylvania State Troopers Association v. PLRB, 761 A.2d 645 (Pa. Cmwlth., 2000) (affirming the PLRB's dismissal of the charges against the Commonwealth based on the theory of contractual privilege).

In this matter the City has not raised a sound arguable basis for its refusal to bargain over the reopener provision. The City argues that, in its opinion, the reopener language was part of an ongoing integration dispute between the City and the FOP and thus not part of any current (at that time) agreement between the City and the FOP. However, the City does not point to any language in the agreement between the parties to support its argument that the reopener language is removed from the existing contract when it is brought up by the City in an interest arbitration proceeding. The language with respect to the reopener still existed even if the City was proposing that it should not. The City cannot remove language from the agreement by merely proposing to an arbitrator that the City wants it removed. Since the reopener language was part of the contract between the City and the Union, the City committed an unfair practice when it refused to bargain with the FOP subsequent to the City's withdrawal from Act 47 oversight and the demand to bargain from the FOP. Teamsters Local Union No. 249 v. City of Pittsburgh, supra.

CONCLUSIONS

The Hearing Examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds as follows:

1. The City is a public employer and political subdivision under Act 111 as read *in pari materia* with the PLRA.
2. The FOP is a labor organization under Act 111 as read *in pari materia* with the PLRA.

3. The Board has jurisdiction over the parties hereto.

4. The City has committed an unfair labor practice in violation of Section 6(1)(a) and (e) of the PLRA and Act 111.

ORDER

In view of the foregoing and in order to effectuate the policies of the PLRA and Act 111, the Hearing Examiner

HEREBY ORDERS AND DIRECTS

that the City of Pittsburgh shall:

1. Cease and desist from interfering with, restraining or coercing employes in the exercise of the rights guaranteed in the PLRA and Act 111.

2. Cease and desist from refusing to bargain collectively with the representatives of its employes.

3. Take the following affirmative action which the Hearing Examiner finds necessary to effectuate the policies of the PLRA and Act 111:

(a) Immediately proceed to arbitration and/or bargain with the FOP pursuant to the FOP's demand in its February 13, 2018, letter.

(b) Post a copy of this Decision and Order within five (5) days from the effective date hereof in a conspicuous place readily accessible to the bargaining unit employes and have the same remain so posted for a period of ten (10) consecutive days;

(c) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this Decision and Order by completion and filing of the attached Affidavit of Compliance; and

(d) Serve a copy of the attached Affidavit of Compliance upon the FOP.

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 days of the date hereof, this decision and order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this second day of January, 2020.

PENNSYLVANIA LABOR RELATIONS BOARD

Stephen A. Helmerich, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE, LODGE 1 :
v. : Case No. PF-C-18-34-W
CITY OF PITTSBURGH :

AFFIDAVIT OF COMPLIANCE

The City of Pittsburgh hereby certifies that it has ceased and desisted from its violations of Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act; that it has complied with the Proposed Decision and Order as directed therein; that it has immediately proceeded to arbitration and/or bargained with the FOP pursuant to the FOP's demand in its February 13, 2018, letter; that it has posted a copy of the Proposed Decision and Order as directed therein; and that it has served an executed copy of this affidavit on the Union 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