

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF HOUSING POLICE :
 :
 v. :
 : Case No. PERA-C-06-135-E
 PHILADELPHIA HOUSING AUTHORITY :

FINAL ORDER

The Philadelphia Housing Authority (Authority) filed exceptions with the Pennsylvania Labor Relations Board (Board) on February 16, 2007, challenging an amended Proposed Decision and Order (PDO) issued by a Board Hearing Examiner on January 29, 2007. The Examiner found in the PDO that the Authority violated Section 1201(a)(1) and (8) of the Public Employe Relations Act (PERA) by failing to comply with a grievance arbitration award. Pursuant to an extension of time granted by the Secretary of the Board, the Authority filed a brief in support of exceptions on March 6, 2007. The Fraternal Order of Housing Police (Union) filed a brief in response to the Authority's exceptions on March 30, 2007. After a thorough review of the record, the Board makes the following

ADDITIONAL FINDINGS OF FACT

10. At the time of issuance of the arbitration award reinstating Police Officer Omar Taylor, Taylor did not possess valid certification under the Municipal Police Officers' Education and Training Act, 53 Pa. C.S.A. §2167, (hereinafter "MPO certification"). (N.T. 29).

11. After issuance of the arbitration award, Officer Taylor commenced his MPO training. Officer Taylor was promptly reinstated by the Authority once he obtained his certification. (N.T. 29-30, 60-61, 82-84).

12. To date, the Authority has not paid Officer Taylor any backpay. (N.T. 43).

DISCUSSION

Briefly stated, the case arises out of arbitration over the termination of Police Officer Omar Taylor from his employment with the Authority. On February 14, 2005, an arbitrator, finding no just cause for Taylor's dismissal, issued an award directing the Authority to reinstate Officer Taylor "with backpay from June 22, 2004 but without loss of seniority and/or pension credits." (Finding of Fact 3). The Authority did not reinstate Officer Taylor until August 2005, after he obtained MPO certification. (Finding of Fact 4).

The collective bargaining agreement between the Union and the Authority provided that the Authority could offset, from any backpay awarded through arbitration, "unemployment compensation or compensation from other full-time employment substituted for employment under this Agreement." (Finding of Fact 7). Upon Officer Taylor's return to work in August 2005, he was asked about interim employment by Fred Pasour, the Authority's Director of Labor and Employment. (Finding of Fact 5). Officer Taylor only reported that he had worked for ProGuard Security, because he was of the opinion that the ProGuard position was full-time, and that another position that he held with Wackenhut Security was part-time. (Findings of Fact 5 and 8).

The Authority contacted the Department of Labor and Industry in connection with its own investigation of Officer Taylor's interim earnings, and in December 2005 discovered that Officer Taylor had also worked for Wackenhut. (Finding of Fact 6). Although the Authority was aware of Officer Taylor's interim employment with Wackenhut, it continued to ask him whether he had interim employment other than ProGuard (Finding of Fact 8). In January 2006, the Authority finally confronted Officer Taylor about his employment with

Wackenhut. Officer Taylor indicated that he believed it was part-time employment. (Finding of Fact 8). The Authority has not paid any amount whatsoever to Taylor as backpay under the award. (Finding of Fact 12).

The Examiner found that because the parties' discussions regarding the amount of backpay continued into January 2006, the Union's March 30, 2006 charge of unfair practices was timely filed. The Examiner concluded that even though Officer Taylor lacked MPO certification at the time the arbitration award was issued, he was entitled to backpay from June 22, 2004 to the date of his reinstatement in August 2005. The Hearing Examiner found that in view of the Authority's knowledge of Officer Taylor's interim earnings, it violated Section 1201(a)(1) and (8) of PERA by refusing to make any payment of backpay. In remedying the unfair practice, the Examiner awarded six percent interest on the backpay owed, and directed the Authority to monetarily compensate Officer Taylor for the value of lost leave and benefits.¹

The Authority contends that the Examiner erred in finding that the Union's charge of unfair practices was timely filed. Specifically, the Authority argues that the collective bargaining agreement between the Union and Authority expressly provided that arbitration awards were to be complied with within thirty days. Thus, the Authority contends that the Union should have known no later than March 16, 2005 (thirty days after issuance of the award) that the Authority was not complying with the grievance arbitration award, and therefore its charge filed March 30, 2006 was untimely.

The four-month statute of limitations under Section 1505 of PERA commences to run when the complainant knew or should have known of the acts alleged to be an unfair practice. International Brotherhood of Electrical Workers, Local No. 81 v. Scranton Housing Authority, 33 PPER ¶33134 (Final Order, 2002). With regard to a claim under Section 1201(a)(8) of PERA, the statute of limitations does not accrue immediately with the issuance of the award, but "begins to run when a party takes a 'firm and unyielding stance' that it will not comply with the award." Luzerne County Community College Association of Higher Education v. Luzerne County Community College, 37 PPER 123 (Final Order, 2006) (*quoting* Pennsylvania Labor Relations Board v. Commonwealth of Pennsylvania, 9 PPER ¶9003 (Final Order, 1977)). Indeed, the statute of limitations under PERA is tolled during any period where the employer gives assurances that it is attempting to comply with the grievance award. Commonwealth of Pennsylvania v. Pennsylvania Labor Relations Board (APSCUF), 438 A.2d 1061 (Pa. Cmwlth. 1982).

Through its discussions with Officer Taylor and the Union concerning interim employment (which continued into January 2006), the Authority gave assurances that it was attempting to comply with the grievance arbitration award. According to its own assertions, the Authority could have calculated Officer Taylor's backpay as of December 2005. By its failure to pay any amount of backpay after the January 2006 meeting with the Union and Officer Taylor, despite then admittedly having all necessary information to calculate its backpay liability, the Authority took a firm and unyielding stance that it would not be complying with the award. Accordingly, the Examiner correctly determined that the Union's charge filed on March 30, 2006 was timely filed within four months of when it knew or should have known of the Authority's refusal to comply with the grievance award. Luzerne County Community College, *supra*.

The Authority next contends that when the arbitration award was issued, Officer Taylor could not receive a salary or compensation as a police officer, see 53 Pa. C.S.A.

¹ The Authority excepts to Findings of Fact 7 and 8 as not supported by evidence of record. Upon review, the Examiner's Findings are expressly supported by the unequivocal testimony of Fred Pasour, the Authority's Director of Labor and Employment, (N.T. 84 and 91) and will not be disturbed. Further, the Authority asserts that the Examiner failed to make several findings of fact. However, the Authority's proffered "findings" are credibility determinations, which will not be disturbed on exceptions, Mt. Lebanon Education Association v. Mt. Lebanon School District, 35 PPER 98 (Final Order, 2004); allege contractual provisions not pertinent for purposes of addressing the claims under PERA, Page's Department Store v. Velardi, 464 Pa. 276, 346 A.2d 556 (1975) (Board need not render findings of facts unnecessary to the determination of the charge of unfair practices); or are simply proffered conclusions of law, which are more appropriately discussed elsewhere in this order.

§2167(b), because he lacked the necessary MPO certification. The Authority argues that it cannot be held liable for backpay after January 1, 2005, because it could not lawfully return Officer Taylor to work until August 2005, when he obtained his MPO certification.

To sustain its burden of proof on the charge alleging noncompliance with an arbitration award, the Union must establish that 1) a grievance award exists, 2) there is no stay of the award because of an appeal, and 3) the Authority has failed to comply with the provisions of the award. City of Philadelphia v. Pennsylvania Labor Relations Board, 759 A2d 40 (Pa. Cmwlth. 2000) (*citing Pennsylvania Labor Relations Board v. Commonwealth*, 478 Pa. 582, 387 A.2d 475 (1978)). There is no dispute that an award exists, that no appeal of the award was filed, and that the appeal period has expired.

With regard to the Authority's alleged failure to comply with the award, the Union established that Officer Taylor was not reinstated following issuance of the award until August 2005. However, the Authority countered by raising Officer Taylor's lack of MPO certification to justify its failure to immediately reinstate him pursuant to the award. In determining whether an employer has unlawfully failed to comply with a grievance arbitration award, the burden remains with the union to establish an entitlement to the relief requested under the award. City of Philadelphia, *supra*. Here, we agree with the Authority that the record is devoid of any evidence that the Authority could have lawfully employed Officer Taylor for the full period of potential back pay. Accordingly, the Union failed to sustain its burden of establishing Officer Taylor's entitlement to backpay during the period of time he lacked the required MPO certification.

We note however that the Authority erroneously states that MPO certification was required for all of its police officers as of January 1, 2005. Section 4 of Act 65 of 2003, provides, in relevant part, that "[a] police officer who, as of the effective date of this section, has not successfully completed a basic training course ... shall be able to perform the duties of a police officer for one year from the effective date of this section. By the end of that year, the police officer must be certified..." Section 5 of Act 65 makes Section 4 effective sixty days from December 30, 2003, the date it was adopted into law. Pursuant to Sections 4 and 5, Officer Taylor could have performed police duties in the absence of an MPO certification through February 28, 2005. Thus, consistent with the above analysis, the Union has not shown that the Authority could have lawfully paid Officer Taylor backpay from March 1, 2005 to the date of his reinstatement in August 2005.

Indeed, the Municipal Police Officer's Education and Training Act provides:

Any person hired as a police officer shall be ineligible to receive any salary, compensation or other consideration for the performance of duties as a police officer unless the person has met all of the requirements as established by the commission and has been duly certified as having met those requirements by the commission.

53 Pa. C.S. §2167(b). The Act further provides:

Any person who orders, authorizes or pays as salary to a person in violation of the provisions of this subchapter commits a summary offense and shall, upon conviction, be sentenced to pay a fine of \$ 100 or be imprisoned for a term not to exceed a period of 30 days.

53 Pa. C.S. §2167(c). In Dougherty v. Borough of Meshoppen, 612 A.2d 595 (Pa. Cmwlth. 1992), the Commonwealth Court concluded that even if the failure to timely obtain an MPO certification was a mere technical oversight, payment of backpay to an officer who lacks certification under the Municipal Police Officers' Training and Certification Act is illegal. The Commonwealth Court further imposed a surcharge on the members of borough council who voted to award back pay to a police chief for the period of time he was suspended from his position because he was not certified under the Municipal Police Officers' Education and Training Act. On this record, we are constrained to conclude that the Municipal Police Officer's Education and Training Act prohibits payment of back pay for Police Officer Taylor from March 1, 2005 to his reinstatement. Therefore, the relief

directed by the Hearing Examiner will be modified to direct backpay only from June 22, 2004 through February 28, 2005.²

In an attempt to avoid having to comply with the award at all, the Authority argues that equity weighs in its favor to excuse its noncompliance because, in its opinion, Taylor has not been completely straightforward in disclosing his interim employment. However, the Authority was aware that some amount of backpay would be owed for the period of time for which Officer Taylor was not required to possess MPO certification and, as of December 2005, was satisfied that it was aware of all of Taylor's interim employment. (Finding of Fact 6). Nevertheless, the Authority refused to pay Taylor any amount whatsoever in backpay. On this record, the Authority will not be excused from making any payment of backpay.

Finally, the Authority argues that the Examiner erred in awarding the "monetary value of the agreed upon amounts of vacation, sick and personal time..." (PDO at 8). There is no specific award for payment for the monetary value of vacation, sick and personal time. Whether or not Officer Taylor is entitled to payment or accrual of vacation, sick, and personal time is a matter to be determined in accordance with the collective bargaining agreement. Accordingly, the portion of the Examiner's Order that directed payment for vacation, sick, and personal time will be set aside.

After a thorough review of the exceptions and all matters of record, the Examiner did not err in concluding that the Authority violated Section 1201(a)(1) and (8) of PERA. The Authority's exceptions are denied in part and sustained in part, and the Examiner's Order will be amended accordingly.

ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employe Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed by the Philadelphia Housing Authority are hereby dismissed in part and sustained in part. Paragraph 3(a) of the Order on page 8 of the January 29, 2007 Amended Proposed Decision and Order is hereby modified to direct the Authority to immediately comply with the arbitration award by issuing a check to Omar Taylor for backpay from June 22, 2004 through February 28, 2005, less any offset between those dates in accordance with the collective bargaining agreement. The Amended Proposed Decision and Order, as amended herein, is hereby made absolute and final.

SEALED, DATED and MAILED pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, Anne E. Covey, Member, and James M. Darby, Member, this fifteenth day of May, 2007. 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.

² This limitation on the backpay award to Police officer Taylor affects the ability of the Authority to offset the backpay award as a result of Officer Taylor's interim earnings between March 1, 2005 and his reinstatement. The proper period for including backpay offsets is the period for which back pay is due. North Schuylkill Educational Support Personnel Association v. North Schuylkill School District, 36 PPER 1 (Final Order, 2005).

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AFFIDAVIT OF COMPLIANCE

The Philadelphia Housing Authority hereby certifies that it has ceased and desisted from its violation of Section 1201(a)(1) and (8) of the Public Employee Relations Act; that it has complied with the arbitration award by issuing a check to Omar Taylor for backpay from June 22, 2004 through February 28, 2005, less any offset between those dates in accordance with the collective bargaining agreement; that the amount paid to Taylor included six percent per annum interest from the date of the arbitration award to the actual date of payment; that it has posted the final order and proposed decision and 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