

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE LODGE 85 :  
:  
v. : Case No. PF-C-07-101-E  
:  
COMMONWEALTH OF PENNSYLVANIA :  
DEPARTMENT OF GENERAL SERVICES :

**PROPOSED DECISION AND ORDER**

On July 2, 2007, the Fraternal Order of Police, Lodge No. 85 (FOP), filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair labor practices alleging that the Commonwealth of Pennsylvania (Commonwealth) violated sections 6(1)(a) and 6(1)(e) of the Pennsylvania Labor Relations Act (PLRA) as read in pari materia with Act 111 of 1968 (Act 111) by refusing to comply with a back pay provision in a grievance arbitration award involving a capitol police officer (Michael Schmidt). On July 12, 2007, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on August 27, 2007. The hearing examiner subsequently continued the hearing upon the request of the Commonwealth and without objection by the FOP. On October 9, 2007, the hearing was held. The parties were afforded a full opportunity to present evidence and to examine witnesses. Each party made a closing argument. Neither party filed a brief. On November 8, 2007, the transcript of the hearing was filed with the Board.

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

FINDINGS OF FACT

1. The Commonwealth employs capitol police officers who are represented by the FOP. (Case No. PF-R-4-C)
2. After the Commonwealth suspended Officer Schmidt without pay on July 18, 2006, the parties processed a grievance to arbitration, and he obtained part-time employment and received unemployment compensation. (Stipulations 2-3, 8)
3. On April 18, 2007, an arbitrator issued an award disposing of the grievance. Among other things, the arbitrator directed the Commonwealth to provide Officer Schmidt "with full back pay." (Stipulation 4; Joint Exhibit 1)
4. On June 15, 2007, the Commonwealth provided Officer Schmidt with back pay less certain deductions, including his earnings from the part-time employment and the unemployment compensation he received. (Stipulation 8; Joint Exhibit 9)
5. The Commonwealth subsequently notified Officer Schmidt of his liability under section 874(b) of the Unemployment Compensation Law for the amount of unemployment compensation it deducted from his back pay. (Stipulation 10)

DISCUSSION

The FOP has charged that the Commonwealth committed unfair labor practices under sections 6(1)(a) and 6(1)(e) of the PLRA as read in pari materia with Act 111 by refusing to comply with a back pay provision in a grievance arbitration award involving a capitol police officer (Officer Schmidt). As set forth in finding of fact 3, the award directed the Commonwealth to provide him with "full back pay." According to the FOP, because the Commonwealth deducted "outside earnings" and unemployment compensation from his back pay, it did not provide him with "full back pay" as directed in the award. The FOP also contends that the Commonwealth did not provide him with "full back pay" as directed in the award because it subsequently notified him of his liability under section 874(b) of the Unemployment Compensation Law for the unemployment compensation it deducted from his back pay.

The Commonwealth contends that the charge should be dismissed for lack of proof. In the Commonwealth's view, it provided Officer Schmidt with "full back pay" as set forth in the award even though it deducted the "outside earnings" and the unemployment compensation from his back pay and even though it subsequently notified him of his liability under section 874(b) of the Unemployment Compensation Law for the unemployment compensation it deducted from his back pay. According to the Commonwealth, it would have provided him with more than "full back pay" as directed in the award if it had not deducted the "outside earnings" and the unemployment compensation from his back pay. The Commonwealth also submits that its subsequent notification to him of his liability under section 874(b) of the Unemployment Compensation Law for the unemployment compensation it deducted from his back pay was as required by law.

In East Hempfield Township, Case No. PF-C-07-76-E (Final Order, October 16, 2007), the Board recently reiterated the applicable law as follows:

"To conclude that a party has failed to comply with the provisions of a grievance arbitration award, the Board must find that (1) a binding award exists, (2) no appeal of the award has been filed or stay of the award issued, and (3) the responding party has failed to comply with the provisions of the arbitration award. AFSCME, District Council 47 Local 2187 v. City of Philadelphia, 36 PPER 124 (Final Order, 2005). In addressing compliance with the provisions of the award, the Board performs a limited interpretive role necessary to ascertain the arbitrator's intended remedy. State System of Higher Education (Kutztown University) v. PLRB, 528 A.2d 278 (Pa. Cmwlth. 1987); PLRB v. Erie City School District, 15 PPER ¶15134 (Erie County Court of Common Pleas, 1984); AFSCME, Local 1971 v. City of Philadelphia (Office of Housing and Community Development), 24 PPER ¶24052 (Final Order, 1993). The charging party bears the burden of proving the respondent's non-compliance with the arbitrator's decision. City of Philadelphia v. PLRB, 759 A.2d 40 (Pa. Cmwlth. 2000)."

Slip opinion at 2.

The dispositive issue is whether or not the Commonwealth refused to comply with the back pay provision of the award when it deducted "outside earnings" and unemployment compensation from Officer Schmidt's back pay. A close review of the record reveals that the Commonwealth provided Officer Schmidt with "full back pay" as directed in the award even though it deducted the "outside earnings" and the unemployment compensation from his back pay and even though it subsequently notified him of his liability under section 874(b) of the Unemployment Compensation Law for the unemployment compensation it deducted from his back pay. Accordingly, the charge must be dismissed.

The FOP's contention that the Commonwealth did not provide Officer Schmidt with "full back pay" as directed in the award because it deducted "outside earnings" and unemployment compensation from his back pay finds no support in the record. Although, as the FOP points out, the award does not expressly provide for any deductions from back pay, the award does not expressly prohibit them either. Indeed, the award is silent in that regard. Compare Minersville Area School District, 19 PPER ¶ 19197 (Final Order 1988), appeal dismissed as moot sub nom. Minersville Area School District v. Commonwealth of Pennsylvania, PLRB, 568 A.2d 979 (Pa. Cmwlth. 1989)(where a grievance arbitration award specifically provided that unemployment compensation was to be deducted from an employe's back pay, the employer refused to comply with its provisions by also deducting interim earnings from the back pay).

Moreover, the back pay language in the award is generally understood to mean that an employe is to be made whole, not given a windfall. See Commonwealth of Pennsylvania, PLRB v. Stairways, Inc., 425 A.2d 1172, 1176 (Pa. Cmwlth. 1981)("[t]he purpose of the award of back pay is to make the employee whole, not to give the employee a windfall"); City of Philadelphia, 30 PPER ¶ 30204 at 443 (Final Order 1999)("[t]he purpose of a make whole award is to return the employees to the positions they would have been had the contractual violation not occurred"). Thus, in Delaware County, 27 PPER ¶ 27039 (Final Order 1996), aff'd on other grounds sub nom. Flagg v. PLRB, 28 PPER ¶ 28176 (Court of Common Pleas of Delaware County 1997), the Board found that an employer did not refuse to

comply with a provision in a grievance arbitration award directing that a discharged employe be "made whole" where the employer deducted from the employe's back pay earnings from employment the employe obtained after he was discharged. Similarly, in SSHE, 17 PPER ¶ 17076 (Final Order 1986), reversed on other grounds sub nom. APSCUF v. Commonwealth of Pennsylvania, PLRB, 532 A.2d 60 (Pa. Cmwlth. 1987), the court held that an employer did not refuse to comply with a provision in a grievance arbitration award directing that a discharged employe be "made whole" where the employer deducted from the employe's back pay unemployment compensation the employe would not have received had he not been discharged.

As set forth in findings of fact 2 and 4, the record shows that the "outside earnings" the Commonwealth deducted from Officer Schmidt's back pay were from part-time employment he obtained after the Commonwealth suspended him,<sup>1</sup> while the unemployment compensation the Commonwealth deducted from his back pay was received by him after the Commonwealth suspended him. Thus, it is apparent that if the Commonwealth had not deducted the "outside earnings" and the unemployment compensation from his back pay, it would have provided him with more than "full back pay" as directed in the award, and he would have received a windfall. There is, therefore, no basis for finding that the Commonwealth did not provide Officer Schmidt with "full back pay" as directed in the award because it deducted "outside earnings" and unemployment compensation from his back pay as the FOP contends.<sup>2</sup>

The FOP's contention that the Commonwealth did not provide Officer Schmidt with "full back pay" as directed in the award because it subsequently notified him of his liability under section 874(b) of the Unemployment Compensation Law for the unemployment compensation it deducted from his back pay also finds no support in the record. As the FOP points out, section 874(b) of the Unemployment Compensation Law provides in pertinent part as follows:

"Any person who other than by reason of his fault has received with respect to a benefit year any sum as compensation under this act to which he was not entitled shall not be liable to repay such sum but shall be liable to have such sum deducted from any future compensation payable to him with respect to such benefit year, or the three-year period immediately following such benefit year[.]"

43 P.S. § 874(b)(1). Thus, as the FOP also points out, Officer Schmidt stands to receive less than "full back pay" as directed in the award if the unemployment compensation the Commonwealth deducted from his back pay is also deducted from any unemployment compensation he becomes entitled to during the three-year period referenced in section 874(b) of the Unemployment Compensation Law. The record does not show, however, that Officer Schmidt has become entitled to any such unemployment compensation to date, much less that any of the unemployment compensation the Commonwealth deducted from his back pay also has been deducted from any such unemployment compensation. There is, therefore, no present basis for finding that the Commonwealth did not provide Officer Schmidt with "full back pay" as directed in the award because it subsequently notified him of his liability under section 874(b) of the Unemployment Compensation Law for the unemployment compensation it deducted from his back pay. See APSCUF v. PLRB, 661 A.2d 898 (Pa. Cmwlth. 1995), allocatur denied, 542 Pa. 649, 666 A.2d 1058 (1995)(charge prematurely filed where

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<sup>1</sup> Although the FOP specifically alleged in the charge that the "outside earnings" were "from employment [Officer Schmidt] had prior to and maintained during the suspension period," the record does not show that to be the case, and the FOP does not contend otherwise.

<sup>2</sup> Although the record shows that the Commonwealth also deducted federal withholding taxes, social security taxes, medicare taxes, state withholding taxes, local withholding taxes, unemployment compensation taxes, FOP dues and retirement from Officer Schmidt's back pay (Joint Exhibit 9), the FOP does not contend that the Commonwealth thereby refused to comply with the back pay provision of the award. A contention not presented to a hearing examiner is, of course, waived. SSHE, 32 PPER ¶ 32118 (Final Order 2001). In any event, it is apparent that the Commonwealth would have deducted federal withholding taxes, social security taxes, medicare taxes, state withholding taxes, local withholding taxes, unemployment compensation taxes, FOP dues and retirement from his pay if it had not suspended him. Under the analysis set forth in Stairways, supra, then, it also is apparent that the Commonwealth provided him with "full back pay" as directed in the award even though it deducted the same from his back pay. See also South Butler County School District, 22 PPER ¶ 22068 (Final Order 1991)(an employer did not refuse to comply with a provision in a grievance arbitration award directing that an employe be paid a sum certain where the employer paid the sum certain less withholding taxes).

complained of action had yet to take place); Crestwood School District, 37 PPER 105 (Final Order 2006)(speculative loss of pay cannot be remedied by the Board).

#### CONCLUSIONS

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

1. The Commonwealth is an employer under section 3(c) of the PLRA as read in pari materia with Act 111.
2. The FOP is a labor organization under section 3(f) of the PLRA as read in pari materia with Act 111.
3. The Board has jurisdiction over the parties.
4. The Commonwealth has not committed unfair labor practices under sections 6(1)(a) and 6(1)(e) of the PLRA as read in pari materia with Act 111.

#### ORDER

In view of the foregoing and in order to effectuate the policies of the PLRA as read in pari materia with Act 111, the hearing examiner

#### HEREBY ORDERS AND DIRECTS

that the complaint is rescinded and the charge dismissed.

#### IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed to this decision and order 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 nineteenth day of November 2007.

PENNSYLVANIA LABOR RELATIONS BOARD

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Donald A. Wallace, Hearing Examiner