

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE :
LODGE NO. 5 :
 :
 v. : Case No. PF-C-96-251-E
 :
 CITY OF PHILADELPHIA :

FINAL ORDER

On June 8, 1999, the City of Philadelphia (City) filed timely exceptions to a proposed decision and order (PDO) entered on May 20, 1999. Along with its exceptions, the City included a request for a twenty (20) day extension of time in which to file its brief in support of exceptions. Although the Fraternal Order of Police, Lodge No. 5 (FOP) opposed the City's request, the Secretary of the Board granted the City's request and the City filed its brief in support of exceptions on June 29, 1999. On July 16, 1999, the 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 an arbitrator found that Officer Bruce DeNoble was not terminated for just cause and therefore ordered the City to expunge his record "to the fullest extent." The hearing examiner directed the City to expunge and clear the record of Officer DeNoble, including but not limited to his Internal Affairs Division (IAD) records, which the City did not treat as unsupported by the arbitration award.

The essential facts of this case as found by the hearing examiner are as follows. On February 28, 1995, an arbitrator issued a grievance award under Act 111 involving Officer Bruce DeNoble. The arbitrator sustained the grievance and issued the following award:

Bruce DeNoble was not terminated for just cause.
Therefore, the grievance is sustained and Bruce DeNoble is to be returned to his former position with the City of Philadelphia Police Department and made whole in every respect. Further, his record should be expunged and cleared to the fullest extent.

(FF 5). Since the arbitration award, the City has continued to maintain a record of Officer DeNoble's discipline. Although the City has deleted any reference to the prior incident that was contained in his personnel file, the City has kept an IAD record of the underlying investigation. The IAD records indicate a sergeant's complaint against Officer DeNoble for having drugs in his locker and notes that the complaint was "sustained" (FF 6). An officer's IAD record is kept separate from the officer's personnel file. When an officer applies for transfer to a specialized unit or for a promotion, or when the officer has been charged with misconduct, an IAD check may be run to see if prior charges or complaints of misconduct were brought against the officer in the past.

In its exceptions to the PDO, the City contends that the hearing examiner erred in failing to look beyond the four corners of the award and should have analyzed the award in the context of the narrowly framed issue that was before the arbitrator (i.e., whether Officer DeNoble's discharge was for just cause). The City contends that the arbitrator did not consider whether, or find to be unproven that, Officer DeNoble had committed the misconduct for which he was disciplined. Rather, the City points out that Officer DeNoble admitted that drugs were found in his locker. Furthermore, the City alleges that the arbitrator did not find that the admitted misconduct was not worthy of discipline. Instead, the City claims that the arbitration award was limited to the discharge, not the underlying misconduct, and therefore the City was only required to remove reference to the discharge from Officer DeNoble's personnel file, not his IAD record.

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 that remains is whether the City failed to comply with the arbitration award.

In the PDO, the hearing examiner determined that the City is in violation of the arbitration award by maintaining an IAD record of the incident involving Officer DeNoble. In response to the same argument now made by the City in its exceptions, the hearing examiner concluded that the expungement remedy in the arbitrator's award referred to more than the mere decision to terminate Officer DeNoble's employment. The hearing examiner recognized that expungement erases the record of the accused, including the facts leading up to the discipline, which is the likely result intended by the arbitrator based on his use of the language in the award "to the fullest extent." Based on a review of the record as a whole and the arbitration award itself, the Board will not disturb the hearing examiner's conclusion.

To adopt the City's position, the Board would in fact be required to distinguish between those references to the drug incident contained in Officer DeNoble's personnel file and those references contained in his IAD records; a distinction that the City failed to advocate before the arbitrator and indeed a distinction that the arbitrator clearly did not make according to the award. The City now contends in defense of the unfair labor practice charge that the arbitrator ordered Officer DeNoble's record be cleared "of the rescinded termination," notwithstanding language in the award that his record be cleared and expunged to the fullest extent. However, a review of the four corners of the award shows that the arbitrator did not distinguish between expungement of the termination and expungement of the underlying misconduct. By directing expungement of the

IAD record, the City contends that the hearing examiner broadened the arbitrator's award beyond the logical scope and intent of his decision and award. Indeed, the City points out that the award shows that the arbitrator did not consider or mention an IAD record during the arbitration proceedings, in the opinion itself or in the award. Contrary to the City's reliance on a lack of reference to an IAD record, however, the Board views the lack of reference to an IAD record as indicating that the distinction now urged by the City was never raised as an issue before the arbitrator and therefore cannot now constitute a defense against compliance with the award. There is no evidence to show that the City appealed the arbitration award or requested clarification of the award from the arbitrator. Thus, the Board views the City's argument here as an unlawful collateral attack on the award of an arbitrator via an unfair labor practice proceeding. The Board is limited to a determination of whether the charged party has in fact complied with the award and is not permitted to review the merits of the award or to act as a "super-arbitrator." Pennsylvania, Department of Labor and Industry, 17 PPER ¶ 17177 (Final Order, 1986). The City would have the Board revisit the merits of the award and determine that only Officer DeNoble's personnel records were the basis of the award. This the Board cannot do.

The City urges the Board to draw a distinction between this arbitration award where the misconduct alleged is admitted and those arbitration awards where the conduct alleged has been found by the arbitrator to either not have been proven to have occurred or, if proven, is found to be conduct that does not warrant discipline. This argument must be rejected for several reasons. First, the City's argument that the award should not be enforced because the grievant admitted to the conduct pertaining to the merits of the award and accordingly are beyond the function of the Board. Once the award is issued and the appeal process exhausted or waived, questions regarding whether the remedy fits the offense are not within the purview of the Board's role in enforcing the award.

Second, in support of its position, the City relies on Northwestern School District, 15 PPER ¶ 15058 (Proposed Decision and Order, 1984), wherein grievant's suspension was found to have been based on conduct that did not violate district policy and was not considered unprofessional. Unlike Northwestern School District, the City contends that there is no dispute that Officer DeNoble engaged in misconduct or that such conduct warranted a penalty; rather, the arbitrator noted that he was restricted by the parties' stipulated issue to either upholding the termination or returning Officer DeNoble to his former position and making him whole.

Further, the distinction urged by the City is unnecessary here because the Board need only decide the intent of the arbitrator from the four corners of the arbitration award. The Board's determination is limited solely to determining whether the employer in fact complied with this award. Contrary to the City's invitation, the Board will not look beyond the four corners of the award to determine the intent of the award. City of Philadelphia, 24 PPER ¶ 24052 (Final Order, 1993). As the hearing examiner recognized in the PDO, expungement erases the record of the accused in its entirety. Indeed, despite the City's attempt to analogize the present situation to the criminal context wherein a court reverses a judgment of sentence and leaves intact the underlying conviction, the arbitrator's award does not simply overturn the discipline imposed. The issue before the arbitrator as stipulated by the parties was whether

Officer DeNoble was terminated for just cause. Although the arbitrator recognized that Officer DeNoble admitted making a mistake, he further recognized that the City had the burden to provide ample proof that Officer DeNoble was guilty as charged. However, the arbitrator concluded that the City did not prove just cause and therefore sustained Officer DeNoble's grievance and ordered that he be made whole in every respect.

The City further contends that the arbitration award is ambiguous and therefore the Board should dismiss the charge. If upon review of an arbitration award as a whole the Board is unable to discern the intent of the arbitrator and the award is therefore ambiguous, the Board will dismiss an unfair practice charge alleging non-compliance with the award.

Commonwealth, Department of Labor and Industry, 17 PPER ¶ 17177 (Final Order, 1986). The City argues that the award is ambiguous because the arbitrator does not specify in his opinion or in the award itself whether expungement refers to the discharge itself and/or to the underlying admitted and allegedly proven misconduct. Because the issue of an IAD record was never considered during the arbitration process, the City claims that the award does not clearly include the expungement of Officer DeNoble's IAD records.

However, the Board is satisfied that the hearing examiner correctly interpreted the award, which did not distinguish between the different types of records that may document the drug incident and further stated in a general fashion that Officer DeNoble's record should be expunged and cleared to the fullest extent. The IAD record is part of DeNoble's record. The City would now have the Board find that the broad language used by the arbitrator is ambiguous because the City now wishes to maintain an IAD record of the underlying incident, which the arbitrator ordered cleared and expunged from Officer DeNoble's records. The City's position would nullify in part the award of the arbitration by allowing the City to continue to maintain a record of the incident. The Board, however, must decline to find ambiguity where none exists simply as a means to preserve an argument not made to the arbitrator.

Finally, the City excepts to the hearing examiner's failure to find that the City is bound by a federal court decree in NAACP, et al., v. City of Philadelphia, No. 96-6045 E.D. Pa., (Judge Stewart Dalzell), which allegedly requires the City to maintain IAD records. Further, the City contends that the hearing examiner's construction of this arbitration award requires the performance of an illegal act and is therefore unenforceable. The City asserts that the award can and should be construed in a manner which does not place the City in violation of a consent decree and the PDO should be reversed to the extent that it fails to do so.

After a review of the relevant provisions of the consent decree, the Board is satisfied that the hearing examiner appropriately recognized that there is nothing in the decree that would prohibit the City from complying with the grievance arbitration award, which was rendered pursuant to Act 111 and the parties collective bargaining agreement. The hearing examiner further noted that the preface to the City's response in the consent decree provides that certain legal limitations may serve to impede or delay certain of the proposals contained in the decree, including but not limited to Act 111 and the collective bargaining agreement between the City and the FOP. Thus, the consent decree allowed for the possibility that arbitration awards pursuant to Act 111 could affect the agreed to IAD reforms included in the consent decree. Further, the FOP points out that the consent

decree, dated September 4, 1996, post-dates by more than eighteen months the arbitration award in this case which was issued on February 28, 1995. Thus, the City cannot now rely upon a subsequent consent decree as an excuse for its non-compliance with a previously issued arbitration award. Accordingly, the City's exceptions will be dismissed.

After a thorough review of the exceptions, the brief in support of exceptions and all matters of record, the Board shall dismiss the exceptions and make the Proposed Decision and Order final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania, pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, John Markle Jr., Chairman, and Members L. Dennis Martire and Edward G. Feehan, this seventeenth day of August, 1999. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within Order.

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AFFIDAVIT OF COMPLIANCE

The City 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 expunged and cleared the record of Officer Bruce DeNoble to the fullest extent, including but not limited to the records located in the internal affairs division, 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 FOP 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