

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE :
LODGE NO. 5 :
 :
v. : Case No. PF-C-98-132-E
 :
CITY OF PHILADELPHIA :

FINAL ORDER

On May 27, 1999, the City of Philadelphia (City) filed timely exceptions to a proposed decision and order (PDO) entered on May 11, 1999. Along with its exceptions the City included a request for an extension of time in which to file its brief in support of exceptions. The Secretary of the Board granted the City's request and directed the City to file its brief on or before June 21, 1999. Thereafter, the City filed its brief in support of its exceptions within the extension. On July 12, 1999, the Fraternal Order of Police, Lodge No. 5 (FOP) filed its brief in opposition to exceptions.

In the PDO the hearing examiner concluded that the City violated Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA) and Act 111 by failing to comply with a grievance arbitration award in which the arbitrator determined that the City did not have just cause to dismiss three police officers (Edward Greene, Lester Johnson, and John O'Hanlon) and therefore directed their reinstatement to their former positions and required that they be made whole. In order to comply with the arbitration award, the hearing examiner directed the City to place the three officers in assignments which have police duties consistent with their prior positions and to reissue badges, weapons and sufficient identification to all three officers so that they can perform traditional police duties, including effectuating arrests. The examiner further directed the recalculation of back pay owed to the officers to include credit for overtime hours they would have worked as police officers had they not been improperly discharged. Finally, the hearing examiner required the City to give Officer O'Hanlon credit for the written portion of the sergeant's examination that he passed prior to his discharge and allow him to take the oral portion of that examination. If his score is sufficiently high, the hearing examiner ordered the City to promote O'Hanlon retroactively to the rank of sergeant. After a thorough review of the exceptions and all matters of record, the Board makes the following:

ADDITIONAL FINDINGS OF FACT

18. That the City filed an appeal of the arbitration award, which was affirmed by the court of common pleas. The City filed no further appeal of the award. (N.T. 12, 104).

19. That Article VII of Philadelphia Police Department Directive 6, dated February 18, 1994, provides that the purpose of the DPR unit is to "respond, over the phone, to certain incoming complaint calls received by Police Radio thereby releasing patrol officers to service more serious complaints." Directive 6 further notes that "[w]hen any officer receives a complaint requiring police action, the complainant WILL NOT be referred to the DPR Unit. The officer will handle the complaint directly." (FOP Exhibit 6).

DISCUSSION

The essential facts of this case are as follows. On April 27, 1996, the City discharged Officers Greene, Johnson and O'Hanlon. Johnson and O'Hanlon worked in the highway patrol unit and Greene as a patrol officer for the twenty-fifth district when the City discharged them for the alleged theft of money from individuals involved in a cockfight, which also served as the basis for a federal indictment of all three officers. The officers went to trial on a multiple count indictment in December 1996¹ and a federal jury acquitted all three officers on all counts.

When the City refused to reinstate these officers despite their acquittal, the Union filed a grievance pursuant to the parties' collective bargaining agreement seeking their reinstatement. The grievance eventually proceeded to arbitration and resulted in an award sustaining the grievance. In her award dated January 14, 1998,² the arbitrator ordered:

In line with the above opinion, the grievance is upheld. The City is hereby ordered to reinstate the grievants, Edward Greene, Lester Johnson, and John O'Hanlon to their former positions and to make them whole for all back pay, benefits and seniority they would have earned but for their discharges, less any interim substitute earnings.

(FF 4). The City filed an appeal with the court of common pleas, which affirmed the award. On July 3, 1998, the City reinstated the three officers and assigned them to the differential police response unit (DPR), which exclusively receives citizen phone calls that do not require police action (e.g., calls about barking dogs and stolen lawn furniture). As DPR unit officers, the three officers simply tell the caller that he/she must contact the district attorney's office to further pursue the matter. An assignment with the DPR unit offers no opportunity for overtime. Although the three officers were reinstated, they were not reissued badges, weapons or identification numbers. Other than the commanding officer, a corporal, and an administrative clerical officer, virtually all of the other twenty or so police employees in the DPR unit are temporarily assigned to that unit because of various reasons (i.e., light duty because of injury, pregnant and off the street by request, undergoing investigation or awaiting disposition thereof). With the exception of Greene, Johnson and O'Hanlon, all officers in the DPR unit and all other police officers in the City's police department are issued a badge, a service weapon, and identification card with badge number.

All officers returned to work, regardless of the circumstances that resulted in their discharge, have been reissued a badge, a weapon and proper identification when they returned to duty. No officer returned to duty by way of an arbitration award has ever been placed in the DPR unit, regardless of the circumstances that resulted in his or her discharge. For example, in 1991 Officer Rodney Hunt was dismissed from the twelfth district and charged criminally with murder, voluntary manslaughter, aggravated assault and possessing instruments of a crime. After he was found not guilty by a criminal

¹ As pointed out by the City in its exceptions, the hearing examiner mistakenly found that the trial was held in December 1979. However, the record evidence shows that the trial was in fact held in December 1996 and the City's exception in this regard is accordingly sustained.

² We note that the hearing examiner incorrectly found the award to have been issued on January 12 as opposed to January 14, 1998. Thus, finding of fact 4 in the PDO is accordingly amended to reflect the correction.

jury, he was reinstated to his former position by an arbitrator and upon reinstatement was reissued a badge, weapon and necessary identification. Officer Hunt was assigned to the fifteenth district. In 1992 Officer Frank Incarvite was dismissed from the fourteenth district and charged criminally with simple assault, reckless endangerment and false reports to law enforcement officials. An arbitrator directed he be reinstated to his former position. Upon reinstatement, the City reissued Officer Incarvite a badge, weapon and sufficient identification and assigned him to the seventeenth district. In 1986 Officer Joseph Formelio was dismissed from the twelfth district and was charged criminally with aggravated assault and simple assault. An arbitrator ordered him to be reinstated, whereupon the City reassigned Officer Formelio a badge, weapon and sufficient identification. Officer Formelio was assigned to the fifth district. In 1991 Officer Marcellus Robinson was dismissed from the twelfth district and charged criminally with assault. An arbitrator directed that he be reinstated to his former position, whereupon the City reissued Officer Robinson a badge, weapon and sufficient identification. Officer Robinson was assigned to the twenty-fifth district.

Finally, each of these three officers earned significant overtime in 1994 and 1995. In addition, prior to his discharge Officer O'Hanlon took the written portion of the sergeants examination and was notified that he had passed that portion. He was then scheduled to take the oral portion of the examination in May 1996 but was discharged in April 1996. The City prepared a promotional list and did in fact promote individuals from that list based on the results of the oral examination given in May 1996. The City traditionally promotes straight down the list of those who have successfully completed the examinations for the rank of sergeant.

The Board's jurisdiction includes the determination of whether an employer's alleged failure to comply with a grievance arbitration award constitutes an unfair labor practice. Wilkins Township Police Department v. PLRB, 707 A.2d 1202 (Pa. Cmwlth. 1998); Pottstown Police Officers' Association v. PLRB, 634 A.2d 711 (Pa. Cmwlth. 1993). When an unfair labor practice charge alleges a refusal to comply with a grievance arbitration award, the Board must determine whether an arbitration award exists, whether the appeal process has been exhausted and, if so, whether the employer failed to comply with the award. PLRB v. Commonwealth, 478 Pa. 582, 387 A.2d 475 (1978). The party alleging non-compliance with a grievance arbitration award has the burden of proof to show that the opposing party has indeed failed to comply with the arbitrator's decision. Id. In this case, the parties do not dispute that a grievance arbitration award exists and that the appeal process has been exhausted. The only question is whether the City failed to comply with the arbitration award.

In its exceptions, the City contends that the hearing examiner correctly found that Greene, Johnson and O'Hanlon had no right to be reinstated to their previously held assignments with the highway patrol or the twenty-fifth district but erroneously concluded that assignment to the DPR unit did not comply with the arbitration award. The City argues that it was illogical for the hearing examiner to acknowledge that these three officers have no right to any particular assignment upon reinstatement but then conclude that they should not have been assigned to the DPR unit. The City asserts that reinstatement to the DPR unit is consistent with the arbitration award, which directed the City to reinstate the officers to their "former positions." As before the hearing examiner, the City attempts to distinguish a "position" from an "assignment," with the former referring to that of police officer and the latter to that of the particular unit in which an officer is placed. Because no police officer

has the right to any given assignment within the department, the City believes it has complied with the award by assigning these officers to the DPR unit.

The hearing examiner did not, as the City now suggests, find that the City lacked the managerial right to make assignments.³ Rather, the examiner concluded that on no other occasion where an officer charged with a crime was reinstated did the City assign that officer to the DPR unit, which is in effect a light duty, temporary type of position, and refuse to issue that reinstated officer a weapon, badge and identification.⁴ Whether other officers were assigned to some sort of administrative duties rather than to a numbered district upon reinstatement is not the issue. The issue here is whether the City in fact returned these three officers to their former positions, which involved traditional police duties such as effectuating arrests. Assignments with the DPR unit clearly do not involve traditional police duties and certainly do not resemble any duties that these three officers performed prior to their discharge. At a minimum, these officers can only make arrests like all other police officers, administrative or otherwise, if they are supplied with a weapon, badge and identification number.

The City does not dispute that reinstated officers assigned to administrative duties were at least given a weapon, badge and identification number upon reinstatement. Even the other officers in the DPR unit, most of who are there on temporary assignment, have a weapon, badge and identification number. As revealed by the Police Commissioner's testimony, Greene, Johnson and O'Hanlon cannot even fulfill their off-duty obligations as police officers and effectuate arrests for felonies committed in their presence, a duty imposed upon all off-duty Philadelphia police officers (N.T. 238-41). Unlike all other Philadelphia police officers, the Commissioner suggested that these three officers should call 911 and await the arrival of responding officers (N.T. 240-41), which is the same action often taken by ordinary citizens. The City's attempted distinction between positions and assignments cannot cloud the fact that Greene, Johnson and O'Hanlon have not been returned to their former positions as required by the arbitration award. Based on the award of reinstatement here, the arbitrator clearly intended to put these officers in positions where they will have the same promotional opportunities that they had before their discharge and that all other police officers have as employes of the City. The City failed to put these three officers in such positions and has therefore not complied with the award.

³ The City also contends that the examiner erred in applying the transfer provision of the parties' collective bargaining agreement to this situation, which involves reinstatement after dismissal rather than a transfer from one unit to another during the course of employment. The hearing examiner referred to the transfer provision, however, in order to acknowledge the City's rights under the parties' agreement and to point out that the City could not rely on that provision to circumvent the mandate of the award. Whether the transfer provision applies or not in this case does not change the conclusion that the City failed to reinstate these officers to their former positions, which involved the performance of traditional police duties.

⁴ In its exceptions, the City also challenges finding 11 of the PDO, which provides in part that no officer returned to work has ever been placed in the DPR unit, as not supported by the record. However, an FOP representative testified that he did not know of a single instance in which an officer was reinstated to the DPR unit (N.T. 140). Moreover, the employe history records of other reinstated officers, which the City introduced and moved into evidence, show that none of these officers was assigned to the DPR unit (City Exhibit 2).

The City further excepts to finding 5 in the PDO that the work of the DPR unit does not require police action. However, the Board has reviewed the entire record and concludes that this finding is supported by substantial evidence (N.T. 112; FOP Exhibit 6). Moreover, the City's exception to this portion of finding 5 misses the point: the hearing examiner did not find that the work of the DPR unit is not police work. Rather, the hearing examiner found that the work of the DPR unit (e.g., the receipt of citizen complaints regarding barking dogs and stolen lawn furniture) did not require police action. In other words, the officers assigned to the DPR unit field phone calls and pass the complaints on to someone else for investigation if necessary or tell the caller to contact the district attorney's office (N.T. 112, 187; FOP Exhibit 6). Thus, the DPR unit does not require immediate police action or attention with regard to the phoned in complaint. Significantly, the Philadelphia Police Department's Directive 6 mandates that complaints "requiring police action" are to be handled directly by a sworn officer and not by the DPR unit (Amended FF 19). Based on finding 5, the hearing examiner concluded that the work of the DPR unit was not the same as the work that Greene, Johnson and O'Hanlon had performed in their former positions as patrol officers, which included the ability to make arrests.

The City would have the Board interpret the award to require only that these officers be returned to duty doing bargaining unit work and not necessarily patrol work, which they performed prior to their dismissal. In support of its position, the City relies upon City of Philadelphia, 27 PPER ¶ 27048 (Proposed Decision and Order, 1996) for the proposition that the Board has found police work to include other work that doesn't involve traditional arrest-making functions. However, City of Philadelphia involved an illegal transfer of bargaining unit work, which requires an analysis of whether police employes previously performed the work at issue. A determination as to whether work is bargaining unit work belonging to police employes is a far cry from the situation presently before the Board. The Board's determination here is limited to determining whether an arbitration award exists, whether the appeal process has been exhausted and, if so, whether the employer failed to comply with the award. PLRB v. Commonwealth, *supra*. The arbitrator did not simply direct that these officers be reinstated and be given bargaining unit work but that they be reinstated to their former positions within the bargaining unit. Thus, the City's exception to finding 5 of the PDO is dismissed.

The City next excepts to the hearing examiner's conclusion that the arbitration award requires the City to issue guns and badges to Greene, Johnson and O'Hanlon. The City argues that the examiner ignored the unique circumstances of this case and failed to recognize that the arbitration award did not address guns and badges. The City claims the decision not to reissue weapons and a badge to these officers arose after the arbitration award and was simply not an issue in arbitration. The City therefore alleges that the arbitration award is ambiguous in this regard and cannot be enforced. An arbitration award, however, does not become ambiguous simply because one party to the award does not agree with that award. See City of Philadelphia, ___ PPER ¶ ___, PF-C-96-251-E (Final Order, August 17, 1999). The arbitration award here found no just cause for the dismissal of these three officers and directed the City to reinstate them to their former positions, which previously required them to have a weapon, badge and identification number in order to make arrests.

The City also argues that the decision whether to issue guns and badges is very serious and is therefore vested in the Police Commissioner. Under the Philadelphia Home Rule Charter, the Commissioner has the authority to "train, equip, maintain, supervise and discipline the Philadelphia Police." 351 Pa.

Code § 5.5-200(b). However, this provision of the Charter does not exempt the City from complying with an Act 111 grievance arbitration award or the parties' collective bargaining agreement. The City further argues that police officers are not automatically entitled to carry a weapon because of their status as police officers. Rather, the City notes that an officer is not authorized to carry a gun until certified to do so by the Municipal Police Education and Training Commission, which can also revoke certification. 53 Pa. C.S.A. § 2164. The City also stresses that certain department directives provide that an officer may be relieved of his or her weapon if the officer is suspected to be in need of psychiatric care or evaluation, or if the officer is involved in a shooting. Despite these contentions, the City has not shown that these officers were not certified and/or their certification was revoked; nor has the City demonstrated that any of the three officers was involved in a shooting or that they are in need of psychiatric attention. The hearing examiner concluded that the City denied Greene, Johnson and O'Hanlon weapons, badges and identification numbers in order to avoid compliance with the arbitration award.

The City claims that this case is also unique in that these three officers are now tainted in their ability to make arrests as evidenced by the letters from the U.S. Attorney and the District Attorney to the Commissioner raising concerns about their credibility in future prosecutions. The hearing examiner, however, did not find the City's claim in this regard convincing and instead concluded that the City was using the letter as a way to avoid compliance with and collaterally attack an award that the City views as incorrect. The Board concludes that the hearing examiner's assessment of the record in this regard was based on substantial evidence and will therefore not disturb the PDO.

The City's next exception is that the hearing examiner erred in directing the City to include overtime in the back pay due the officers under the award. The City points out that the award does not say that overtime is to be paid. The City also asserts that it has an almost seven year practice not to include overtime in back pay unless an award specifically directs overtime. With regard to any alleged policy regarding overtime, the hearing examiner discredited the testimony of the department's fiscal officer that there was such a policy. The examiner recognized that the fiscal officer could not provide one example of a case where the City did not include overtime in back pay where the award directed make-whole relief. Absent compelling circumstances, the Board will not overturn the credibility determinations of its hearing examiner, who is in a position to observe the manner and demeanor of witnesses during their testimony. Township of Springfield, 12 PPER ¶ 12354 (Final Order, 1981). The Board finds no compelling circumstances to reverse credibility in this case.

Although the arbitration award does not explicitly direct the payment of overtime as part of the back pay award, the award does direct the City to "make [the officers] whole for all back pay . . . they would have earned but for their discharges" (FF 4). The purpose of a make whole award is to return the employes to the positions they would have been had the contract violation not occurred. Bristol Township School District, 12 PPER ¶ 12136 (Final Order, 1981). The FOP points out that mere base salary reimbursement does not make these officers whole as required by the award. The parties stipulated that Greene, Johnson and O'Hanlon earned significant amounts of overtime in 1994 and 1995 prior to their discharge and the hearing examiner made findings to reflect those amounts (FF 6-8). The City cannot now hide behind its contention that overtime is not guaranteed and is therefore speculative. In its make-whole awards, the NLRB will compute back pay on the basis of a forty-hour week plus the adjusted average overtime hours worked by each employe. Ellis & Watts

Products, 143 NLRB 1269 (1963), enf'd. 344 F.2d 67 (6th Cir. 1965). The FOP showed that in 1994 and 1995, respectively, Greene earned \$1,677.95 and \$1,921.57, Johnson earned \$5,742.20 and \$7,501.75 and O'Hanlon earned \$10,584.81 and \$8,159.58. The City introduced no evidence to show that the officers earned less in other years. Thus, overtime is certainly warranted under the award here and is not so speculative as to be incapable of calculation. The City's exception to overtime is denied.

Finally, the City excepts to that portion of the PDO that requires the City to give Officer O'Hanlon credit for the written part of the 1996 sergeants exam, which he passed, to allow him to take the oral part of the exam when next given and to promote him retroactively to sergeant if his overall score ranks the same or above the lowest scoring candidate promoted as a result of the May 1996 oral part of the sergeants' exam. The City contends that the arbitration award does not authorize such relief and even if it did the City could not comply without violating its Home Rule Charter, 351 Pa. Code § 7.7-401, and civil service regulations, Section 13 of the Act of June 25, 1919, P.L. 581, as amended, 53 P.S. § 12633.

Although the make whole relief in the award does require the promotional relief set forth in the PDO, the hearing examiner's reference to and use of the 1996 promotional list as a means to determine whether Officer O'Hanlon should be promoted from the list generated by the upcoming year 2000 sergeants exam is contrary to law and therefore cannot be sustained. Commonwealth Court has held that "it is beyond peradventure that a civil service promotion list cannot be extended beyond two years. The legislature has spoken on this issue quite clearly . . . When the Charter and regulations have the force and effect of law, [the list] cannot be extended by agreement or by the order of a court." Walls v. City of Philadelphia, 646 A.2d 592, 595-96 (Pa. Cmwlth. 1994). Subsequently, in Gaffney v. City of Philadelphia, 728 A.2d 1049 (Pa. Cmwlth. 1999), Commonwealth Court en banc cited Walls with approval. It follows then that the two-year limit cannot be extended by way of a grievance arbitration award or by way of an administrative agency charged with enforcing such award. By basing O'Hanlon's potential promotion on the '96 list, the examiner is essentially extending that list for purposes of promotion beyond its two year statutory limit, which would have expired in or about May 1998. Contrary to the FOP's assertions, the examiner's conclusion regarding the promotion of O'Hanlon unlawfully imposes on the promotional process set forth in the Home Rule Charter and civil service regulations. The City's exception in this regard is therefore sustained.

However, the City has cited nothing to demonstrate that Officer O'Hanlon should not be given credit for the written portion of the exam that he passed in 1996 before his discharge. Indeed, the award requires that he be made whole but for his unlawful discharge, including credit for that portion of the exam that he passed. Thus, the City will be directed to credit O'Hanlon for the written portion of the exam on the next sergeants exam, which the record shows is scheduled in or about January 2000.

After a thorough review of the exceptions and all matters of record, the Board shall sustain the exceptions in part, dismiss the exceptions in part and make the Proposed Decision and Order, as amended herein, absolute and final.

ORDER

In view of the foregoing and in order to effectuate the policies of the PLRA and Act 111, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed to the Proposed Decision and Order in the above-captioned matter be and the same are hereby sustained in part and dismissed in part, and the Proposed Decision and Order, as amended herein, is hereby made absolute and final, and

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that 3(e) of the affirmative relief directed in the Order at page 8 of the Proposed Decision and Order is hereby vacated and set aside.

SIGNED, SEALED, DATED and MAILED this twenty-second day of September, 1999.

PENNSYLVANIA LABOR RELATIONS BOARD

JOHN MARKLE JR., CHAIRMAN

L. DENNIS MARTIRE, MEMBER

EDWARD G. FEEHAN, MEMBER

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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AFFIDAVIT OF COMPLIANCE

The City of Philadelphia hereby certifies that it has ceased and desisted from its violation of Section 6(1)(a) and (e) of the PLRA and Act 111; that it has reinstated Officers Johnson, O'Hanlon, and Greene to positions where they can perform traditional police duties including effectuating arrests; that it has reissued badges, weapons and proper identification to these three officers; that it has recalculated back pay to include the overtime each officer would have worked but for his improper discharge, and paid each officer that additional amount plus interest on that amount; that it has given O'Hanlon credit for the already taken, written portion of the sergeants examination and will allow him to take the oral portion of that examination at the next scheduled exam date in 2000; that it has posted the proposed decision and order and final order as directed; and that it has served a copy of this affidavit on the Union at its principal place of business.

Signature/Date

Title

SWORN AND SUBSCRIBED TO before me
the day and year first aforesaid.

Signature of Notary Public