

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FOP LODGE 56 GENERAL GREENE :
 :
 v. : Case No. PF-C-23-73-E
 :
 CITY OF GREENSBURG :

PROPOSED DECISION AND ORDER

On August 14, 2023, the Fraternal Order of Police General Greene Lodge 56 (FOP or Union) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) against the City of Greensburg (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, by refusing to bargain the impact of a Medicare Withholding Tax implemented on July 14, 2023.

On September 15, 2023, the Secretary of the Board issued a Complaint and Notice of Hearing, assigning the matter to conciliation, and directing a hearing on December 4, 2023, if necessary. The parties subsequently agreed to proceed by way of joint stipulations of fact in lieu of an evidentiary hearing. The Board received the duly executed Joint Stipulations of Fact on December 1, 2023. The parties each filed separate post-hearing briefs in support of their respective positions on January 12, 2024.

The Hearing Examiner, on the basis of all matters and documents 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. (Joint Exhibit 9)¹
2. The FOP is a labor organization under Act 111, as read *in pari materia* with the PLRA. (Joint Exhibit 9)
3. The FOP is the exclusive bargaining representative for a unit of police employees at the City. (Joint Exhibit 1, 9)
4. The FOP and the City are parties to a collective bargaining agreement (CBA) effective January 1, 2022 to December 31, 2026. (Joint Exhibit 1, 9)
5. The City's police employees 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. (Joint Exhibit 9)²

¹ The Joint Stipulation of Facts has been marked as Joint Exhibit 9, as the parties have attached eight exhibits to the Joint Stipulation of Facts, which will be identified as Joint Exhibits 1 through 8, respectively.

² Section 218(a)(1) of the Social Security Act provides, in relevant part, that "[t]he Commissioner of Social Security shall, at the request of any State, enter into an agreement with such State for the purpose of extending the insurance system established by this title to services performed by

6. While municipal governments are allowed to opt out of the Social Security Retirement System, all municipal employes hired after April 1, 1986 were required to be enrolled in the Medicare System. Under the Medicare System, employes are required to pay 1.45 percent of their pay into the Medicare Trust Fund, which is withheld from their pay and required by law. (Joint Exhibit 9)³

7. All current members of the bargaining unit were hired after April 1, 1986. (Joint Exhibit 9)

8. 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. (Joint Exhibit 2, 9)

9. By email dated May 2, 2023, the City's Solicitor, Zachary Kansler, indicated to FOP President, Robert Jones, in relevant part, the following:

Mr. Jones,

I believe Chief Irvin spoke with you about this last evening.

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 [the 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.

Please let me know if you have any questions or concerns or wish to have a meeting concerning this...

(Joint Exhibit 3, 9)

10. By email dated June 15, 2023, Kansler indicated to Jones, in relevant part, the following:

Good Afternoon Mr. Jones.

individuals as employees of such State or any political subdivision thereof..." 42 U.S.C. § 418.

³ 26 U.S.C. § 3101(b)(1) 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..."

As discussed in the below email, the IRS recently did an audit of the City's 2021 expenses and it was anticipated that there would be a finding that the Police Officers are subject to FICA withholdings for the Medicare portion only. The City received the audit findings, which in the attached document find that the Police Officer employees hired after 4/1/1986 are subject to Medicare tax withholdings. The City will be sending an email to the Police Officer employees tomorrow that the withholding will begin with the July 14, 2023 payroll.

Police Officer employees will not be subject to payment of back taxes that were not withheld...

(Joint Exhibit 3, 9) (Emphasis in original)

11. 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 FOP members for the pay period of 2021. (Joint Exhibit 4, 9)

12. The City had not been deducting the Medicare Tax from the pay of the FOP members since April 1, 1986. (Joint Exhibit 9)

13. By email dated June 16, 2023, the City's Fiscal Director/City Treasurer, Trisha Hilderhoff, indicated to the bargaining unit employees the following, in relevant part:

Hello,

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 7/14/2023 pay date, the Medicare portion of the FICA tax will be withheld from your paycheck.

Below is a link with information on Medicare coverage for local government employees...

Please let me know if you have any questions regarding this change...

(Joint Exhibit 5, 9) (Emphasis in original)

14. On June 28, 2023, the City paid \$87,718.28 for the unpaid Medicare Tax deduction for the FOP members for the pay period of January 1, 2021 through December 31, 2021. (Joint Exhibit 6, 9)

15. The first paychecks with the Medicare deductions were distributed on July 14, 2023. The deductions equaled 1.45 percent of the employees' pay, as required by law. (Joint Exhibit 9)

16. By letter dated July 14, 2023, FOP President Jones indicated the following, in relevant part, to Mayor Robert Bell of the City:

Mayor Bell:

The City has made a unilateral change in members['] compensation through the deduction of a Medicare taxes [sic]. This action has a severable impact upon wages, hours, benefits, retirements, pensions and other terms and conditions of employment which is now apparent to each bargaining unit member. Accordingly, the FOP demands to bargain over the effects of this decision in accordance with Act 111.

(Joint Exhibit 7, 9)

17. On August 7, 2023, authorized City and FOP representatives had a meeting to discuss the deduction. FOP President Jones requested a commensurate increase in pay to match the Medicare Tax deduction. (Joint Exhibit 9)

18. By letter dated August 10, 2023, Mayor Bell indicated the following, in relevant part, to FOP President Jones:

Lieutenant Jones,

City Council has reviewed your request 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...

(Joint Exhibit 8, 9)

19. The FOP has not previously demanded raises or bargaining from the City based upon the implementation of a new tax or tax increase. (Joint Exhibit 9)

DISCUSSION

The FOP has charged the City with violating Section 6(1)(a) and (e) of the PLRA⁴ and Act 111 by refusing to bargain the impact of a Medicare Withholding Tax implemented on July 14, 2023. The FOP does not question the City's decision to concede the tax liability to the IRS and not litigate or appeal the determination. Instead, the FOP specifically claims that the assignment of this tax to the employees is a separate decision that has a severable impact on employees since the City could potentially incur the payment through a wage adjustment or even reimbursement. The City, meanwhile, contends that the charge should be dismissed because the deduction of the Medicare Tax is legally mandatory and not subject to bargaining. The City also maintains that the CBA does not contain any language regarding the imposition of taxes or the impact thereof and that there is no severable

⁴ Section 6(1) of the PLRA provides that "[i]t shall be an unfair labor practice for an employer: (a) To interfere with, restrain or coerce employees in the exercise of the rights guaranteed in this act... (e) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section seven (a) of this act." 43 P.S. § 211.6.

impact from the City's obligation to withhold the Medicare taxes from the employees' pay.

The Board has long held that an employer's decision to withhold FICA deductions from employee pay is an exercise of inherent managerial prerogative since the employer lacks the discretion to withhold and must ensure compliance with federal law. Pennsylvania Office of the Budget, 18 PPER ¶ 18138 (Final Order, 1987).⁵ Where a matter is not a mandatory subject of bargaining, however, an employer may still have an obligation to negotiate over the impact that a managerial prerogative decision has on the employees' wages, hours, and working conditions. Wilkes-Barre Police Benevolent Ass'n v. City of Wilkes-Barre, 29 PPER ¶ 29240 (Final Order, 1998). The Commonwealth Court has adopted a four-part test for a prima facie cause of action when a public employe alleges a refusal to bargain over the impact of a matter of managerial prerogative. Lackawanna County Detectives' Ass'n v. PLRB, 762 A.2d 792 (Pa. Cmwlth. 2000). First, the employer must lawfully exercise its managerial prerogative. Second, there must be a demonstrable impact on wages, hours, or working conditions, matters that are severable from the managerial decision. Third, the union must demand to negotiate these matters following management's implementation of its prerogative. And fourth, the public employer must refuse the union's demand. *Id.* at 794-795.

As detailed above, the FOP contends that the Medicare portion of the FICA deductions had a severable impact on the police employes because the City could potentially incur the payment through a wage adjustment or subsequent reimbursement to the employes. However, the police employes still receive the same gross wages they did before pursuant to the CBA. And, the police employes 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 employes.⁶ As a result then, the FOP's contention is essentially an argument that the City's managerial decision had a severable impact on the employes 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 employee pay beginning on July 14, 2023, led to the direct and necessary

⁵ Although this case was decided under the Public Employe Relations Act, and not the PLRA and Act 111, the FOP essentially concedes that the underlying decision to withhold the Medicare portion of the FICA deductions was not bargainable, as the FOP has limited both its charge and post-hearing brief to a discussion regarding the effects or impact of the City's decision.

⁶ 26 U.S.C. § 3102(f)(3) provides that "[t]o the extent that the amount of any tax imposed by section 3101(b)(2) is not collected by the employer, such tax shall be paid by the employee."

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. Indeed, at least one Board hearing examiner has opined that, where the charging party seeks to bargain over losses necessarily resulting from an employer's exercise of a managerial prerogative, then requiring bargaining to restore those losses would be tantamount to bargaining over the exercise of the managerial prerogative itself. Mt. Lebanon Education Ass'n v. Mt. Lebanon School District, 35 PPER 43 (Proposed Decision and Order, 2004) (citing Wilkes-Barre Police Benevolent Ass'n v. City of Wilkes-Barre, 29 PPER ¶ 29240 (Final Order, 1998) (loss of overtime opportunities was an inseparable consequence of the employer's managerial prerogative decision); Fraternal Order of Police Lodge 5 v. City of Philadelphia, 28 PPER ¶ 28048 (Final Order, 1997) (same); Brookville Borough, 27 PPER ¶ 27005 (Final Order, 1995) (same); PSSU Local 668, SEIU v. Commonwealth of Pennsylvania, Dept. of Public Welfare, 33 PPER ¶ 33021 (Proposed Decision and Order, 2001) (no smoking rule at new office space was an inseparable consequence of the employer's managerial prerogative decision to relocate operations). Thus, requiring the City to bargain to restore the net losses in employee 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. But that decision is a managerial prerogative over which the City has no bargaining obligation with the FOP. Accordingly, the charge under Section 6(1)(a) and (e) of the PLRA must be dismissed.

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 not committed unfair labor practices in violation of Section 6(1)(a) or (e) of the PLRA.

ORDER

In view of the foregoing and in order to effectuate the policies of the PLRA and Act 111, the 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 days of the date hereof, this decision and order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this 27th day of February, 2024.

PENNSYLVANIA LABOR RELATIONS BOARD

/s/ John Pozniak
John Pozniak, Hearing Examiner