THE COMMONWEALTH OF PENNSYLVANIA
LABOR ARBITRATION TRIBUNAL

IN THE MATTER OF THE ARBITRATION BETWEEN

TEAMSTERS LOCAL 502 (CASA)	:	
	:	
and	:	**Grievance: Failure to Pay**
	:	**Wage Increases**
SCHOOL DISTRICT OF	:	
PHILADELPHIA	:	

GRIEVANCE: The grievance protests the refusal to pay negotiated wage increases.

HEARING: June 10, 2013
Philadelphia, PA

ARBITRATOR: John M. Skonier, Esq.

APPEARANCES

FOR THE UNION:

Thomas H. Kohn, Esq.

FOR THE DISTRICT:

Ronak R. Chokshi, Esq.
Talib N. Ellison, Esq.

Procedural History

The undersigned was notified by letter of his selection by Teamsters Local 502 (CASA) (Union) and the School District of Philadelphia (District or Employer) to hear and decide a matter then in dispute. Pursuant to due notice, a hearing was held on June 10, 2013, in Philadelphia, Pennsylvania; at which time both parties were afforded a full opportunity to present testimony, examine and cross-examine witnesses, and introduce documentary evidence in support of their respective positions. Following the close of the hearing and the receipt of the transcribed notes of testimony[1], the parties submitted post hearing briefs. The parties then submitted reply briefs and the matter is now ready for final disposition.

Background Facts

The Union is the exclusive bargaining representative for "all appointed Administrators as set forth in Appendix A" of the parties' collective bargaining agreement. That collective bargaining agreement was effective from September 1, 2009 to August 31, 2012. Prior to the expiration of this collective bargaining agreement, in May/June, 2011, the District requested concessions. The parties then agreed to some modifications, which were memorialized in a Memorandum of Adjustments. (Exhibit U-2)

The dispute which gave rise to the instant grievance concerns the District's refusal to pay an agreed-upon 3% across-the-board wage increase, effective January 1,

[1] References to the transcribed Notes of Testimony will be "NT" followed by the relevant page number(s).

2013. (Exhibits U-2 and U-10) The Union filed a grievance over this refusal and processed the matter to the instant arbitration for final resolution.

Relevant Provisions of the Contract

Article 2
RIGHTS OF THE BOARD OF EDUCATION and/or SCHOOL REFORM COMMISSION

2.1 Except as expressly abridged by a specific provision of this Agreement, the Board of Education and/or the SRC retain the sole right to hire, discipline or discharge for cause, lay off, transfer and assign Administrators; to determine or change the number of hours to be worked; to promulgate policies and regulations regarding school operations and personnel; to assign duties to the work force; to organize, discontinue, enlarge or reduce a department or function of administration; to assign or transfer Administrators to different schools or administrative locations as the operation of schools may require; to control and regulate the use of schools , facilities, supplies, equipment and other property of the School District; to determine the qualifications and performance expectations required of Administrators to fill new or existing positions; to evaluate the performance of administrators according to District established criteria, which shall be provided to the administrators; and to carry out the ordinary and customary functions of managing the School District.

* * *

Article 3
RECOGNITION

3.1 The Board and/or the SRC recognizes the Commonwealth Association of School Administrators (CASA) as the exclusive representative of all appointed Administrators as set forth in Appendix A.

* * *

Discussion and Opinion

The issue in this matter is whether the District violated the parties' collective bargaining agreement by refusing to pay bargaining unit members the negotiated across-the-board wage increase, effective January 1, 2013.

The Union argues that it is undisputed that the District has not paid the contractual across-the-board 3% wage increase to all members of the bargaining unit, effective January 1, 2013. The Union asserts that the District is contractually obligated to increase the pay of bargaining unit members by 3%, effective January 1, 2013. Contractually, this obligation is only contingent on the date the increase was to be paid, which has come and gone. The Union recognizes that the State General Assembly has substantially reduced its support of school systems throughout the Commonwealth' however, the Union argues that this does not change the fact that the parties negotiated in good faith and agreed to a 3% increase, effective January 1, 2013. The Union asserts that the District has chosen to make payments to certain employees and vendors and is, in fact, operating, despite its financial situation.

The Union points out that the parties signed a collective bargaining agreement for the period September 1, 2009 through August 31, 2012. (Exhibit U-1, p. 34) This agreement provided for a 3% across-the-board wage increase to all members of the bargaining unit to be effective January 1, 2012, (*Id.*, p. 12), with salary step increases to be effective the same date. (*Id.*, p. 39-64). However, in recognition of the District's financial difficulties, in the first half of 2011,the Union met with the District and agreed to a one year extension of the existing contract, with some modifications. (Exhibits J-2 and U-10) This agreement deferred the negotiated wage increase for 2012 in return for an agreement to rescind layoff notices that the District had issued on September 7, 2011 to approximately 27 bargaining unit members and a commitment not to impose unpaid furlough days during the term of the Agreement. The Union, with the approval of its members, agreed to defer the scheduled 2012 wage increase of 3% for one year, until January 1, 2013, and to delay bargaining unit members' step movement for 6 months. (NT-12-13) In addition, the Union agreed to waive the District's required contribution to the

Professional Growth Fund of $1000 per member for 2011 and to reduce it to $500 per member for 2012. (NT-13-14) With approximately 580 bargaining unit members at the time, the Union waived approximately $900,000 that the District was otherwise obligated to pay into the Fund.

The Union points out that Article 5 of the parties' collective bargaining agreement provides a comprehensive grievance procedure which specifically states that, "[t]he Arbitrator shall be without power or authority to make any decision that is : (1) contrary to, or inconsistent with, or which modifies or varies in any way, the terms of this Agreement or of applicable law or rules or regulations having the force and effect of law;" (Exhibit U-1, p. 10)

While the District has argued impossibility of performance, the Union asserts that this is not a valid defense. The Union points to a prior instance in 1981, in which the District faced a large budget deficit due to lack of sufficient tax revenues from the City. The District laid off thousands of employees and refused to implement bargained for wage increases and fringe benefit improvements to employees represented by all of its unions. One union, the International Brotherhood of Firemen and Oilers, Local 1201, filed a grievance and processed the matter to arbitration. The District argued impossibility of performance, as the City Council had not provided the District with sufficient funds. As it did not receive sufficient funding, the District maintained that its contractual obligation was excused. The arbitrator sustained the grievance and ordered the District to pay the salary increases and benefit improvements, as provided for in the agreement. The District appealed the arbitration award to Philadelphia Common Pleas Court, where it was affirmed. The District appealed to the Commonwealth Court, which reversed the arbitrator's decision. The Union then appealed the matter to the Pennsylvania Supreme

Court, which reversed the Commonwealth Court, reinstated the arbitrator's decision sustaining the grievance, and ordered the District to fulfill its contractual obligations to pay the wage increases. See, *International Brotherhood of Firemen and Oilers, Local 1201, AFL-CIO v. The Board of Education of the School District of Philadelphia,* 500 Pa. 474; 457 A.2d 1269 (1983, Pa. Supreme Court).

In *Firemen and Oilers,* the Court cited *Luria Engineering Company v. Aetna Casualty and Surety*, 206 Pa. Super. 333, 213 A.2d 151 (1965), in which that Court held that an act of a third party that makes performance of a contract impossible would not excuse performance if it is foreseeable and not provided for in the contract.

The Union points out that the District has once again not developed strategies to deal with its obligations arising under its collective bargaining agreements. The Union cites to *In RE: Appeal of Busik*, 759 A.2d 417 (Cmwlth. Ct. 2000) which recognized that:

> Impossibility of performance means not only strict impossibility but impracticability because of extreme and unreasonable difficulties, expenses or loss involved. Impossibility of performance however does not include mere inconvenience even though it may work a hardship. Nor does it include a party's financial inability to pay. (citing to International Brotherhood of Firemen and Oilers, Local 1201, AFL-CIO v. The Board of Education of the School District of Philadelphia, supra.)

The Union argues that the District failed to demonstrate that with an operating budget of $2.6 billion it was not possible to pay the negotiated salary increases for a bargaining unit that represented a small fraction of its total employee compliment.

The Union points out that despite its proclaimed overwhelming budget crisis, the District has paid wage increases to favored exempt employees, has hired

additional school police officers and has otherwise spent money on salaries, benefits, vendors and outside contractors. The Union argues that the District had the ability to pay the negotiated wage increases to this bargaining unit, but chose not to do so. The Union asks that its grievance be sustained.

In addition, the Union argues that the District's motive to save money cannot justify its breach of a clear and undeniable obligation to meet its contractual obligation and pay the negotiated wage increase. The Union has foregone one wage increase plus delayed step increases that may have been due. The Union allowed the District to pay less into the Professional Growth Fund than it otherwise would have been obligated to pay. As part of the negotiated agreement, the District was to increase wages by 3% on January 1, 2013, yet it chose not to honor its obligation. The Union argues that such behavior is the essence of bad faith and should be so found in this matter.

The Union asserts that the bargaining unit deserves not only to be made whole, but also to be provided with interest. While the Union recognizes that generally, arbitrators deny interest on awards of back pay, "[t]here are exceptions when one party has acted arbitrarily, capriciously, or in bad faith." (Elkouri and Elkouri, *How Arbitration Works* (Seventh Edition 2012) at 18-1, 32) In this case, the Union maintains that the District acted arbitrarily, capriciously or in bad faith. It has paid various vendors and utility providers and hired various employees but determined that it need not pay the bargaining unit members of this Union on the basis of impossibility, a previously rejected defense. The Union acknowledges that arbitrators have recognized that interest should not be used as a punishment, however, because of the time value of money, it may be necessary to make a grievant whole.

The Union points out that those bargaining unit members who left the District's employment subsequent to January 1, 2013, due to layoff, retirement or otherwise, have suffered a reduction in termination pay or pensions. The Union argues that to make them whole, their payments in this regard should be recalculated to take into consideration any differential that results from this arbitration.

The Union is also seeking that the District be made to pay the Union's portion of the costs of arbitration and reasonable attorney's fees.

The District maintains that its contractual obligation to pay the Union a previously negotiated wage increase on January 1, 2013, was abrogated by a supervening impracticability or impossibility. It argues that under Pennsylvania law, if a party's performance is made impracticable without its fault by the occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made, then the party's duty to perform is discharged, unless the language or circumstances indicate to the contrary. The District points out that the three categories of cases in which this general principal has been applied are supervening death or incapacity of a person necessary for performance, supervening destruction of a specific thing necessary for performance, and supervening prohibition or prevention by law.

The District points out that for a supervening event to discharge a duty, the nonoccurrence of that event must have been "a basic assumption" on which both parties made the contract. Moreover, the event alleged as an excuse must have been beyond the party's control and not due to any fault or negligence by the non-performing party. The District recognizes that the non-performing party has the burden of proof to show what action was taken to perform the contact regardless of the occurrence of the excuse. *Gulf*

Oil Corp. V. Federal Energy Regulatory Commission, 706 F.2d 444 (3rd Cir. 1983), cert. denied, 464 U.S. 1038, 104 S.Ct. 698 (1984). Acts of a third party making performance impossible do not excuse failure to perform if such acts were foreseeable. *Yoffe v. Keller Industries, Inc.,* 297 Pa. Superior Ct. 178, 443 A.2d 358 (1982)

The District asserts that the doctrine of impracticability is similar to the doctrine of impossibility, as both are triggered by the occurrence of a condition which prevents one party from fulfilling the contract. The difference, however, is that while impossibility excuses performance where the contractual duty cannot physically be performed, the doctrine of impracticability occurs where performance is still physically possible, but would be very burdensome for the party who is otherwise obligated to perform. The District asserts that impossibility is an objective condition, while impracticability is a subjective condition for a trier of fact to determine. The District argues that both doctrines are applicable in releasing it from its duty to perform in this instance.

The District argues that it was impossible to have known in 2008, when negotiations were underway, that the country and the Commonwealth were on the precipice of a major economic recession and that revenue sources would dwindle. It asserts that both parties knew that adequate funding from local and state sources was a condition precedent to performance under the collective bargaining agreement.

The District maintains that it made every effort to secure proper funding to fulfill its obligations, however, there was no money. The District asserts that in 2011, it sought concessions so that it could ultimately provide the Union with that which the parties negotiated. The District insists that the circumstances which deprived the District

of needed revenues have continued and, therefore, the District cannot pay the Union the negotiated wage increase.

The District argues that it has demonstrated the dire financial conditions under which it has been forced to operate and which have precluded performance of the collective bargaining agreement at issue.

The District relies on the following relevant facts:

> The District entered into the 2009-2012 collective bargaining agreement with the Union with the expectation that it would be able to fulfill its financial obligations as set forth in that agreement.
>
> By law, the District must draft and enact a budget each year. The budget is based on the Mayor's request to City Council, appropriations, tax revenue and the Governor's request to the General Assembly.
>
> The District has no taxing authority.
>
> The District is financially dependent on State appropriations, City taxes and City appropriations.
>
> The District's ending funding balances for the following years were as follows:
>
> > The District's 2009 ending fund balance was $51.8 million.
> > The District's 2010 ending fund balance was $51.8 million.
> > The District's 2011 ending fund balance was $30.7 million.
> > The District's 2012 ending fund balance was ($20.4) million.

(District's Brief, pp. 2-3)

Between 2009 and 2011, the District's State and City funding remained consistent, however, beginning in 2012, the State decreased the District's funding by more

than $202 million. The District maintains that because of this under funding by the State, the District sought concessions from the Union and other labor unions. It asked that these entities forgo certain financial terms under the respective collective bargaining agreements with the understanding that these obligations would be met when sufficient revenues were secured.

The District asserts that it entered into subsequent cost-saving concession-oriented agreements with the unions based on a good faith expectation that it would be able to fulfill the financial obligations set forth therein.

It points out that in an effort to reduce costs, the District eliminated 3800 job positions in the 2012 fiscal year. In addition, in 2012, all non-represented employees were furloughed and began contributing towards the cost of District-provided health care insurance. Non-represented employees making more than $75,000 annually had their salaries reduced on a sliding scale. Despite these and other cost saving measures, the District's 2012 fiscal year ending fund balance was a $20.4 million deficit.

While the Union has pointed to 25 District management employees identified in Exhibit U-6 as having received an alleged "pay raise," 20 employees were promoted to different, higher paying positions with greater responsibilities. Five of the employees in Exhibit U-6 received salary increases because of the threat that these critical personnel would leave the District.

Based on the above, the District maintains that it has demonstrated that it was faced with impossibility and impracticality of performance of its contractual

obligations and, therefore, could not provide the negotiated January 1, 2013 wage increase to the Union. The District asks that the instant grievance be denied.

The record reveals that this is not the first time that the District has faced dire financial conditions. In 1981, the District faced a financial shortfall primarily because the City failed to raise taxes to a level which the District believed sufficient for operations. Thousands of employees were laid off and the District refused to implement negotiated wage increases and fringe benefit improvements under the various collective bargaining agreements it had with its labor unions. A direct result of this 1981 situation was the arbitration and subsequent litigation that led to the Pennsylvania Supreme Court decision in *International Brotherhood of Firemen and Oilers, Local 1201, AFL-CIO v. The Board of Education of the School District of Philadelphia,* 500 Pa. 474; 457 A.2d 1269 (1983, Pa. Supreme Court). The Court recognized, in relevant part, that it must ". . . first consider the claim of impossibility of performance. The District bases the claim on an inability to obtain sufficient funds." It noted that "the District is therefore dependent on funds appropriated by the Philadelphia City Council." (500 Pa. 474, at 478) The Court noted that the District, ". . contends that its dependence on funds so appropriated and its inability to incur a deficit renders performance of the contract impossible. The arbitrator rejected the claim on the basis that the refusal to honor the contract was based on the District's unilateral decision as to how to balance its budget without a showing that it had tried to honor the contract by all possible means." (500 Pa. 474, at 478-479) The Court then found, in pertinent part, as follows:

> We accept the arbitrator's finding that impossibility of performance was not established. In *Moore v. Whitty*, 299 Pa. 58, 149 A. 83 (1930), this Court held that a strike or the threat thereof did not excuse a building contractor from performing on a contract. It was found that mere inconvenience, although it works a hardship, does not excuse performance and that a party who wishes to be excused from performance on the basis of a subsequently occurring condition has a duty so to provide in the contract and will not be excused otherwise

> if performance is lawful and possible in itself. *Luria Engineering Co. v. Aetna Casualty & Surety Co.*, 206 Pa.Super. 333, 213 A.2d 151 (1965), was another case where a labor dispute was found not to excuse performance of a contract. The court held that an act of a third party that makes performance of a contract impossible will not excuse performance if it is foreseeable and not provided for in the contract. In the instant case, we find that the District was required to establish impossibility of performance and failed to do so in the absence of a showing that it attempted performance by all possible means. Furthermore, there is nothing in the agreement stating that a balanced budget or any particular level of funding is a condition precedent to the payment of the agreed on salary and benefit increases. We find that the District had a duty to make such provision in the agreement if it wished to be excused. In *Danson v. Casey*, [484 Pa. 415, 399 A.2d 360 (1979)] supra, we took note of the fact that the Philadelphia School District has had a history of funding difficulties. We find that the District's financial condition was foreseeable and did not excuse performance on the basis of action of a third party, i.e. failure of the city council to appropriate sufficient funds or any other basis.
>
> Our finding that the District's financial condition does not excuse performance is further supported by cases dealing specifically with labor relations. The award of an arbitrator in a labor dispute is not improper on the basis of its fiscal impact when the legislative body charged with appropriating the necessary funds has not rejected the award, *Board of Education of the School District of Philadelphia v. American Federation of State, County & Municipal Employees, Local 1660, District Council 33, AFL-CIO*, 66 Pa.Cmwlth. 346, 444 A.2d 813 (1982). Here the City Council appropriated funds for the District to allocate as it saw fit and did not reject the arbitration award.
>
> In the instant case, the matters in question are proper terms and conditions of employment. Wages are specifically made subject to collective bargaining by Act 195, § 701, 43 P.S. § 1101.701. Fringe benefits are also a proper subject of collective bargaining, *Costigan v. Philadelphia Finance Department Employees, Local 696, American Federation of State, County, and Municipal Employees, AFL-CIO*, 462 Pa. 425, 341 A.2d 456 (1975). The parties have not cited and we have not found any applicable statutory or home rule charter provision that prohibits the salary and benefit increases provided for in the collective bargaining agreement and enforced by the arbitration award. The finding of impossibility of performance would, under the circumstances here announced, be improper without a showing of the capabilities or lack of the same to implement the award. While the Court is cognizant of the potential difficulties that may occur when one body negotiates a contract and another is required to act to guarantee its implementation, the solution lies in bargaining or with legislative enactment and not with decision-making.

(500 Pa. 474, at 480)

The District argues that in 2008, when the contract was negotiated, no one could have foreseen the economic recession that befell our country and the Commonwealth. However, the contractual concessions were sought in mid-2011 and the

contractual obligation to pay the bargaining unit a 3% wage increase on January 1, 2013 was executed on September 11, 2011, well within that period of time when economic uncertainty, dwindling resources and financial shortfalls were gripping the country and the state. It is telling that the parties did not negotiate a condition precedent to the contractual changes that they agreed to in their September 11, 2011, memorandum of agreement.

The fact that the District did not have the ability to dictate its sources of revenues was nothing new. The parties were aware of the funding sources for the District. While the District did seek concessions and cost saving measures whenever and wherever possible, it cannot be said that it may now rely on the doctrines of impracticability or impossibility to escape what it bargained with the Union to do, *i.e.*, increase the wages of the bargaining unit by 3% on January 1, 2013. The record reveals that the District did provide increased duties and increased compensation for non-represented employees, that it did hire more police officers and that it did compensate vendors of goods and services during this time.

While the District took great efforts to reduce costs, there was no showing that it attempted to meet its specific obligation to the Union or that it provided in the collective bargaining agreement that a certain level of funding was a condition precedent to its obligation to meet the agreed upon wage increase.

The previous 1981 conditions under which the *Fireman and Oilers* case was decided, appear to be repeating. In 1981, the District faced a large budget deficit as City Council refused to raise taxes to a level which the District required to fund its operations. The District laid off thousands of employees and refused to implement bargained for wage

increases and fringe benefit improvements to employees represented by all of its unions. Local 1201 of the Fireman and Oilers filed a grievance and took the District to arbitration. The District argued that it was impossible for it to pay the contractual wage increases because the City had failed to provide sufficient funds. It argued that its obligation to pay the wage increases was contingent upon sufficient funding revenue. As it did not have the revenue, it maintained that its contractual obligation was excused. The arbitrator dismissed the District's arguments, sustained the grievance and ordered the District to pay the salary increases and benefit improvements, as provided for in the contract.

This judicial precedent reveals that this situation is not entirely new for the District, yet in the current matter, there is still no language in the parties' contract or the memorandum of agreement that acts to excuse the District from its obligation in this matter. As such, the District's impracticality and impossibility defenses are denied and the appropriate Award shall be issued.

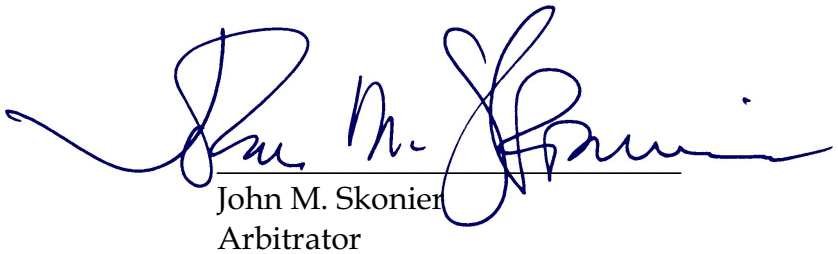
Although the Union requested interest and legal fees, it is recognized that the District is in a very serious financial condition and the undersigned does not seek to further increase its burden. However, as this is not the first time the District has found itself in this situation, as has been amply noted in the foregoing discussion, the District should not expect such consideration by arbitrators in the future.

Award

Based on the record as a whole and for the reasons discussed, the grievance is sustained. The District is directed to implement the 3% across-the-board wage increases, as provided for in the Agreement, within 45 days from the date of the Award. The District is to calculate the back pay differential and pay each affected current bargaining unit member no later than 45 days from the date of the Award.

The District is further directed to recalculate the pensions of any members of the bargaining unit who retired on or subsequent to January 1, 2013 to reflect the 3% back pay increase.

The undersigned shall retain jurisdiction for a period of 90 days to resolve any disputes relating to individual back pay calculations owed to bargaining unit members.



John M. Skonier
Arbitrator

October 14, 2013