

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AFSCME DISTRICT COUNCIL 88 :
 :
 v. : Case No. PERA-C-02-405-E
 :
 BERKS COUNTY AND BERKS COUNTY CORONER :
 (NICHOLAS BYBEL) :

FINAL ORDER

On February 12, 2007, the American Federation of State, County and Municipal Employees, District Council 88 (AFSCME) filed a request with the Pennsylvania Labor Relations Board (Board) for a hearing regarding outstanding issues of compliance with the Board's March 15, 2005 Final Order. The Final Order held that Berks County and the Coroner (collectively the County) violated Section 1201(a)(1), (3), (5) and (8) of the Public Employe Relations Act (PERA) and directed the usual and customary remedy, including reinstatement and make-whole relief for the affected employes. Following a compliance hearing, the Hearing Examiner issued a Proposed Decision and Order (PDO) on May 8, 2008, finding that the County had not fully complied with the make-whole and back pay relief for Ellis Edmonds and William Hertzog, who were discriminatorily discharged from their full-time positions as deputy investigators in the Coroner's office on June 4, 2002 and August 15, 2002, respectively.

The County filed timely exceptions with the Board on May 28, 2008, challenging the May 8, 2008 PDO. Following extensions of time granted by the Secretary of the Board, the County filed a brief in support of the exceptions on June 24, 2008. AFSCME was also granted an extension of time, and filed a responsive brief on August 13, 2008.

In the underlying March 15, 2005 Final Order the Board sustained the Hearing Examiner's conclusion that the County committed unfair practices in the termination of Edmonds and Hertzog from their full-time positions as deputy investigators in the Coroner's office. Regarding Edmonds and Hertzog, the Board directed the County to offer them unconditional reinstatement to their former positions without prejudice to any rights or privileges enjoyed by them and make them whole for all wages and benefits that they would have earned from the date of discharge to the date of the unconditional offer of reinstatement. Edmonds and Hertzog were reinstated by the County to their former full-time positions as deputy investigators in the Coroner's office on January 11, 2006.

The County argues that Hertzog is entitled to \$3,686.49 and Edmonds is entitled to \$1,872.73 in back pay arising from their unlawful loss of full-time employment. The County bases its calculations on the premise that after the Coroner fired Hertzog and Edmonds from their full-time positions, the Coroner only hired part-time deputy investigators. The County asserts that the Coroner's use of part-time employes was found to be lawful in the Hearing Examiner's August 2, 2004 Amended Proposed Decision and Order in which the Hearing Examiner originally concluded that the County had unlawfully discharged Hertzog and Edmonds. Therefore, the County argues that Edmonds and Hertzog are only entitled to a back pay calculation based upon the availability of part-time work, not upon the full-time positions from which they were discharged.

The County's reliance on the Hearing Examiner's Amended Proposed Decision and Order is misplaced. In that order the Hearing Examiner merely found that by using bargaining unit part-time employes the County did not unlawfully refuse to comply with the express provisions of a grievance arbitration award in violation of Section 1201(a)(8) of PERA. The arbitration award directed the County to cease assigning bargaining unit work to non-bargaining unit employes. AFSCME contended that the part-time employes in the Coroner's office who were performing bargaining unit work were not members of its bargaining unit. The Hearing Examiner simply concluded that those part-time employes were, in fact, bargaining unit members. By rejecting AFSCME's argument that the County violated Section 1201(a)(8) in the use of part-time employes for bargaining unit work, the Hearing Examiner did not excuse the County's compliance with his remedy issued for the violation of Section 1201(a)(3) for discriminatorily discharging Edmonds and Hertzog from their full-time positions.

Nevertheless, the County cites Fraternal Order of Police, Lodge No. 19 v. City of Chester, 20 PPER ¶20099 (Final Order, 1989) for the proposition that Hertzog's and Edmonds' back pay cannot be based on the availability of full-time employment. The County's reliance on City of Chester, supra, for this proposition is equally misplaced. In City of Chester, in addition to its regular full-time police officers, the City utilized a Commonwealth Department of Community Affairs (DCA) grant to hire additional part-time police officers who did not have an expectation of continued employment. When the Board found that the unilateral use of non-bargaining unit part-time officers was in violation of the City's bargaining obligation, the full-time bargaining unit officers sought relief in the nature of wages for the work that was performed by part-time officers. In denying that relief, the Board held that:

[T]he choice of remedy is a product of informed discretion. In this case, the City paid for the services of the part-time police officers by means of a DCA grant rather than out of its own funds, and the City contends that without the grant it could not have afforded to engage their services.... Moreover, the record does not indicate whether the City could have obtained a DCA grant to pay the members of the bargaining unit for additional hours of service. ... Furthermore, although the DCA is authorized to provide grant funds for the employment of individuals pursuant to the Manpower Employment Assistance and Training Program, ... the regulations suggest that this program is intended to foster the hiring of individuals not currently employed rather than to provide funds to pay current employes for additional hours of service.

Consequently, on this record, we are unable to say that the Hearing Examiner abused his discretion by not ordering the City to make the bargaining unit members whole for the work that was performed by the part-time police officers. At this juncture after the record has been closed and it is the Board's function to review the record, we are not certain that the moneys available from the DCA grant could have been used for this purpose. If the work could not have been performed without the grant funds, we cannot say that the bargaining unit employes lost work they would have performed but for the use of the part-time employes. The Board's authority is remedial and not punitive.

City of Chester, 20 PPER at 272. City of Chester stands for the proposition that if the City could have provided for the additional part-time hours, the City would have been obligated to reimburse the full-time officers under the Board's typical remedial relief. Because the County could have reinstated Edmonds and Hertzog on a full-time basis, City of Chester actually supports the Hearing Examiner's Compliance PDO in this case.

Unlike City of Chester, this is not a situation where after issuance of the Board's order there arose materially changed circumstances that were out of the employer's control that precluded Edmonds' and Hertzog's full-time reinstatement and thus would affect their back pay entitlement. E.g. Fraternal Order of Housing Police v. Philadelphia Housing Authority, 38 PPER 79 (Final Order, 2007) (by statute the employer was precluded from reinstating or paying back pay for period of time employe lacked police officer certification); PLRB v. Commonwealth (Office of Special Prosecutor), 9 PPER ¶9076 (Final Order, 1978) (employer's back pay obligation ceased when the Office of Special Prosecutor, from which employe was discharged, ceased operations due to a lack of appropriations from the General Assembly, and the employe was unable to bump into another position elsewhere). As a general principle, an employer's gross back pay liability under a Board order is based on the employer's ongoing obligation to reinstate the unlawfully discharged employe to the same or substantially similar position to make the employe whole.¹ Id.

¹ As the Board noted in Corry Area Education Association v. Corry Area School District, 38 PPER 155 (Final Order, 2007), because the public and private sector policies of remedying unfair practices are similar, the National Labor Relations Board's Compliance Manual may be looked to for guidance in determining compliance with a Board Final Order. As recognized in the National Labor Relations Board's Compliance Manual, to comply with an order of reinstatement to remedy an unfair labor practice, even if the discriminatee's former position is occupied or unavailable, the respondent/employer cannot simply escape compliance on that basis alone, but may be required to displace any replacement workers, NLRB Compliance Manual (III) § 10530.2, or find a substantially equivalent position for the unlawfully discharged employe, NLRB Compliance Manual (III) § 10530.3.

Here, the County acknowledges in its brief on exceptions that "the County did not and does not argue that the County was unable to reinstate the employees due to a lack of available positions." (County's Brief at 8). There is absolutely no dispute that at all relevant times between 2002 through 2006, there were eight full-time positions approved by the County Salary Board and available in the Coroner's office. (Finding of Fact 23). In fact, three bargaining unit positions remained full-time throughout the back pay period,² and were available to Hertzog and Edmonds to satisfy the Board's reinstatement order.³

Replacing an unlawfully discharged full-time employe with part-time replacement employes performing the same amount of work is not materially changed circumstances that would have precluded Edmonds and Hertzog from reinstatement as full-time deputy investigators. The County did not "go out of the coroner business" or stop investigating deaths. Nor did the County cease providing this service twenty-four hours a day, seven days a week. The only asserted difference is that between 2002 and 2006 the County performed the same amount of work but reduced its number of full-time employes and increased its use of part-time deputy investigators. However, because work was available, the County was obligated under the Board order to reinstate Edmonds and Hertzog to their former full-time positions. Accordingly, the Hearing Examiner did not err in basing the County's back pay liability on Edmonds' and Hertzog's former full-time deputy investigator positions, and the County's exception thereto is dismissed.

The County also argues that Edmonds and Hertzog failed to mitigate their damages by seeking available, substantially equivalent employment. Although relied upon by the Hearing Examiner, the County fails to address Delliponti v. DeAngelis, 545 Pa. 434, 681 A.2d 1261 (1996), which set forth the well-settled law with regard to proving a failure to mitigate damages, that "[t]he burden is on the breaching party to show that the losses could have been avoided... This burden can be established 'by proving that other substantially equivalent positions were available to [Complainant] ... and that [the Complainant] failed to use reasonable diligence in attempting to secure those positions.'" Id., 681 A.2d at 1265 (*quoting Appeal of Edge*, 606 A.2d 1243 (Pa. Cmwlth. 1992)). The at-fault employer is required to establish that actual, vacant, comparable positions were available to the innocent employe before the issue of the employe's reasonable diligence in attempting to secure those positions even arises. North Schuylkill Education Support Personnel Association v. North Schuylkill School District, 36 PPER 1 (Final Order, 2005), affirmed, North Schuylkill School District v. PLRB, 37 PPER 2 (Court of Common Pleas, 2005).

The County asserts that during the back pay period between 2002 and 2006 there were positions available with the County that were substantially similar to the duties of a deputy investigator in the Coroner's office. The positions claimed to be similar and available were deputy sheriff, correctional officer, juvenile correctional counselor, shelter counselor at the Youth Center, and telecommunication operator at the 911 center.⁴

As regards the availability of these County positions, the record supports the Hearing Examiner's determination that the County failed to sustain its initial burden of showing that positions were actually available to Edmonds and Hertzog. As astutely noted by the Hearing Examiner, "not all approved vacant positions are filled by the County. In point of fact, some vacant positions remain so for years, because the County chooses not

² Contrary to the County's assertion, the Chief Deputy Coroner, First Deputy Coroner and Second Deputy Coroner positions are not managerial positions excluded from the bargaining unit, but rather are bargaining unit positions pursuant to a Board Order. In the Matter of the Employees of Berks County, 27 PPER ¶27110 (Final Order, 1996).

³ Additionally, at various times throughout the back pay period, the Coroner employed a full-time "intern", thus clearly establishing the availability of full-time work in the Coroner's office.

⁴ Notably, if, as the County claims, it was not able to offer full-time employment in the Coroner's office, and there were substantially similar positions available elsewhere in the County since August 2, 2004, it was *the County's obligation* to offer Edmonds and Hertzog unconditional reinstatement to those allegedly similar, full-time positions, not the discriminatees' obligation to actively seek those positions. Having been found to have violated PERA, the County simply cannot shift its ongoing obligation to comply with the remedial relief for its unfair practice onto the unlawfully discharged employes.

to fill them." PDO at 6. Indeed, we agree with the Hearing Examiner's conclusion that just because a County's Salary Board may have approved the existence of a position, does not prove that the position is open and available to be filled.

Lawrence Murin, Assistant Director of AFSCME District Council 88, testified that after Edmonds and Hertzog were terminated from their County positions as deputy investigators in the Coroner's office, he approached Hal Baker, the County's Human Resources Director, to inquire of other positions for Edmonds and Hertzog. According to Murin, Baker advised him that the County would not transfer Edmonds and Hertzog to another position in the County, and did not indicate to him that any positions were available. (N.T. 285 - 286). Hertzog also testified that subsequent to his termination he approached Baker and asked if any jobs with the County were available, and Baker responded that there were no jobs available. (N.T. 247). Additionally, both Hertzog and Edmonds testified that they approached Barry Jozwiak, County Sheriff, and were advised that there were no deputy sheriff positions available. (N.T. 237, 246).

The County offered the testimony of Jennifer Biehn, Assistant Director of Human Resources, that generally, at any given time there are approximately 15 - 30 vacant positions in the County and that the County hires approximately five to seven people per week. However, this testimony does not refute AFSCME's testimony that the Sheriff and the County's own Human Resources Director stated that there were no jobs available to Edmonds and Hertzog. Accordingly, on this record, the County has failed to establish open and available positions for Edmonds and Hertzog. Thus, as a matter of law, the County cannot sustain its further burden of establishing that Edmonds and Hertzog failed to mitigate their losses.

Moreover, the County failed to establish that any of these asserted positions are substantially similar to the duties of a deputy investigator in the Coroner's office. Where the employer seeks to base reinstatement or back pay on a position other than the employe's former position, the Board will carefully scrutinize whether the two positions are substantially similar:

[T]he type of work that constitutes substantially equivalent employment for a given employe depends upon that employe's unique set of circumstances which include his abilities, skills, qualifications, experience, background, age and personal and physical limitations. Substantially equivalent employment refers, not only to the hours worked, scheduling, pay and benefits of the available interim or replacement employment, but also to the nature of the work itself. A discharged or furloughed employe need not seek, accept or retain interim employment that is either essentially different from his/her regular job, unsuitable to someone of his/her background, skill and experience, or involves substantially more onerous conditions.

North Schuylkill School District, 36 PPER at 3. Additionally, for the employer to carry its burden of proving the existence of substantially similar employment, the employer must produce evidence of the actual job duties of both positions for examination by the Hearing Examiner. North Schuylkill School District, supra.

Upon review of the record, the Hearing Examiner noted that the County did not introduce a job description for the position of deputy investigator in the Coroner's office, and therefore provided no basis for determining substantially equivalent duties with any other position. The County, on exceptions, now argues that there was substantial testimony regarding the job duties of the Coroner's deputy investigators, and cites to a January 10, 2003 hearing transcript. However, that testimony, upon which the County now seeks to rely, was developed in a separate unit clarification petition proceeding, and was not introduced into the record of this case. The only evidence concerning the duties in the Coroner's office on this record is testimony that deputy investigators assisted with telephone calls and investigations, (January 7, 2003, N.T. 182), and that deputy coroners would go to the scene, investigate cases, complete death reports, and act in the Coroner's absence in looking at the scene of a death. (June 2, 2003, N.T. 585). This scant evidence of the deputy investigators' job duties is an insufficient basis for a finding of similarity with any other position. Accordingly, the Hearing Examiner

correctly determined that the County failed to sustain its burden of proving substantially equivalent employment.⁵

Pursuant to the Board's statutory authority under Section 1303 of PERA, the Board is afforded discretion in fashioning an appropriate remedy for an unfair practice that effectuates the policies of PERA. Pennsylvania Emergency Management Association v. PLRB, 768 A.2d 1201 (Pa. Cmwlth. 2001); Pennsylvania State Police v. PLRB, 912 A.2d 909 (Pa. Cmwlth. 2006). We have reviewed the remedy in this case and find it to be remedial, and not punitive. The remedy is in furtherance of the purposes and policies of PERA to restore the *status quo* and make Edmonds and Hertzog whole for the damages arising from their unlawful, discriminatory termination from employment with the County. After a thorough review of the exceptions and all matters of record, the County's exceptions to the compliance PDO will be dismissed, and the May 8, 2008 PDO directing, *inter alia*, \$135,864.27 in back pay to Edmonds and \$74,515.92 in back pay to Hertzog, shall be made final.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the exceptions filed by Berks County are hereby dismissed, and the May 8, 2008 Proposed Decision and Order, be and hereby is made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania 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 eighteenth day of November, 2008. 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.

⁵ Having failed to sustain its initial burden of proving the availability of substantially equivalent jobs, we need not address the County's remaining exceptions concerning whether Edmonds and Hertzog exercised reasonable diligence in seeking interim employment. Delliponti, supra.

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 CORONER (NICHOLAS BYBEL) :

AFFIDAVIT OF COMPLIANCE

The County certifies that it has paid Edmonds \$135,864.27, plus six percent interest *per annum*, calculated from the date of Edmonds' unlawful discharge on June 4, 2002, to the date of actual payment; that it has credited Edmonds with one sick day for every month between his unlawful discharge and his reinstatement on January 11, 2006; that it has credited Edmonds with full-time seniority for the entire back pay period; that it has credited Edmonds with full-time service for purposes of his participation in the County pension system for the entire back pay period; and that it has credited Edmonds with full-time service for purposes of vacation leave accrual for the entire back pay period.

The County further certifies that it has paid Hertzog \$74,515.92, plus six percent interest *per annum*, calculated from the date of Hertzog's unlawful discharge on August 15, 2002, to the date of actual payment; that it has credited Hertzog with one sick day for every month between his unlawful discharge and his reinstatement on January 11, 2006; that it has credited Hertzog with full-time seniority for the entire back pay period; that it has credited Hertzog with full-time service for purposes of his participation in the County pension system for the entire back pay period; and that it has credited Hertzog with full-time service for purposes of vacation leave accrual for the entire back pay period.

The County certifies that it has posted this Final Order and the Proposed Decision and Order as directed; and that it has served a copy of this affidavit on AFSCME District Council 88 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