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PENNSYLVANIA STATE LODGE  
FRATERNAL ORDER OF POLICE

Legal Report - January 29, 2010

1. **City of Philadelphia v. Fraternal Order of Police, Lodge No. 5 (Jason Breary), No. 38 EAP 2007 (Supreme Court, issued December 29, 2009)**

This case involves an appeal of a grievance arbitration award ordering the reinstatement of a police officer. The FOP had requested the arbitrator to issue a subpoena requiring certain documentary evidence to be produced on the day of the arbitration hearing, July 10, 2006. When the City failed to produce the documents at that time (the City had contended that the failure was due to a "clerical error" -- the subpoena had been misplaced), the hearing was continued to July 25, 2006. Central to the legal questions raised, at the July 10, 2006 hearing, the FOP had asked the arbitrator to sanction the City for failure to comply with the subpoena. The sanction requested was to preclude the City from introducing any evidence encompassed by the documents requested in the subpoena. The arbitrator determined that he would rule on the sanctions at the July 25, 2006 continued hearing. In an effort to cure its noncompliance, the City supplied the requested documentation immediately following the July 10, 2006 hearing.

At the continued hearing, the arbitrator heard arguments by the parties, including the FOP's claim that the City's failure to comply with the subpoena represented a repeated pattern of the City's refusal to provide requested information as had occurred in prior grievance arbitration proceedings. After considering the parties' positions, the arbitrator ruled in favor of the FOP and granted the FOP's request that the City be "precluded from presenting any evidence that was subject to disclosure under the subpoena." This request was granted although the arbitrator had become aware (1) that the City's non-compliance was due to clerical oversight; and (2) that the City's counsel cured the problem immediately thereafter. Based on the arbitrator's ruling, the City determined that it was prohibited from presenting any evidence and accordingly, it had no case and was forced to rest. The FOP also rested, and the arbitrator issued a decision

sustaining the grievance and reinstating the grievant with full back pay, holding that the City had failed to meet its burden of proving just cause for termination. The City appealed to the Court of Common Pleas.

The Common Pleas Court denied the City's petition indicating that because the arbitrator had not exceeded his authority, the Court could not disturb the sanction ordered against the City, nor the resulting arbitration award. Citing PA. State Police v. PA. State Troopers' Ass'n (Betancourt), 656 A.2d 83 (Pa. 1995). The City filed an appeal to the Commonwealth Court.

In a panel decision, the Commonwealth Court set aside and vacated the Court of Common Pleas' decision and remanded the matter for a full arbitration hearing on the merits. In so doing, the Commonwealth Court determined that the arbitrator's "constructive dismissal" of the City's case (by precluding all evidence subject to subpoena) permitted the Court's substantive review of the award within the "narrow certiorari" Betancourt standard. The Court essentially held that the sanction of complete preclusion of evidence equated to "dismissal" of the City's case, and was therefore a violation of the City's right to due process, thus raising a constitutional issue.

The FOP filed for allowance of appeal to the Supreme Court requesting that the Court resolve the issue of whether the Commonwealth Court had "improperly expanded the limited scope of review in Act 111 grievance arbitrations", as well as the question of whether Act 111 arbitrators "can award ... sanctions, and, if so, what is a reviewing court's role in reviewing sanctions under the Act 111 narrow certiorari scope of review?"

In affirming the result reached by the Commonwealth Court, the Supreme Court relied upon Pennsylvania precedent utilized to determine the appropriateness of severity of discovery sanctions. The Court ruled that it would consider the following factors: (1) the prejudice, if any, endured by the non-offending party and the ability of the opposing party to cure any prejudice; (2) the non-complying party's willfulness or bad faith in failing to provide the requested discovery materials; (3) the importance of the excluded evidence in light of the failure to provide the discovery; and (4) the number of discovery violations by the offending party. In applying these criteria to the case before it, the Supreme Court determined:

- (1) Although a discovery violation clearly occurred, the delay in the proceedings (from July 10 to July 25) actually benefited the FOP in this matter. The Court reasoned that if the City had initially complied with the subpoena, the FOP would only have received the requested materials moments prior to the original hearing date. In this case, the City immediately cured the defect by providing the materials to the FOP the following day (July 11). Thus, the Court opined that the FOP actually had the benefit of the materials two weeks prior to the hearing. Accordingly, the

Court found that there was “no real prejudice” as a result of the City’s discovery violation.

(2) The Supreme Court concluded that the City did not “willfully, or in bad faith, withhold the requested documents from the FOP.” The Court observed that the record contained evidence that the subpoena inadvertently “sat on a secretary’s desk,” and that the non-compliance was a result of a clerical error. The Court also again relied on the fact that the City Solicitor provided the subpoenaed documents to the FOP promptly after being informed of the “inadvertent non-compliance.” Thus, the Court concluded that no willful misconduct had occurred on the part of the City.

(3) In examining the importance of the excluded evidence (which, in the Court’s view, “constituted the City’s entire case”), the Court stated that in light of the arbitrator’s ruling, the City “clearly had no other alternative but to rest its case”. The Court rejected the FOP’s argument that the City had other options to present its case, including the ability to call the internal affairs investigator and/or the grievant. Accordingly, the Court concluded that the excluded evidence was “critical to the City’s ability to present a case.”

(4) Finally, the Court was troubled by the arbitrator’s reliance upon alleged prior discovery violations by the City. The Court’s “independent review of the record” revealed that although the FOP had referenced prior alleged incidents of non-compliance, it did not introduce specific testimony or other evidence supporting the substance of the allegations or the circumstances under which the alleged violations occurred. Thus, the Court determined that it did not have sufficient evidence of record for the Court to review the arbitrator’s reliance on these prior violations. In addition, the Court reasoned that the City was not in the position to rebut these accusations because, in the Court’s view, the City did not possess sufficient “notice” that such allegations would be made. The Court ruled that under the fourth prong of the test, with respect to this arbitration, “it is undisputed that only a single discovery violation occurred, rather than a number of violations over the course of the entire litigation.”

In view of these findings and conclusions, the Supreme Court agreed with the result reached by the Commonwealth Court that, under the circumstances of this case, the arbitrator's sanctions effectively violated the procedural due process rights of the City to present its case. In concluding its opinion, the Court noted that because of its disposition of the appeal on constitutional due process grounds, it did not reach the additional question of "whether Act 111 arbitrators may, in the first instance, impose discovery sanctions." However, a review of the Supreme Court's decision strongly suggests that arbitrator's would have inherent authority to issue appropriate sanctions for discovery violations.

**2. Parris v. State Employees' Retirement Board, No. 2066 C.D. 2008 (Commonwealth Court, issued November 2, 2009).**

In a case of first impression, the Commonwealth Court was asked to interpret the definition of "Correction Officer" set forth in Section 5102 of the State Employees' Retirement Code ("Code"). The Code provides that a correction officer meets the superannuation age requirements for eligibility upon the accrual of 35 points and reaching age 50. The Claimant filed a petition to have his service as a Therapeutic Activities Worker Manager/Activities Coordinator included within the definition of correction officer.

In affirming the administrative determination issued by SERS, the Commonwealth Court ruled that to be eligible for consideration as a "correction officer", Section 5102 requires that the "principle duty [of the job position must be] the care, custody and control of inmates or direct therapeutic treatment, care, custody and control of inmates ...". While the Claimant was required to spend a substantial amount of his time developing, coordinating and overseeing prison programs, including visiting various correctional institutions, any direct contact he had with inmates was only a "small part of his overall responsibility for activities programs and not the principal duties of his position." Accordingly, Claimant was denied credit for this service as a "correction officer."

**3. Kelly v. The Borough of Port Allegany, No. 314 C.D. 2009 (Commonwealth Court, issued November 15, 2009).**

The issue in this case is whether, under the Police Tenure Act, a police officer, after having completed the required probationary period and being retained, can be terminated for "neglect of duty" or "conduct unbecoming" for failing to report requested prior work history on his employment application. The application requested detailed disclosure of employment for the preceding 10 years and whether the employee had been terminated from such employment for cause. The officer did not list a 6-year period of employment for which he was terminated for alleged theft.

On appeal, the officer argued (1) that no theft had been committed because the property in question was purchased by him in order to perform his duties, returned at the time he was terminated, and that no criminal charges were ever filed and (2) that the

former employer's notice of these facts to his present employer was merely retaliation for his testimony regarding former employer's alleged unlawful billing practices.

In upholding the officer's termination, the Commonwealth Court affirmed the Common Pleas' ruling that it was irrelevant whether the charges for which the officer was terminated could be substantiated or that the former employer's notice to the current employer may have been improperly motivated. The Court held that the failure to include *all* relevant employment information as requested (the officer also signed a verification that the information provided was true and correct to the best of his knowledge) precluded the employer from performing a complete background check. The Court concluded that the failure to disclose prior employment for which the officer was terminated for cause was material "false representations constitute[ing] conduct unbecoming an officer" within the meaning of the Act, thereby warranting dismissal.

**4. Barringer v. State Employees' Retirement Board, No. 446 C.D. 2009 (Commonwealth Court, issued December 8, 2009).**

Commonwealth Court upheld SERS determination that a certain period of an employee's service as a "warrant officer" did not qualify as service as a "parole agent" to meet the age 50 superannuation criteria set forth in Section 5102 of the Retirement Code. The express terms of the Code provide that an "enforcement officer" may retire upon the accrual of 35 eligibility points and age 50. An "enforcement officer" is pertinently defined as: "Parole agents, classified as such by the Executive Board and employed by the [Parole Board]." While the claimant had worked as a "warrant officer" from September 2000 through August 2006 and beyond, the Executive Board did not reclassify the "warrant officer" position to a "parole agent" position until August 5, 2006. The court held that the reclassification only affected service from that date onward even though the reclassification did not involve a change in the duties performed. Accordingly, the Court concluded that the express language of the Code precluded service credit during the period the position was not classified by the Executive Board as that of a "parole agent".

**5. Neshaminy Federation of Teachers Local Union 1417 v. PLRB, No. C87 C.D. 2009 (Commonwealth Court, issued December 8, 2009).**

This decision reaffirms established precedent that for purposes of maintaining the "*status quo*" following the expiration of a collective bargaining agreement, an employer does *not* have to implement automatic longevity increases or any other automate "step" increases contained in the expired agreement. This is because the Courts have viewed such increases as constituting part of the overall wage/compensation package under negotiations. Accordingly, employers can effectively "freeze" salaries until the new contract is negotiated. If the "step" increases are retained as part of the overall wage package in the successor agreement, the employees will receive retroactive payments in order to make them whole.

**6. Shoemakersville Borough Association - and - Shoemakersville Borough,  
(Arbitrator John M. Skonier, Esquire, issued January 10, 2010).**

The Arbitrator's decision in this case involves an extremely important principle of arbitral jurisdiction and contractual interpretation governing a dispute that occurred subsequent to the Borough's abolishment of its police department, as well as following the expiration of the parties' last collective bargaining agreement. The facts giving rise to the dispute are somewhat complex.

The aggrieved police officer (a Chief of Police) suffered a serious injury while making a traffic stop on May 3, 2004. As a result, he was placed on injured-on-duty status (under the Heart and Lung Act) beginning May 4, 2004. While the officer was recovering from his disability, the Borough attempted to have him removed from the bargaining unit on the basis that he was a "managerial employee". The Pennsylvania Labor Relations Board ("PLRB") ultimately ruled against the Borough and the officer remained in the bargaining unit.

While this process was ongoing, in October 2004, after surgery and rehabilitation, the officer was released to return to work by both his personal physician, as well as the Borough's doctor. However, rather than returning him to work, the Borough placed him on paid administrative leave, again under the Heart and Lung Act, pending further investigation of "alleged disciplinary infractions" by the Borough. As a result of this disciplinary investigation, the Borough terminated the officer on February 2, 2005. The police association filed a grievance to challenge the termination, which was ultimately taken to arbitration. On May 30, 2006, the arbitrator ruled that the grievant's discharge was without just cause and he was reinstated to his position with full back pay minus adjustments for a sixty-day period (which was designed to address the arbitrator's conclusion regarding the officer's inadvertent failure to properly record his hours due to questions involving the Borough's time clock). The Borough appealed this arbitration award to the Court of Common Pleas of Berks County, which dismissed the appeal by Order dated November 14, 2006. No appeal was taken from that order.

While the Borough was challenging the officer's reinstatement, at a Borough Council meeting on June 6, 2006, the officer, on behalf of the police association, presented the Borough with a notice of intent to initiate collective bargaining pursuant to Act 111 (the parties' contract was to expire on December 31, 2006). The Borough went into executive session and during the same meeting, Borough Council publicly voted to disband its police department immediately. The police association subsequently filed two unfair practice charges with the PLRB alleging (1) that the Borough had not "totally and permanently" ceased providing police services and (2) that the Borough had unlawfully failed/refused to comply fully with the remedial relief set forth in the award ordering reinstatement.

While the unfair practice charges were pending, on June 4, 2007, the officer filed an application for disability retirement benefits. Along with his application, the officer

included a report from his treating physician indicating that the officer's condition had gradually worsened to the point that he was now permanently precluded from performing the duties of a police officer. When the Borough failed to respond to the officer's request, he filed a grievance. The parties agreed to suspend the time limits for processing the grievance pending the PLRB proceedings. Thereafter, on August 21, 2007, the Borough formally denied the grievance and the police association notified the Borough of its intention to proceed to arbitration. The Borough raised the issue of jurisdiction before the arbitrator contending that the matter was not arbitrable because (1) no collective bargaining agreement existed and (2) no bargaining obligation existed because the police department had been abolished. The parties also presented their case on the merits. On October 3, 2008, the arbitrator issued an award determining that he had no jurisdiction to hear the dispute. The officer appealed to the Court of Common Pleas of Berks County, which, by Order dated February 2, 2009, vacated the arbitrator's award and remanded the matter to the arbitrator for a determination on the merits.

After consideration of the parties' briefs on the jurisdictional issues raised by the Borough, as well as on the merits, on January 10, 2010, the arbitrator entered an award (1) finding and concluding that he did, in fact, have jurisdiction over the matter and (2) awarding the officer work-related disability retirement benefits. In reaching this result, the arbitrator initially noted that the officer "had been injured at work on May 3, 2004, ultimately resulting in the need for surgery." The arbitrator then focused on the doctor's report, which stated that:

There is no history that indicates that there has been a new injury since the original injury of May 3, 2004. There has been a gradual worsening of the patient's lower back pain without any new injury or aggravation. His chronic lower back problem is directly related [to] the work injury of May 3, 2004.

With a reasonable degree of medical certainty, it is felt that [the officer] is not capable of performing the duties of a police officer. ... In short, it is felt that he is not capable of returning to the duties of a police officer. It is felt that these restrictions are permanent.

The arbitrator emphasized that this was the "only medical evaluation of record" (the Borough presented no rebuttal medical evidence at the hearing).

The arbitrator succinctly set forth the reasons for his determination:

[The officer's medical evaluation] fully supports the contention that the Grievant was permanently disabled and not capable of returning to the duties of a police officer as of May 23, 2007. The question now becomes is whether

the Grievant was entitled to the disability pension as of June 2007, when he made his request to the Borough.

The Association points out that:

[a]rbitrators have consistently recognized that jurisdiction to hear contractual disputes exists beyond the expiration of the collective bargaining agreement, particularly when the dispute involves matters covered in the agreement governing conditions of employment that extend well beyond the life of an agreement and/or the employer's continuation of its business.

(Association's Brief, p. 11)

(See *Abington Height School District*, 28 PPER ¶28006 (Final Order, 1996); *PLRB v. Williamsport Area School District*, 486 Pa. 375, 406 A.2d 329 (1979); *Shieldalloy Corp.*, 81 LA 489 (1983); *Bunn-O-Matic Corp.*, 70 LA 34 (1977); *Nolde Brothers, Inc. v. Bakery & Confectionary Workers*, 430 U.S. 243, 51 L.Ed. 2<sup>nd</sup> 300, 97 S.Ct. 1067 (1977); *Association of Pennsylvania State College and University Facilities v. State System of Higher Education*, 505 Pa. 369, 479 A.2d 962, 966.)) In the instant matter, the parties' negotiated a provision for pension benefits. It is obvious that there are various contractual disputes that could arise concerning such benefits well after the employee left employment and/or such employment may have been discontinued.

Article XIII, Pensions, Section 3, which has remained the same in the relevant collective bargaining agreement in this matter, reads, in pertinent part, as follows:

Any Full Time Police Officer who ... becomes totally disabled due to injury sustained in the line of duty shall be deemed fully vested, and shall be eligible for retirement benefits of fifty percent (50%) of final average salary.

The credible evidence of record demonstrates that the Grievant became totally disabled on or about May 23, 2007

due to an injury sustained in the line of duty on May 3, 2004. The Grievant's injury was incurred at a time that the parties' collective bargaining agreement was in full effect and operation. There is no dispute between the parties that the original injury was work related. The fact that the Grievant was not determined to be totally disabled as a direct result of this injury until approximately three years later, after the expiration of the collective bargaining agreement and after the Borough had ceased its police operations, does not render his entitlement to disability benefits null and void. He, in essence, "vested" in the entitlement to this benefit when he was injured on the job on May 3, 2004. When it was determined, in May 2007, that his permanent disability was a direct result of that injury, he became eligible for the contractual disability pension benefits.

The Grievant's testimony was unrebutted that he was never questioned by the Borough and/or challenged regarding the sufficiency of Dr. Johnson's May 23, 2007 report; the Borough offered no competent medical evidence that would refute Dr. Johnson's report and/or conclusions and the Borough never asked the Grievant to undergo any other testing or examination.

In view of the above, the arbitrator concluded that the officer had fully met the requirements of the parties' collective bargaining agreement governing entitlement to disability pension benefits. Accordingly, the arbitrator entered an award directing the Borough to provide the officer with work-related disability retirement benefits retroactive to June 4, 2007, the date of his original request for such benefits.

This decision is extremely important and has far-reaching consequences. Initially, given the recent disbandment of several municipal, as well as regional, police departments, the decision provides a solid framework for allowing police officers to continue to grieve/arbitrate disputes flowing from expired collective bargaining agreements. Moreover, it establishes that certain contractual benefits, particularly in the area of pensions, remain grievable well after the contracts under which rights have "vested" expire and, significantly, beyond the officer's active employment with the police department. This is of particular help to retired members who experience disputes with their employers following the termination of their employment. Employers have frequently argued that there is no jurisdiction to resolve such disputes contending that retirees are no longer "employees" covered by the collective bargaining agreement. The Shoemakersville decision is based upon a body of federal, state and arbitral precedent that directly refutes such jurisdictional arguments.