COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 1776	:	
v.	:	Case No. PERA-C-05-610-E
DUNMORE BOROUGH	:	

PROPOSED DECISION AND ORDER

On December 29, 2005, United Food and Commercial Workers Union Local 1776 (Union or Complainant) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that Dunmmore Borough (Borough) violated Sections 1201(a)(1) and (8) of the Public Employe Relations Act (Act) by failing to comply with a grievance arbitration award.

On April 6, 2006, the Secretary of the Board issued a Complaint and Notice of Hearing in which the matter was assigned to a conciliator for the purpose of resolving the dispute by mutual agreement of the parties and June 2, 2006 in Scranton was assigned as the time and place of hearing, if necessary. The hearing was necessary and was held before Thomas P. Leonard, Esquire, a hearing examiner of the Board, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence.

The hearing examiner, on the basis of the testimony presented at the hearing and from all other matters and documents of record, makes the following:

FINDINGS OF FACT

1. That Dunmore Borough is a public employer within the meaning of Section 301(1) of the Act.

2. That the United Food and Commercial Workers Union Local 1776 is an employe organization within the meaning of Section 301(3) of the Act.

3. That the Borough and the Union are parties to a collective bargaining agreement (hereinafter “CBA”), for the period January 1 2003 through December 31, 2005. (N.T. 11, 12, Complainant’s Exhibit 1)

4. That on July 16, 2004, the Union filed a grievance on behalf of Frank DeMarco in which it requested that DeMarco be returned to his former classification as a truck driver. He had been removed from the truck driver classification and reduced to the laborer’s classification when he lost his Commercial Driver’s License (CDL). After he gained reinstatement of the license, he sought several times to be returned to the truck driver classification and when the Borough refused, he filed his July 16, 2004 grievance. (N.T. 15, Complainant’s Exhibit 4)

5. That pursuant to the grievance arbitration provisions of Article 12 of the CBA, the Union sought arbitration with respect to its grievance on behalf of DeMarco. The grievance proceeded to arbitration and by Opinion and Award dated September 6, 2005, the arbitrator sustained the union’s grievance and issued the following award:

> The grievance is sustained. The Borough violated the agreement by not reinstating the Grievant, Frank DeMarco, to his classification as Truck Driver.
>
> The Borough shall immediately reinstate DeMarco to the classifcation of Truck Driver. Further, the Borough shall pay to DeMarco the difference in

> wages between the wage rate he actually received and the wage rate he should have received as a Truck Driver for all work performed, including overtime, between the date the instant Grievance was filed, July 16, 2004, and the date of his reinstatement.

(N.T. 11, 12, Complainant's Exhibit 1)

6. That the parties stipulated and agreed that the Borough took no appeal from the Opinion and Award of the arbitrator. (N.T. 21)

7. That the Borough reinstated Demarco to the classification of truck driver in September, 2005. (N.T. 23)

8. That the Borough paid DeMarco the difference in straight time wages between the laborer's classification and the truck driver's classification. That difference is 9 cents an hour and resulted in payment to DeMarco of approximately $220. (N.T. 23)

9. That the Borough did not pay DeMarco for overtime work as a truck driver that was lost to him when he was in the laborer's classification. (N.T. 50, Complainant's Exhibit 6)

10. That while DeMarco remained in his laborer's classification after filing his grievance on July 16, 2004, three employes from the maintenance classification operated Borough vehicles during the winter months to plow and remove snow from the Borough streets and to cinder and salt those streets on an overtime basis. (N.T. 38-40, 59)

11. That the maintenance employes who worked in place of DeMarco were Richard Gammaitoni, Richard Drosinski and Michael Falzone. During this period each of these employes earned approximately $2,200 in overtime in the operation of Borough vehicles. (N.T. 29-30, 59, 60-61)

DISCUSSION

The Union's charge of unfair practices alleges that the Borough violated the Act by refusing to comply with an arbitration award by not paying Frank DeMarco overtime that he would have earned but instead paying other out of class employes.

The legal standard to apply to this dispute is long established. In State System of Higher Education v. Commonwealth of Pennsylvania, Pennsylvania Labor Relations Baord, 528 A.2d 278 (Pa. Cmwlth. 1987), the Commonwealth Court restated and reaffirmed the duty of the Board when confronted with a charge of unfair practices alleging a failure or refusal to comply with the provisions of a final and binding arbitration award:

> "Under the Act, when a complainant in a charge of unfair labor practices alleges refusal to comply with the provisions of an arbitration award deemed binding, the Board must determine: (1) if the award exists; (2) if the appeal procedure available to the party under the rule has been exhausted; and then (3) whether the party has failed to comply with the provisions of the arbitrator's decision."

528 A.2d at 281.

In the present case, there is no dispute over the first two parts of the test. Thus, the question is whether the award has been complied with. That, of course, requires determining whether the award can be understood. In City of Philadelphia v. Pennsylvania Labor Relations Board, 772 A.2d 460 (Pa. Cmwlth. 2001), the Commonwealth Court, citing United School District, 13 PPER ¶ 13170 (Final Order, 1982), stated: "In determining whether an award has been complied with, the Board must first ascertain the arbitrator's intent." 772 A.2d at 463. For reasons set forth below, this award is perfectly clear on its face, so it is not difficult to understand what the arbitrator intended.

The Borough contends that it has not paid DeMarco the overtime he claims for two reasons: he did not work overtime in the period in question and he would not have earned overtime in the period in question because he routinely refused overtime when he was in the truck driver position.

The Borough's first argument is at odds with the intent of the arbitrator's award. Here, the award is clear, definite and ascertainable on its face. The arbitrator clearly intended that DeMarco be made whole for the wages, including the overtime wages, he lost because the award is written in terms of overtime opportunities lost during the period when the Borough did not return him to the truck driver classification. Whether or not DeMarco worked overtime in the period he was classified as a laborer is irrelevant to his claim for lost overtime as a truck driver.

The Borough's second argument is based on testimony from the Borough Manager that DeMarco was not entitled to overtime because it was his understanding that DeMarco always refused overtime when he worked as a truck driver. It is difficult to base a finding of fact on this testimony, as the Manager did not testify from direct knowledge. The Manager also admitted that he never asked DeMarco to work overtime. On the other hand, DeMarco himself testified that only once did he decline overtime. Based on DeMarco's credible testimony, I must be conclude that he would have made himself available to work overtime as a truck driver had such work been offered to him in this period. Consistent with the arbitrator's award, the Borough should have paid DeMarco the sum of $2,200, the amount that was paid to each of the maintenanace employes who were called on overtime to perform truck driver work during the period when DeMarco was in the laborer classification.

Additionally, in case there is any remaining doubt about the arbitrator's intent, the arbitrator's award is also consistent with and in fulfillment of the union's specific request for a remedy made at the hearing held before the arbitrator on April 26, 2005. As seen in the Union's opening statement, as set forth in the Transcript in the arbitration hearing, (Complainant's Exhibit 2) the union specified the precise remedy which arbitrator granted.

The refusal to pay DeMarco the overtime to which he is entitled under the award is a refusal to comply with a final and binding award and, therefore, an unfair practice under the Act.

CONCLUSIONS

The hearing examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds:

1. That Dunmore Borough is a public employer within the meaning of Section 301(1) of the Act.

2. That the United Food and Commercial Workers local 1776 is an employe organization within the meaning of Section 301 (3) of the Act.

3. That the Board has jurisdiction over the parties hereto.

4. That the Borough has committed unfair practices within the meaning of Sections 1201(a)(1) and (8) of the Act.

ORDER

In view of the foregoing and in order to effectuate the policies of the Act, the hearing examiner

HEREBY ORDERS AND DIRECTS

that the Borough shall

1. Cease and desist from interfering with, restraining or coercing employes in the exercise of the rights guaranteed in the Act.

2. Cease and desist from refusing to comply with an arbitration award deemed binding under the Act.

3. Take the following affirmative action:

(a) Pay Frank DeMarco the sum of $2,200, the amount of overtime that he would have earned had he been employed as a truck driver between July 16, 2004 and the date of his reinstatement;

(b) Post a copy of this Decision and Order within five (5) days from the effective date hereof in a conspicuous place readily accessible to its employes and have the same remain so posted for a period of ten (10) consecutive days; and

(c) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this Decision and Order by completion and filing of the attached Affidavit of Compliance.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty days of the date hereof, this decision and order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this thirtieth day of August, 2006.

PENNSYLVANIA LABOR RELATIONS BOARD

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THOMAS P. LEONARD, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 1776	:	
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DUNMORE BOROUGH	:	

AFFIDAVIT OF COMPLIANCE

Dunmore Borough (Borough) hereby certifies that it has ceased and desisted from its violation of Sections 1201(a)(1) and (8) of the Public Employe Relations Act, that it has complied with the Arbitration Award dated September 6, 2005 and paid Frank DeMarco the sum of $2,200; that it has posted a copy of this decision and order as directed and that it has served an executed copy of this affidavit on the United Food and Commercial Workers Union Local 1776 at its current address.

_____
Signature/Date

_____
Title

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

_____
Signature of Notary Public