
**In the Matter of Arbitration
Between**

Commonwealth of Pennsylvania

And

**Council 13, American Federation
of State, County and Municipal
Employees, AFL-CIO**

Grievance Nos.

13-SW-0000-00660-FL

13-SW-0000-00661-RF

13-SW-0000-00662-RF

13-SW-0000-00663-FL

**Class Action – Interest on delayed wages
Before Michael E. Zobrak, Arbitrator**

Appearances:

For the Commonwealth: Frank A. Fischer, Acting Chief Counsel

For the Union: Alaine S. Williams, Esquire

Place of Hearing: Harrisburg, Pennsylvania

Date of Hearing: August 27, 2010

Record Closed: October 19, 2010

Date of Award: November 13, 2010

Type of Grievance: Interest on delayed wages

Award: The grievance is sustained

ADMINISTRATION

The undersigned was notified of his selection to serve as the arbitrator to hear and decide a matter then in dispute between them. A hearing went forward on August 27, 2010, at which time both parties were afforded the opportunity to present testimony, written evidence and arguments in support of their respective positions. At the conclusion of the hearing, the parties elected to file post-hearing briefs. The record was closed on October 19, 2010, following receipt of those briefs. The matter is now ready for final determination.

GRIEVANCE AND QUESTION TO BE RESOLVED

13-SW-0000-00660-FL: Most Employees are not receiving appropriate compensation in accordance with Recommendation 19, Section 1 and 13, due to the lack of an approved Pennsylvania State budget beginning with the pay date July 17, 2009.

13-SW-0000-00661-RF: Most Employees are not receiving appropriate compensation in accordance with Article 19, Section 1 and 12, due to the lack of an approved Pennsylvania State budget beginning with the pay date July 17, 2009.

13-SW-0000-00662-RF: Employees received incorrect compensation in accordance with Article 20 starting with pay checks issued on July 17, 2009 for overtime hours worked prior to this July 17, 2009 date.

13-SW-0000-00663-FL: Employees received incorrect compensation in accordance with Recommendation 20 starting with pay checks issued on July 17, 2009 for overtime hours worked prior to this July 17, 2009 date.

The issue in this case is whether the Commonwealth violated the Master Agreement and the Master Memorandum when it delayed payment of employees' wages and, if so, what is the appropriate remedy.

RELEVANT PORTIONS OF THE MASTER AGREEMENT AND MASTER MEMORANDUM

The following provisions of the parties' July 1, 2007 – June 30, 2011 Master Agreement are relevant to the resolution of this dispute:

ARTICLE 19 – SALARIES AND WAGES

Section 1: Effective July 1, 2007, employees will continue to be paid in accordance with the January 1, 2007 Standard Pay Schedule in Appendix A.

Section 12: The salaries of employees shall be paid biweekly. In the event the payday falls on a holiday, the preceding day shall be a payday.

ARTICLE 20 – OVERTIME

Section 7: Payment for overtime is to be made the pay day of the first pay period following the pay period in which the overtime is worked. For the purpose of this Section, and in the determination of this time, pay periods will be considered as after-the-fact.

ARTICLE 35 – MISCELLANEOUS PROVISIONS

Section 3: In the event that any provision of this agreement requires legislative action to become effective, including but not limited to the amendment to existing statutes, the adoption of new legislation, or the granting of appropriations, it shall become effective only if such legislative action is taken. The parties, however, mutually agree to make recommendations to the Legislature which may be necessary to give force and effect to the provisions of this Agreement.

The following provisions of the parties' July 1, 2007 – June 30, 2011 Master Memorandum are relevant to the resolution of this dispute:

RECOMMENDATION NO. 19 – SALARIES AND WAGES

Section 1: Effective July 1, 2007, employees will continue to be paid in accordance with the January 1, 2007 Standard Pay Schedule in Appendix A.

Section 13: The salaries of employees shall be paid biweekly. In the event the payday falls on a holiday, the preceding day shall be a payday.

RECOMMENDATION NO. 20 – OVERTIME

Section 8: Payment for overtime is to be made the pay day of the first pay period following the pay period in which the overtime is worked. For the purpose of this Section, and in the determination of this time, pay periods will be considered as after-the-fact.

RECOMMENDATION NO. 35 – MISCELLANEOUS PROVISIONS

Section 1: In the event that any provision of this Memorandum requires legislative action to become effective, including but not limited to the amendment to existing statutes, the adoption of new legislation, or the granting of appropriations, it shall

become effective only if such legislative action is taken. The parties, however, mutually agree to make recommendations to the Legislature which may be necessary to give force and effect to the provisions of this Memorandum.

FACTUAL BACKGROUND

AFSCME Council 13 (“Union”) and the Commonwealth of Pennsylvania (“Commonwealth”) are signatory to a Master Agreement and Master Memorandum encompassing rank-and-file employees and first level supervisors, respectively. The relevant language in both the Master Agreement and Master Memorandum is essentially identical.

The Commonwealth’s fiscal year ends on June 30, and a new fiscal year begins on July 1. Due to a budget impasse, the Commonwealth withheld compensation for employees beyond the expiration of the fiscal year on June 30, 2009, although employees continued working beyond that date. Working without pay caused significant hardship for many Commonwealth employees who, according to the testimony of the Union’s Executive Director, were not eligible to receive unemployment compensation.

Richard Jennings, a Department of General Services employee, testified that he had a wife with serious health problems, including a heart transplant and kidney failure which required dialysis and expensive medication. He testified that he got behind on his mortgage and incurred late fees. He also had trouble paying his utilities and making his car payment. His credit worsened. He could not secure a credit union loan or a bank loan. He received some money from his church.

Tangerine Irvin, a PennDOT employee, testified that her car broke down and she did not have the funds to get it repaired. She was forced to obtain welfare and food stamps. She was denied a credit union loan, but received some help from her church. She also struggled to pay her day care fees for her daughter. Ms. Irvin was forced to move out of her apartment.

Jan Rullo, a Department of Labor and Industry employee, testified that her husband was retired and she had to sell goats from her farm in order to make ends meet. She testified that she had been living paycheck to paycheck and the lack of pay caused her extreme hardship. Della Selner, an Office of Administration employee, testified that she has two children, including a daughter who counted on her income in order to attend

beauty school. She stated that struggled to pay her parking fees when she went to work. She had a monthly mortgage of \$564 per month and incurred late fees of \$45 per month when she was unable to make her payments.

On August 5, 2009, the Commonwealth passed a supplemental appropriations bill for the purpose of paying the salaries and overtime of Commonwealth employees. After passage of the supplemental appropriations bill on August 5, 2009, employees were paid the compensation that had been withheld due to the budget impasse. Some employees were paid on August 7, some on August 10, and some on August 14.

On July 17, 2009, the Union filed the instant class action grievances, alleging that the Commonwealth violated Articles 19 and 20 of the Master Agreement and Recommendations 19 and 20 of the Master Memorandum by failing to pay employees on a biweekly basis during the time of the budgetary impasse. As a remedy the Union sought the payment of interest on all compensation, including overtime, which was withheld until passage of the supplemental appropriations bill and ultimate payment to the employees.

The Union maintains that there were approximately 41,794 bargaining unit employees who were affected by the budget impasse. They were not paid their withheld biweekly wages until passage of the supplemental appropriations bill. The Union also alleges that there were an additional 1,079 affected employees who were employed by three independent Commonwealth agencies who were also not timely paid. The Union seeks the payment by the Commonwealth of 6% interest on all delayed regular and overtime wages for all affected employees, compounded daily. The Union also seeks the payment of interest on the total amount of unpaid interest.

CONTENTIONS OF THE PARTIES

UNION CONTENTIONS

The Union contends that the Master Agreement and Master Memorandum were violated by the Commonwealth's failure to make biweekly payment of regular and overtime wages during the budget impasse. This arbitration concerns only what the remedy shall be for the breach. When it became apparent to the Commonwealth that an annual appropriation bill would not be passed by June 30, 2009, the Governor refused to consider or support a supplemental appropriations bill to secure timely payment of wages

to employees. Had the Commonwealth supported a supplemental appropriations bill prior to July 1, “payless paydays” could have been avoided.

The Union asserts that the Commonwealth’s anticipated defense that Article 35, Section 3 of the Master Agreement and Recommendation 35, Section 1 of the Master Memorandum gave it license to violate the biweekly pay provisions must be rejected. This same argument was rejected by Arbitrator Charles L. Mullin, Jr., in a 1978 decision dealing with the same issue as is dealt with in this case.

The Union argues that an award of interest is necessary to make the employees whole for the Commonwealth’s breach of the Master Agreement and Master Memorandum. An award of interest compensates the employee for the time value of money not received on the contractually-mandated paydays. Without an award of interest, the contractual provision requiring that “[t]he salaries of employees shall be paid biweekly” would be rendered meaningless. The Commonwealth could simply pay employees whenever it chooses, without any consequences. The concept that interest is necessary in order to make a grievant whole does not necessarily require fault on the part of the offending party. The Union requests that the grievance be sustained.

COMMONWEALTH CONTENTIONS

The Commonwealth takes the position that it did not violate the Master Agreement and Master Memorandum when it did not timely pay employees during the period of the budget impasse. It was unable to make payments during the budgetary impasse because there was no appropriation bill authorizing the payments. Article III, Section 24 of the Constitution of Pennsylvania states, “No money shall be paid out of the Treasury, except on appropriations made by law and on warrant issued by the proper officers. . . .” Pursuant to the Constitution, the Treasury can pay out no money unless authorized by specific appropriations legislation. Case law in effect at the time supported this proposition. In July 2008, the Commonwealth Court of Pennsylvania held that the Fair Labor Standards Act does not pre-empt the Pennsylvania Constitution and does not authorize the payment of wages for FLSA-covered employees in the absence of an appropriation. Although this decision was later overturned by the Pennsylvania Supreme Court, the fact remains that it was the law of the Commonwealth at the time of the budgetary impasse.

The Commonwealth also argues that the clear language of the Master Agreement and Master Memorandum, at Article 35 and Recommendation 35, respectively, provides justification for the non-payment of wages in the absence of an appropriations bill. This provision, argues the Commonwealth, makes the wage and overtime payment provisions – Articles 19 and 20 and Recommendations 19 and 20 – contingent upon “the granting of appropriations.”

The Commonwealth further asserts that the awarding of interest is inappropriate because the Commonwealth did not intentionally seek to avoid its obligation to pay wages. The awarding of interest would amount to punitive damages against the Commonwealth. Arbitrators are historically reluctant to award interest. Interest is especially inappropriate in the instant case because the Commonwealth did not act arbitrarily or capriciously.

The Commonwealth argues that, even if the arbitrator finds that the Commonwealth violated the Master Agreement and Master Memorandum, interest should not be awarded because the amount of interest to be received by individual employees would be *de minimis*. Every breach of a collective bargaining agreement does not necessarily require a remedy. In the instant case the amount to be paid to each employee would be approximately two to five dollars. Such a small payment would not amount to any real remedy for the affected employees. The Commonwealth seeks denial of the grievance.

DISCUSSION AND FINDINGS

The issue to be determined is whether the Commonwealth violated Articles 19 and 20 of the Master Agreement and Recommendations 19 and 20 of the Master Memorandum when it failed to pay employees on a biweekly basis during the period of a budget impasse in July 2009. The Commonwealth’s fiscal year ended on June 30, 2009, without a new budget having been passed. Commonwealth employees, however, were required to work without pay for several weeks until a supplemental appropriations bill was passed on August 5, 2009. Upon passage of the supplemental appropriation, the employees were paid all of their withheld regular and overtime wages. The Union asserts that the Commonwealth did violate the Master Agreement and Master Memorandum by failing to pay the employees on a biweekly basis during the budget impasse. The Union

seeks payment by the Commonwealth of interest on all withheld wages, including interest on the interest, until the time that the interest payment is made.

Article III, Section 24 of the Pennsylvania Constitution provides as follows: “No money shall be paid out of the Treasury, except on appropriations made by law and on warrant issued by the proper officers. . . .” In Council 13, AFSCME, et al. v Commonwealth of Pennsylvania, et al., 954 A.2d 706 (Pa. Cmwlth. 2008), the Commonwealth Court held that the Fair Labor Standards Act does not preempt the Pennsylvania Constitution, and thus wages for FLSA-covered employees cannot be paid in the absence of an appropriation. The Court specifically stated as follows:

This court declines to follow the pre-emption analysis of Casey, which is not binding because it is a single-judge opinion. This court concludes that there exists no conflict between the FLSA and Article III, Section 24; the two provisions address different concerns. Congress did not intend the FLSA to authorize public employers to raid their treasuries to make payroll on time. In sum, The Court holds that the FLSA does not preempt Article III, Section 24 of the Pennsylvania Constitution.

Id. at 716. This case was later overruled by the Pennsylvania Supreme Court. It, however, was the status of the law at the time of the budget impasse in July 2009. The Commonwealth argues that its hands were tied and it was powerless to pay the employees’ wages absent an appropriation, i.e., absent a budget.

The Commonwealth’s reliance on a subsequently overturned Commonwealth Court decision does not excuse it from following the biweekly pay requirements of the Agreement and Memorandum. It is the final determination of the Supreme Court that must be applied to determine the appropriateness of the Commonwealth’s determination not to pay the employees under the terms of the Agreement and Memorandum. What might have been viewed as the controlling law at that time was subsequently found not to be controlling.

The Commonwealth and the Union jointly agreed in the Agreement and Memorandum that employees would be paid on a biweekly basis. As evident by the testimony presented at this hearing, employees relied upon the mutual agreement calling for biweekly payments. The failure to make those payments caused significant hardship to those employees who were required to continue working without being paid.

The arbitrator's authority to decide this matter flows from the Master Agreement and Master Memorandum. It is beyond dispute that the Agreement and Memorandum were in fact breached. The Agreement and the Memorandum clearly call for biweekly payment of regular and overtime wages. The wages clearly were not paid biweekly. The contract was thus violated. The Commonwealth directed the employees to report for work. The employees, under the terms of the Agreement and memorandum, had a reasonable expectation that they would be paid in the manner agreed upon by the parties for the work they were directed to perform. The failure to make said payments results in the Commonwealth being subject to a remedy that falls within the parameters of the Agreement and Memorandum. The undersigned is bound by the language in the four corners of the Agreement and Memorandum. When a violation of that language is found, a proper remedy is appropriate.

The Commonwealth also points to Article 35, Section 3 of the Master Agreement and Recommendation 35, Section 1 of the Master Memorandum as justification for not paying the employees' biweekly wages during the budgetary impasse. These Sections provide that "[i]n the event that any provision of this agreement [memorandum] requires legislative action to become effective, including but not limited to . . . the granting of appropriations, it shall become effective only if such legislative action is taken." The Commonwealth argues that, per these Sections, the provision for payment of biweekly wages is one that does not become effective until the legislature grants appropriations. The remainder of these Sections, however, read as follows: "The parties, however, mutually agree to make recommendations to the Legislature which may be necessary to give force and effect to the provisions of this Agreement and Memorandum."

The Commonwealth, with the Union's approval, made a "recommendation" which led to the passage of a supplemental appropriations bill on August 5, 2009, which gave "force and effect" to the biweekly payment provisions of the Agreement and Memorandum. Had the Commonwealth taken such action at an earlier date the "payless paydays" could have been avoided and the contract would not have been violated. The Commonwealth controls the appropriation process. The Commonwealth directed the employees to continue to work. The employee complied. It was the Commonwealth's obligation to assure that these employees received timely payments for this directed work

in accordance with the terms of the Agreement and Memorandum. The Commonwealth cannot rely upon Article 35 and Recommendation 35 in order to justify its failure to meet the biweekly pay provisions of the Agreement and Memorandum since it controlled the process that would have allowed for the supplemental appropriations for the funding of wages.

Also to be addressed is the question of whether the award of interest is appropriate in a case such as this. At all times the determination to seek supplemental appropriations rested with the Commonwealth. The failure to make timely payment of wages violates the terms of the Agreement and the Memorandum. Since the employees already received their withheld wages it is found that the payment of interest for their not receiving those wages in accordance with the Agreement and Memorandum is an appropriate remedy. The undersigned declines, however, the Union's request to order interest on the interest.

Based on the foregoing, it is directed the Commonwealth pay all impacted employees at the rate of 6% interest, compounded daily, on all monies not properly paid to the employees in accordance with Articles 19 and 20 of the Master Agreement and Recommendations 19 and 20 of the Master Memorandum. The undersigned retains jurisdiction with regard to disputes concerning the calculation of the Commonwealth's liability.

AWARD

The grievance is sustained.



Michael E. Zobrak, Arbitrator

November 13, 2010

Aliquippa, PA