IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania, Department of Corrections, Petitioner	:	
v.	:	No. 1360 C.D. 2011
	:	Argued: December 12, 2011
Pennsylvania State Corrections Officers Association, Respondent	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** President Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER[1] **FILED: March 22, 2012**

The Commonwealth of Pennsylvania, Department of Corrections (Department), petitions for review of an interest arbitration award issued by a panel of arbitrators pursuant to Section 805 of the Public Employe Relations Act (Act 195).[2] At issue are two provisions of the award, a health care benefits paragraph in which the panel majority retained jurisdiction over the issue of all employee plan benefits for the term of the collective bargaining agreement (CBA) and a paragraph

[1] This case was assigned to the opinion writer on or before January 6, 2012, when President Judge Leadbetter completed her term as President Judge.

[2] Act of July 23, 1970, P.L. 563, *as amended*, 43 P.S. § 1101.805.

making optional the wearing of slash/stab resistant protective body armor (vests). The Department's arbitrator concurred with the health care benefit paragraph, but dissented to the vest paragraph. We affirm the decision of the panel majority.[3]

The relevant background of this case is as follows. Noting that the Pennsylvania Employee Benefit Trust Fund (PEBTF) provides quality health insurance benefits, the panel majority nonetheless found that the current funding levels exceeded what was necessary to provide those benefits. Accordingly, "[w]ith the parties' assistance, the Panel . . . identified approximately $40 million in savings by reducing current funding levels to contribution levels necessary to maintain the quality benefits enjoyed by the PEBTF participants." June 29, 2011 Arbitration Decision at 1-2. In addition, it retained jurisdiction, stating its intention to reconvene immediately if during the term of the CBA "the plan provider announces the intention to substantially alter existing benefits." *Id.* at 6.

As for the vests, the panel majority noted that the 2005 interest arbitration award between the parties mandated that corrections officers wear protective body armor. During the term of that contract, however, many bargaining unit members experienced discomfort and other issues with the vests. The members, therefore, renewed their demand to make the vests optional. While noting the Department's legitimate safety concerns and the possibility of injury absent the vests, the panel majority in its 2011 decision nonetheless agreed to make the vests optional, concluding that "[t]he corrections officers are in the best position to assess the wearability and workability of the vests" and "recogniz[ing]

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[3] Our narrow certiorari review permits us "to consider only questions relating to the arbitrators' jurisdiction, the regularity of the proceedings, an excess of the arbitrators' powers and constitutional deprivations." *Dep't of Corr. v. Pa. State Corr. Officers Ass'n*, 608 Pa. 521, 537, 12 A.3d 346, 356 (2011).

the sound judgment and discretion of the individual corrections officer to perform his/her job most effectively and, most importantly, in a safe manner." *Id.* at 3-4. The dissenting Department arbitrator stated: "The issue of slash proof vests is a non-mandatory subject of bargaining which can only be altered with the express consent of the Commonwealth. Absent that consent, notwithstanding the majority's recommendations, the wearing of the vests remains a requirement of the job." *Id.* at 16. We turn first to the health care benefits paragraph.

Health Care Benefits

In pertinent part, the health care benefits provision at issue provides as follows:

> b. It is the express intention of the Panel to set contribution levels at a rate at which the Plan Trustees can maintain plan benefits through June 30, 2014 in substantially the same configuration as currently exists. Accordingly, *the Panel retains jurisdiction over the issue of all employee plan benefits for the term of the [CBA]* as set forth herein. *If during that term, the plan provider announces the intention to substantially alter existing benefits, the Panel shall be immediately reconvened to examine the issues of the modification of employer contributions and/or to address any proposed plan design changes*.

Id. at 5-6 (emphasis added).

Citing the doctrine of *functus officio*, the Department argues that the panel majority erred in retaining jurisdiction over health care benefits in that it had exhausted its jurisdiction and authority with respect to the subject matter and issues submitted by the parties. That doctrine provides:

> [A]rbitrators are the final judges of both the facts and the law and their decision will not be disturbed for a mistake of fact or of law . . . . It is an equally fundamental

> common law principle that once an arbitrator has made and published a final award his authority is exhausted and he is *functus officio* and can do nothing more in regard to the subject matter of the arbitration.

Symons v. Schuylkill Cnty. Voc. Sch., 884 A.2d 953, 957 (Pa. Cmwlth. 2005) [quoting *Stack v. Karavan Trailers, Inc.*, 864 A.2d 551, 556 (Pa. Super. 2004)]. We reject the Department's argument.

In *Symons*, this Court noted, citing *La Vale Plaza, Inc. v. R.S. Noonan, Inc.*, 378 F.2d 569 (3d Cir. 1967), that the doctrine of *functus officio* is a common law concept and applies to common law arbitrations, thus rejecting a furloughed teacher's argument that it should apply to arbitrations under the Uniform Arbitration Act.[4] The case at bar similarly involves a public sector union and case law supports the Association's position that the retention of jurisdiction over various provisions in arbitration awards is a sanctioned mechanism in the realm of public sector interest arbitration in Pennsylvania. *See Schuylkill Haven Borough v. Schuylkill Haven Police Officers Ass'n*, 914 A.2d 936 (Pa. Cmwlth. 2006) (reopener to address issues of officer pension contributions and part-timer participation in overtime opportunities); *W. Pottsgrove Twp. v. W. Pottsgrove Police Officers Ass'n*, 791 A.2d 452 (Pa. Cmwlth. 2002) (retained jurisdiction to ensure that specific mandate for actuarial study be followed); *Greater Latrobe Area Sch. Dist. v. Pa. State Educ. Ass'n*, 615 A.2d 999 (Pa. Cmwlth. 1992) (unless the CBA provides otherwise, arbitrator can retain jurisdiction to make final determinations on procedural issues); *Police Officers of the Borough of Hatboro v. Borough of Hatboro*, 559 A.2d 113 (Pa. Cmwlth. 1989) (reopener for sole purpose of renegotiating wage provision of contract in the event that pension plan is

[4] 42 Pa. C.S. §§ 7301-7362.

required to include additional compensation in excess of annual base salary to compute retirement benefits in the future for any reason). Accordingly, given the fact that the Department has not alleged that there is anything in the CBA prohibiting the retention of such jurisdiction, we conclude that the panel majority did not err in so doing in the present case.[5]

The Department next maintains that the panel majority exceeded its authority by mandating that it could reconvene to address an issue in the event of some future action of a third party such as the PEBTF board of trustees. Noting that only the board has the power "to determine the extent and level of health insurance and benefits to be extended by PEBTF to the officers and other state employees covered by the trust agreement,"[6] the Department argues that, even if the panel were to reconvene, it would not be permitted to alter the board's decisions.

As noted above, the health care benefits provision at issue provides that if during the term of the CBA, "the plan provider announces the intention to substantially alter existing benefits, the Panel shall be immediately reconvened to examine the issues of the modification of employer contributions and/or to address any proposed plan design changes." It does not provide that the panel would usurp the PEBTF board of trustee's role, merely that the board's actions might necessitate that the panel take further appropriate action. We, therefore, reject the

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[5] In *West Pottsgrove Township*, we noted that "the arbitrator's retention of jurisdiction serves to avoid that which we cautioned against in *Greater Latrobe*, *i.e.*, delay in final resolution, unnecessary time and expense and relitigation." *W. Pottsgrove Twp.*, 791 A.2d at 457.

[6] *Pa. State Park Officers Ass'n v. Pa. Labor Relations Bd.*, 854 A.2d 674, 677 (Pa. Cmwlth. 2004).

Department's argument that the panel majority exceeded its authority in that regard and turn now to its resolution of issues concerning the wearing of vests.

Vests

The vest provision provides as follows:

> **6. Uniforms, Clothing and Equipment:** Within 21 days of issuance of this Award, each H-1 bargaining unit member who elects to be provided with a stab/slash vest shall be issued one by the employer. Such employees shall be required, as a term and condition of employment, to wear such a vest at all times while on duty for the period equal to the useful life of the vest as per manufacturer specifications. *Those employees who do not choose to be issued a vest, shall neither receive one, nor be required to wear a vest while on duty.*

Arbitration Decision at 7-8 (emphasis added).

The Department contends that the panel majority exceeded its authority by granting the Association's proposal to remove from the CBA the mandatory vest requirement and by failing to hold that it was within the Department's inherent managerial rights to determine that vests were mandatory. It maintains that the wearing of safety equipment is an inherent managerial prerogative such that the topic is unrelated to a bargainable term or condition of employment, thus placing it beyond the arbitrators' authority.

We first address the Association's contention that the Department waived the issue of whether vests are a non-mandatory subject of bargaining. The Pennsylvania Rules of Appellate Procedure provide that "[n]o question shall be heard or considered by the court which was not raised before the government unit." Pa. R.A.P. 1551(a). An arbitration panel such as the one involved here falls within the definition of a "government unit." Pa. R.A.P. 101; *Pa. State Corr. Officers*

Ass'n v. Commonwealth, 976 A.2d 1236 (Pa. Cmwlth. 2009*), appeal denied*, 606 Pa. 652, 992 A.2d 890 (2010). The Association asserts that: "At no point during the proceeding did the Commonwealth object [to the union proposal concerning slash resistant vests], or assert that the issue was not a mandatory subject of bargaining." Association's Brief at 11. The Department counters that it "asserted its interests" regarding the vest policy, to wit, that the policy served to maintain safety and order in its facilities. While this interest is clearly relevant to the question of whether the issue is bargainable, it is also relevant to the merits of the Association's proposal. In other words, to explain the nature of the Department's interest is quite different from making the legal argument that the issue is outside the authority of the arbitration panel. The Department also argues that the issue goes to the jurisdiction of the arbitration panel, and, therefore, can be raised at any time. We disagree.

It has repeatedly been held that arbitrators *exceed their authority* when they require an employer to perform an illegal act or to perform an action unrelated to a bargainable term or condition of employment under Section 701 of Act 195.[7] Excess of arbitral powers and lack of jurisdiction are separate enumerated elements of narrow certiorari review, not alternate descriptions of the same claim of error. Indeed, in *Department of Corrections v. Pennsylvania State Corrections Officers Association*, 608 Pa. 521, 12 A.3d 346 (2011), when our Supreme Court analyzed the issue presented here, *i.e.*, whether a particular provision was a matter of inherent managerial prerogative rather than a bargainable condition of employment, the court treated the claim—as has consistently been done—as a

[7] 43 P.S. § 1101.701.

question of the arbitrators' power, and noted that "no . . . jurisdictional question has been raised." *Id.* at 537, 12 A.3d at 356.

Finally, the Department has asserted that the legal argument was raised in unrecorded executive sessions, and points out that its arbitrator dealt with the issue in his dissenting opinion.[8] However, given the Association's unequivocal statement that the issue was not raised before the award [including the dissent] was entered, we must look to the record to resolve the conflict, and can find nothing therein to establish that the issue was preserved. Nonetheless, although the record leads us to conclude that the issue was waived, in light of all the circumstances, we deem it appropriate to address the merits of the Department's argument.

Certainly, the vest issue involves, to some extent, the Department's inherent managerial prerogative to control operations and maintain a safe environment at its correctional facilities. Even the Department, however, acknowledges that the vest policy also involves a condition of employment. Department's Brief at 12. As our Supreme Court has noted:

> Because management decisions regarding policy or direction almost invariably implicate some aspect of employer-employee relations or the workplace, disputed arbitration awards more often than not concern both the terms and conditions of employment and the public employer's managerial prerogatives.

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[8] We cannot agree with the Department that its appointed arbitrator's subsequent dissent on the issue constituted raising it on behalf of the Department. In support of its argument, the Department cites *Department of Corrections v. Pennsylvania State Corrections Officers Association*, 932 A.2d 359, 364-65 (Pa. Cmwlth. 2007), *aff'd in part and rev'd in part*, 608 Pa. 521, 12 A.3d 346 (2011), holding that the Department did not waive the issue of whether adopting the Association's proposed changes would exceed the panel's authority, in part, because its appointed arbitrator dissented from the award as being contrary to law. In that case, however, we additionally noted that the record revealed that the Department also independently raised the issue at several points during those arbitration proceedings.

City of Phila. v. Int'l Ass'n of Firefighters, Local 22, 606 Pa. 447, 472, 999 A.2d 555, 570 (2010). When such a hybrid item is in dispute, the following test applies:

> Under the excess-powers prong of narrow certiorari, the following test applies: first, the court asks whether the item in dispute is rationally related to the terms and conditions of employment, *i.e.*, whether it is germane to the working environment. If not, then the item is not subject to mandatory bargaining. If a rational relationship does exist, however, the court then inquires whether collective bargaining over the topic would unduly infringe upon the public employer's essential managerial responsibilities. If so, the award reflects an excess of the arbitrators' powers.

Dept' of Corr. v. Pa. State Corr. Officers Ass'n, 608 Pa. at 539-40, 12 A.3d at 357. In addition, the Court acknowledged the applicability of several balancing tests to employ in these situations. Under *Pennsylvania Labor Relations Board v. State College Area School District*, 461 Pa. 494, 337 A.2d 262 (1975), the balancing test weighs the directness of the impact of the issue on the employee's wellbeing against its effect on the operation of the agency in question. In *Borough of Ellwood City v. Pennsylvania Labor Relations Board*, 606 Pa. 356, 998 A.2d 589 (2010), the Court noted a weighing paradigm under which it is to be determined "whether the impact of the issue on the interest of the employe in wages, hours and terms and conditions of employment outweighs its probable effect on the basic policy of the system as a whole." *Id.* at 376 n.13, 998 A.2d at 600 n.13 [quoting *Pa. Labor Relations Bd. v. State College Area Sch. Dist.*, 461 Pa. 494, 507, 337 A.2d 262, 268 (1975)].

Applying any of these tests, we must reach the same conclusion: the arbitration panel did not exceed its lawful powers. As the Association emphasizes, it presented the testimony of numerous correctional officers who testified that more

than the uncomfortable nature of the vests was at issue. They represented that the vests simply caused the target of assault to move to their heads and necks and did not result in less assaults on corrections officers. Further, the Department presented scant, if any, evidence in support of its contention that the officers were safer wearing vests and that vests further advanced its mission to protect the public by confining persons committed to custody in safe and secure facilities. Clearly, the issue is directly related to terms and conditions of employment and the Department failed to establish that bargaining over the wearing of vests would unduly infringe on its essential managerial responsibilities.

Accordingly, we affirm the panel majority's decision.

Bonnie B. Leadbetter

BONNIE BRIGANCE LEADBETTER,
President Judge

Judges Leavitt and Brobson did not participate in the decision in this case.

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ORDER

AND NOW, this 22nd day of March, 2012, the interest arbitration award is hereby AFFIRMED.

Bonnie B. Leadbetter

BONNIE BRIGANCE LEADBETTER,
President Judge