COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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

AMENDED PROPOSED DECISION AND ORDER

A charge of unfair practices was filed with the Pennsylvania Labor Relations Board (Board) by the Fraternal Order of Housing Police (Union) alleging that the Philadelphia Housing Authority (Authority) violated Section 1201(a)(1), (3), (5) and (8) of the Public Employe Relations Act (Act). On May 9, 2006, the Secretary of the Board issued a complaint and notice of hearing wherein this case was scheduled for hearing on July 24, 2006, in Philadelphia, Pennsylvania. After a series of continuance requests, a hearing was held in this matter on August 14, 2006. On that date, all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Both parties filed post-hearing briefs.

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

FINDINGS OF FACT

1. The Authority is an employer within the meaning of Section 301(1) of the Act.

2. The Union is an employe organization within the meaning of Section 301(3) of the Act.

3. On February 14, 2005 an arbitration opinion and award was issued pursuant to the parties' collective bargaining agreement, after the Union filed a contractual grievance over the termination of Omar Taylor. The opinion concluded that Taylor was not discharged for just cause and the Authority was "directed to reinstate him [Taylor] to his former or similar position with back pay from June 22, 2004 but without loss of seniority and/or pension credits from the date he was placed on administrative leave without pay." (Joint Exhibit 2).

4. The Authority did not reinstate Taylor until August 12 or 15, 2005.[1] (N.T. 60, 84).

5. When asked by the Authority's doyen, Frederick Pasour, Director of Labor and Employment, Taylor reported that he had but one interim employer between the date of his dismissal and re-employment with the Authority. That employer was Pro Guard Security. Taylor was of the opinion that the Pro Guard position was "full-time". (N.T. 33, 36; Union Exhibit 2).

6. Upon investigation by the Pennsylvania Department of Labor and Industry, the Authority discovered in December 2005, that Taylor had an additional interim employer between the date of his dismissal and re-employment by the Authority, Wackenhut Security. Pasour was satisfied that the Labor and Industry investigation had revealed all of Taylor's interim employers. (N.T. 86, 87, 93-97).

7. The parties' collective bargaining agreement allows the Authority to set off arbitration awards by "unemployment compensation or compensation from other full-time employment substituted for employment under this Agreement." Nevertheless, Pasour told

[1] In its brief the Authority asserts that Taylor's re-employment date was August 25, 2005, but the Authority's citation to the record does not support that assertion. (Authority's brief at 4).

the Union that the Authority intended on deducting "any" interim wages Taylor earned. (N.T. 91; Joint Exhibit 3, p 9).

8. Upon returning to work in August of 2005 discussions between the Union and the Authority commenced concerning the proper amount of back pay due Taylor. Although the Authority knew of Taylor's second, unreported interim employment, it continued to ask him whether he had other interim earnings at subsequent meetings. Taylor considered the Wackenhut employment part-time. (N.T. 31-33, 37, 41, 42, 53, 54, 60, 66, 67, 84-86).

9. The parties have stipulated and agreed that it is 14 months or 60 weeks between June 22, 2004 and August of 2005 when Taylor was reinstated; that Taylor's missed wages for this time period are $54,000.00; that accrued leave hours for this time period are 187, vacation hours are 140, and personal hours are 37; that Taylor's interim earnings from Pro Guard are $5,700.00, and from Wackenhut Security are $17,500.00. (N.T. 16-18; Union Exhibit 1).

DISCUSSION

The Union charges the Authority with violating Section 1201(a)(1), (3), (5) and (8) when it did not comply with a grievance arbitration award issued pursuant to the parties' collective bargaining agreement. The Authority recites a litany of reasons, including the timeliness of the charge, why it has not violated the Act even though, by its own admission, it has not fulfilled the award's mandates. Nevertheless, none of the proffered reasons provide a legally sufficient excuse for the Authority's non-compliance. Therefore, the Authority is found to have violated section 1201(a)(1) and (8) of the Act.

The Board will find an employer in violation of Sections 1201(a)(1) and 1201(a)(8) of the Act if the employer refuses to comply with the provisions of a grievance arbitration award. PLRB v. Commonwealth, 478 Pa. 582, 387 A.2d 475 (1978); City of Reading, 26 PPER 26082 (Final Order, 1995). The Board's inquiry is limited to whether an award exists, whether avenues of appeal are exhausted, and whether the employer has failed to comply with the award's mandates. PLRB v. Commonwealth of Pennsylvania, 478 Pa. 582, 387 A.2d 475 (1978). If the Board, after reviewing the award as a whole, is unable to discern the intent of the arbitrator, the award is deemed ambiguous and the charge is dismissed. Commonwealth, Department of Labor and Industry, 17 PPER ¶ 17177 (Final Order, 1986).

Initially the Authority argues that this charge is untimely filed. The general rule is that a charge must be filed within four months of the behavior or statement which is alleged to have violated the Act. 43 P.S. Section 1101.1505. The Authority argues that the Union should have filed the charge "no later than June 14, 2005, in order to be timely." (Authority's brief at 9). A brief rendition of the facts shows why that argument does not carry the day.

The arbitration decision in dispute was issued on February 14, 2005. Therein the Authority was "directed to reinstate him [Taylor] to his former or similar position with back pay from June 22, 2004 but without loss of seniority and/or pension credits from the date he was placed on administrative leave without pay." (Joint Exhibit 2 at 10). Because of the Authority's interpretation of the award, Taylor was not reinstated until August of 2005. Upon his return, discussions over his back pay amount commenced. In November of 2005 the Authority asked Taylor to supply it with any interim earnings before it would issue him any back pay.[2] Because he believed it to be full-time employment, Taylor only revealed one of the two interim jobs at which he worked. Discussions continued. Unbeknownst to Taylor, Pasour's suspicions were aroused by the paltry sum of Taylor's reported interim earnings.

Pasour instituted an investigation into Taylor's employment history. The fruits of that investigation from the Pennsylvania Department of Labor and Industry revealed that Taylor had, indeed, other interim employment. Pasour learned of this other employment in December of 2005. In January of 2006, the Authority confronted Taylor with the evidence

[2] The parties' collective bargaining agreement allows the Authority to deduct from an arbitrator's award of back pay only amounts for unemployment compensation and for "full-time employment substituted for employment under this Agreement." Joint Exhibit 3.

of additional interim earnings and Taylor then acknowledged those earnings. Taylor's explanation was that he thought the unreported job was part-time, and under the contract wages from part-time employment were not deductible from his back pay award. By January of 2006, discussions over the proper amount to be tendered to Taylor ceased, and only then did it became clear that the Authority was not going to issue Taylor any back pay. It is from January of 2006, then, that the limitations period starts to run. Therefore, this charge was timely filed.

To support the timeliness argument in its brief the Authority states,

> [t]he fact that the parties continued to discuss the matter during the period when the limitations period was running or had completely run does nothing to cure the lateness of this filing. . . . [the] statute of limitations does not lend itself to misunderstandings, vagueness or promises of future responses. Brandywine Heights Area Education Association v. Brandywine Heights School District, 36 PPER ¶ 43 (2005).[3]

(Authority's brief at 11).

The Brandywine Heights case has nothing to do with the limitations period for filing a charge under PERA, but rather speaks only to whether an employer met the applicable contractual timelines in answering a grievance. Rather than supporting the Authority's position that case is simply *ignoratio elenchi.*

Notwithstanding the complete inapplicability of Brandywine Heights to these facts, the Authority's assertion that continued talks about the amount of back pay owed do not toll the limitations period is simply wrong. It is when the Union "knows or should have known of the employer's noncompliance" that the limitations period starts to run. United School District, 13 PPER ¶ 13017 (Proposed Decision and Order, 1981), 13 PPER ¶ 13170 at 301 (Final Order, 1982). Intervening discussions between the parties concerning the proper implementation of an arbitrator's award evidence a mutual understanding that there will be compliance, until one party disavows that understanding either through word or deed. See Crawford Central School District, 618 A.2d 1202 (Pa. Cmwlth. 1992); Duquesne City School District, 16 PPER ¶ 16189 (Proposed Decision and Order, 1985).

The condign period of back pay for Taylor is from June 22, 2004, until the Authority reinstated him on August 15, 2005. The Authority argues that it was impossible to reinstate Taylor before the August date because he lacked a necessary certification to act as an Authority police officer.[4] Additionally, in its brief the Authority argues that since the new certification requirements became effective January 1, 2005, Taylor is owed no back pay from January 1, 2005 to August 15, 2005 because he lacked the requisite certification.

But in this case the award ordered the Authority to reinstate Taylor "to his former or similar position with back pay from June 22, 2004. . . ." (Joint Exhibit 2 at 10). The Authority asserts a litany of reasons why it did not reinstate Taylor to his "former position," but it fails to address why it did not employ him in a "similar position." Having offered no legally sufficient reason for not putting Taylor immediately on the payroll in a similar position, the Authority violated Section 1201(a)(8) of the Act and incurred liability for back pay from June 22, 2004, up to the date it actually reinstated Taylor.

Moreover, the Authority's purported defense in this case is, in fact, a collateral attack on the arbitration award. Act 65 which brought Authority police under the certification requirements of the MPO (see footnote 3) was passed by the legislature on December 30, 2003. (Authority's brief at 23). That amendment allowed a one-year grace period until January 1, 2005, for covered employes to obtain proper certification. (Authority's brief at 23). The Authority was aware a month before Taylor's arbitration hearing (January 28, 2005) that Taylor would need to be certified if he were awarded reinstatement. The Authority was also aware of the resultant conundrum of Taylor's back

[3] 36 PPER 43 (Proposed Decision and Order, 2005), 36 PPER 97 (Final Order, 2005).

[4] Colloquially referred to as "Act 65" this legislation amended the Municipal Police Officers' Education and Training Act (MPO), 53 Pa. C. S. A. § 2161 *et seq*. to include Authority police under its purview.

pay for the period in which he was not certified. Despite the Authority's awareness of these issues it chose not to raise them with the arbitrator, even though the issue to be determined in the arbitration was whether "Officer Omar Taylor [was] discharged for just cause and if not, what shall be the remedy?" (Joint Exhibit 2). That was the proper forum for the Authority to raise any possible, known limitations on reinstatement and back pay so the arbitrator could decide them. There is nothing in the award to indicate the Authority did so. To raise those issues now, before the Board, when they could have been raised before the arbitrator, or on appeal from that award, is to collaterally attack the award. The law is clear; "when a party fails to appeal an arbitration award, the party waives the right to contest the illegality of the arbitration award in an unfair labor practice proceeding regarding enforcement of the arbitration award." Borough of Lewistown v. PLRB, 558 Pa. 141, 735 A.2d 1240 (1999). The Authority did not appeal the award and is therefore bound by its provisions.

The Authority next argues that the Board should defer this charge under the rule first set forth in Pine Grove Area School District, 10 PPER ¶ 10167 (Order Deferring Unfair Practice Charge Until Further Order of the Board, 1979). In Pine Grove the Board set forth its policy of deferring action on charges which also form the factual basis for corresponding grievances, do not allege enmity or discrimination, and yet are rooted in the parties' labor agreement.

The Authority's argument is somewhat abstruse on this issue. At one point in the argument the Authority appears to be requesting deferral to Taylor's termination grievance. Yet further down in that same paragraph the emphasis shifts to a grievance the Union filed and then withdrew, concerning the Authority's non-payment of Taylor's back wages. Under well-settled Board law, once the Union withdraws a grievance that also forms the factual basis for an unfair practice charge, there is nothing to which the Board can defer. Hazelton Area School District, 29 PPER ¶ 29180 (Final Order, 1998). And, clearly, when the unfair practice charge alleges non-compliance with an arbitration award, deferring to that award simply makes no sense.

The Authority next argues that it has a defense under the doctrine set forth in Jersey Shore Area School District, 18 PPER ¶ 18061 (Final Order, 1987). That case established that when there are two possible interpretations of a contractual provision specifically on point, and the employer has a sound arguable basis for the interpretation upon which it has acted, the Board will not enter the fray to serve the arbitrator's function of determining which party's characterization is correct. This doctrine, when proved, is a defense to charges that arise under Section 1201(a)(5) of the Act.

However, there is no dispute as to what the arbitration award orders the Authority to do. The rub here is that the Authority wants to interject certain contractual provisions, which it argues inhibit compliance, and assert that those provisions are vague and open to broad interpretation. Therefore, argues the Authority, the Board cannot find it in non-compliance since the vague contractual provisions blur its responsibilities under the arbitration award. This is merely another attempt to collaterally attack the arbitration award. When the award was issued the Authority was well aware of the applicable contractual provisions it now attempts to throw up as roadblocks to compliance. The Authority should have appealed the arbitration award based on these supposed contractual constraints. Since it did not, it cannot come before the Board and now attack the award's mandates.

The parties stipulated to certain benefits and monetary amounts at the hearing. The parties stipulated that the back pay period of June 2004 through August 2005 was fourteen months (or sixty weeks) and missed wages for that time were $54,000.00; that missed leave hours for that time period were 187 vacation hours, 140 sick hours and 37 personal hours; and that Taylor's interim earnings were $5,700.00 from Pro Guard Security (June 2004 to February 2005), and $17,500.00 from Wackenhut Security (February 2005 to August 2005). Under the award, the Authority was liable for back pay to Taylor from June 2004 until it reinstated him to either his former, or a similar position. That reinstatement did not occur until August 2005. Consequently, the liability for back pay was the full $54,000.00. Even if the Authority were allowed the full set-off for Taylor's interim earnings it still owes Taylor a substantial amount of money, not to mention reimbursement

for vacation, sick and personal time. Since the Authority has not tendered one penny to Taylor it has clearly violated the arbitration award.

The Authority next argues that any delay in tendering Taylor's back pay was caused by Taylor's "attempts to deceive PHA." (Authority's brief at 15). In point of fact, it was the Authority that chose to play "gottcha" with Taylor. Instead of simply confronting Taylor with the information about his other interim employment when it was first received, the Authority chose to ask Taylor on at least one subsequent occasion whether he had other employment, when it knew all along that he had.

Moreover, it is no wonder that Taylor might have been hesitant to reveal what he thought was part-time employment, since Pasour testified that he told the Union that the Authority intended on deducting "any wages that he [Taylor] earned while he was out." (N.T. 91). So the Union was on notice that the Authority intended to deduct for interim employment in addition to what was allowed by the contract.

Additionally, Pasour testified that the Authority did not tender Taylor any back pay because it was never sure that Taylor had revealed all his other interim employment. (N.T. 95, 101) That flies in the face of Pasour's testimony that the Commonwealth Department of Labor and Industry had completed its investigation of Taylor's employment history and that neither he, Pasour, nor the Authority, had any reason to think Taylor had employment other than that already reported to the Authority. (N.T. 93-97).

While the Board will find an employer in violation of Sections 1201(a)(1) and 1201(a)(8) of the Act if the employer refuses to comply with the provisions of a grievance arbitration award, the employe is not entitled to a windfall. PLRB v. Stairways, Inc., 56 Pa. Commonwealth Ct. 462, 425 A.2d 1172 (1981). An employer may deduct from any back pay ordered by the Board monies the employe earned elsewhere after being discharged and is not liable for back pay if the employe does not make a satisfactory attempt to find alternative employment until reinstated. Valley Township, 23 PPER ¶ 23137 (Final Order, 1992). There is no allegation that Taylor did not adequately mitigate his damages. Taylor is owed $54,000.00 in back pay plus agreed upon amounts of vacation, sick and personal time. Taylor will be made whole when the Authority pays him that amount minus his interim earnings from both employers. The Board cannot give Taylor a windfall by awarding him full back pay plus his interim earnings. Under applicable Board law the Authority may set off its back pay award to Taylor by the agreed upon amount of his interim earnings. It must immediately pay Taylor the remainder, with full interest from the date of the award to the date of payment.

The Union argues that the parties' collective bargaining agreement allows the Authority to deduct from back pay awards only amounts earned as a result of full time employment. Essentially, the Union also asks the Board to interpret the parties' collective bargaining agreement and apply certain principles therein enunciated to modify the arbitration award's tenets. If the Union wanted to enforce the award under the terms of the parties' collective bargaining agreement it could have done so through the grievance procedure. The issue before the Board is simply whether the Authority has complied with the four corners of the arbitration award. When enforcing the arbitration award, the Board will no more look for guidance to the collective bargaining agreement at the request of the Union than at the request of the Authority.

The Union has proved that the Authority committed unfair practices in violation of Section 1201(a)(1) and (8) of the Act. The appropriate remedy is for the Authority immediately to pay Taylor his back pay of $54,000.000 plus the monetary value of all other stated benefits, minus the agreed upon amount of his interim earnings. The Authority shall pay interest on the total amount paid to Taylor from the date of the arbitration award to the date Taylor is actually paid in full.

CONCLUSIONS

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

1. The Authority is a public employer for purposes of Section 301(1) of PERA.

2. The Union is an employe organization for purposes of Section 301(3) of PERA.

3. The Board has jurisdiction over the parties hereto.

4. The Authority has committed unfair practices in violation of Section 1201(a)(1) and (8) of the Act.

5. The Authority has not committed unfair practices in violation of Section 1201(a)(3) and (5) of the Act.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the Authority shall:

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

2. Cease and desist from refusing to comply with the provisions of arbitration awards deemed binding under Section 903 of Article IX of the Act.

3. Take the following affirmative action which the examiner finds necessary to effectuate the policies of the Act:

(a) Immediately comply with the arbitration award by issuing a check to Taylor for $54,000.00 plus the monetary value of the agreed upon amounts of vacation, sick and personal time, minus the agreed upon amounts Taylor earned from the two interim employers;

(b) Pay simple interest at a rate of six percent per annum on the amount paid to Taylor from the date of the arbitration award to the actual date of payment;

(c) Post a copy of this decision and order within five (5) days from the 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

(d) 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 pursuant to 34 Pa. Code § 95.98(a) within twenty (20) days of the date hereof, this decision and order shall be and become absolute and final.

SIGNED, DATED AND MAILED this twenty-ninth day of January 2007.

PENNSYLVANIA LABOR RELATIONS BOARD

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TIMOTHY TIETZE, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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

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 Act; that it has paid Taylor $54,000.00 plus the monetary value of the agreed upon amounts of vacation, sick and personal time, minus the agreed upon amounts Taylor earned from the two interim employers ; that it has included interest in the amount paid to Taylor as directed in the proposed decision and order; that it has posted the proposed decision and order as directed therein; 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