

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) :

PROPOSED DECISION AND ORDER

A charge of unfair practices was filed with the Pennsylvania Labor Relations Board (Board) on August 29, 2002, as amended on January 13, 2003, by AFSCME District Council 88 (Union), alleging that Berks County and the Coroner (collectively the County) engaged in unfair practices in violation of Section 1201(a)(1), (2), (3), (4), (5) and (8) of the Public Employes Relations Act (PERA). On August 2, 2004, I issued an amended proposed decision and order¹ finding that unfair practices had been committed. Only the Coroner filed exceptions to the proposed decision and order, and the Board issued a final order on March 15, 2005.² The Union, on February 12, 2007, asked for a compliance hearing. A hearing to determine whether the County did, indeed, comply with the Board's final order was held on December 6, 2007³, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The 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:

ADDITIONAL FINDINGS OF FACT

23. The County's human resources department tracks all positions approved by the salary board. Not all approved positions are filled by the County. In the last ten years the County has never filled all its approved positions. "At any given point in time" there are vacancies in the County's position compliment that the County simply never fills. There are eight full-time approved positions in the coroner's office that the County has not filled for the last four years. (C.N.T. 160-162, 168, 187-189).

24. On June 13, 2002, the County had nine approved deputy sheriff positions unfilled. Four of those positions were positions approved by the salary board on March 12, 2002, yet never filled as of June 13, 2002. (C.N.T. 169, 171, 172; County Exhibit 11).

25. The Contract between the Union and the County has provisions allowing bargaining unit members to bid on other open bargaining unit positions before those positions are open to other candidates. The County has no idea how many positions are filled by this bidding process. (C.N.T. 164, 167, 168, 196).

26. The Union's figures as to the full-time back pay for Edmonds and Hertzog are correctly calculated and were admitted without objection from the County. (C.N.T. 27-33, 47-54, 93; Union Exhibit 2, Union Exhibit 41, as replaced).

¹ AFSCME District Council 88 v. Berks County and Nicholas Bybel, 35 PPER 89 (Amended Proposed Decision and Order, 2004). An amended proposed decision and order was issued on August 2, 2004, merely to correct a *vitium scriptoris*.

² AFSCME District Council 88 v. Berks County and the Berks County Coroner (Nicholas Bybel), 36 PPER 36 (Final Order, 2005)(caption as amended by the Board). The final order found that the Union had not charged the Coroner with an independent violation of Section 1201(a)(1) of PERA, but dismissed all other exceptions. 36 PPER at 111.

³ To differentiate between the transcript of the original unfair practice hearing and the compliance transcript, I will use "C.N.T." to designate compliance transcript references, and "N.T." for the unfair practice transcript.

DISCUSSION

The crux of this compliance case is whether the County correctly calculated the back pay for two deputy coroners, Ellis Edmonds and William Hertzog, who were fired in 2002 because each participated in protected activity. If their wages were calculated as full-time employees, according to the Union, they would receive \$135,864.27 and \$74,515.92, respectively, in back pay alone. The County asserts, without blushing, that they should each get less than \$2,000.00.⁴ The County's meager offer is a far cry from compliance with the Board's final order and is simply indefensible.

We will first examine the County's assertion that both employees' back pay should be based upon the assumption that part-time employment was the only employment available in the Coroner's office from August 2002⁵ to January 2006. We will then examine the theory used by the County to further offset the back-pay owed Edmonds and Hertzog.

FULL TIME OR PART TIME

There is no dispute that both Edmonds and Hertzog were full-time employees when they were illegally fired. And, there is no dispute that the Coroner replaced them with part-time employees who worked less than twenty hours a week, and therefore were not covered by the collective bargaining agreement⁶. Because the Coroner replaced these two full-time employees with non-contractually covered, part-time employees, the County argues that there were no full-time positions available. The County does not show or argue any change in the workload of the Coroner's office, nor does it show or argue any budget reductions for that office. The County merely asserts that the Coroner made this move in "an effort to increase efficiency and reduce costs...." County's brief at 2. The County then cites to the original unfair practice transcript pages where the Coroner testified about his motivations for the change.⁷

I no more credit the Coroner's testimony now, than I did at the original hearing when I found that, " the Coroner's testimony is simply untruthful and it is treated as such." 35 PPER at 277. To put it more plainly, the Coroner blatantly lied. His actual and singular motivation was to rid his office of all contractual restrictions and Union influence. AFSCME District Council 88 v. Berks County and Berks County Coroner (Nicholas Bybel), 36 PPER 36 at 108. A fair reading of both the proposed decision and order, and the final order make that abundantly clear. Edmonds and Hertzog were not fired, nor were part-time employees hired, to "increase efficiency and reduce costs." Edmonds and Hertzog were fired, and non-contractually covered, part-time employees were hired, because of the Coroner's brazen Union hatred and his corresponding need to get rid of any employees who dared to engage in protected activity.

Under these facts, how can we determine whether or not the County has complied with the Board's final order? Compliance with the Board's final order is, in many ways, analogous to compliance with a grievance arbitration award for reinstatement with back pay. In the grievance award setting, when an employer has been ordered to return full-time employees to their former positions with full back pay, the Board will excuse non-compliance, "only in those rare instances" when the employer can show, "changed circumstances," and when ignoring those changed circumstances, " would place the grievant in a better position than he or she would have been had the improper conduct not occurred." Minersville Area School District, 19 PPER ¶ 19197, 479 (Final Order, 1988); see also State System of Higher Education (Edinboro University), 32 PPER ¶ 32080 (Final Order, 2001)(employer showed no evidence of intervening, changed circumstance that would excuse its compliance with settlement agreement, and therefore violated the PERA).

⁴ The County admitted at the hearing that, even based upon its own calculations, it should have paid Edmonds an additional \$1,813.76. (C.N.T. 123, 124).

⁵ Edmonds was fired in June of 2002, and Hertzog in August of 2002. AFSCME District Council 88 v. Berks County and Nicholas Bybel, 35 PPER at 274, 275.

⁶ The collective bargaining agreement did not include employees who worked less than twenty hours a week, even though the Board's certification of a collective bargaining unit included all regular full-time and part-time employees, regardless of how many hours they worked a week. 35 PPER 89 at 279.

⁷ The County points out that the parties stipulated the notes of testimony from the original unfair practice hearing into this record. That stipulation, however, does not change the credibility determination that the Coroner's testimony is not truthful.

The same analysis is applicable to the instant situation. Since both Edmonds and Hertzog were full time employees when they were discriminatorily fired, and the County has not shown any intervening, changed circumstances, the back-pay liability is for full-time employment. The reference to increasing efficiency and reducing costs by hiring part-time employees is patently absurd on the record of this charge of unfair practices. The Coroner fired Edmonds and Hertzog because of their protected activity, and then replaced them with employees who worked less than twenty hours a week, because those employees were excluded from the collective bargaining agreement's protections, and the Coroner was determined to extirpate any Union influence in his office.

To bolster its flimsy argument about re-staffing, the County attempts to put my imprimatur on the Coroner's hiring of those part-time employees, who were not included under the contract's or the Union's protections, to replace Edmonds and Hertzog. On page three of its brief, the County states, "Notably, AFSCME challenged this practice [the hiring of part-time employees who worked less than twenty hours a week] in the case's underlying dispute, but the Hearing examiner concluded that the County committed no unfair practices in staffing the Coroner's office in this manner."

Notably, that statement is unduly vague and is, therefore, subject to gross misunderstanding. Without a contextual framework for that statement, the unenlightened reader would think I ruled that the Coroner acted within his managerial rights when he unlawfully fired Edmonds and Hertzog and replaced them with part-time employees who worked less than twenty hours a week. In fact, no such issue was either raised or decided in the proposed decision and order.

What was decided in the proposed decision and order was whether or not the Coroner had complied with a prior grievance arbitration award. The award found that the Coroner had removed bargaining unit work without bargaining, and had therefore violated the collective bargaining agreement. The award ordered the work returned to the bargaining unit. When returning the work to the unit, the Coroner hired part-time employees who worked less than twenty hours per week, and were therefore not covered by the collective bargaining agreement. The Union argued that such a practice was not compliance with the award. The proposed decision and order found the Coroner had complied with the award in hiring those part-time employees.⁸ It is that determination to which the County refers.

The County's argument seems to be that the Coroner's unlawful firing of Edmonds and Hertzog for their protected activity, and his hiring of only part-time employees not offered the protections of the collective bargaining agreement, somehow proves that Edmonds and Hertzog would only have been part-time employees had they not been discriminatorily fired. That logic only serves to re-enforce the adage that one can't leap a twenty-foot chasm in two ten-foot jumps.

Additionally, the County consistently refers to the fact that, after he unlawfully terminated Edmonds and Hertzog, the Coroner only employed three "management" employees along with those less-than-twenty-hour, part-time employees. (County's brief at 2; C.N.T. 100). That is a misstatement of fact, which is hard to attribute to mere error. (C.N.T. 99, 100, 104, 133, 287, 289). The record clearly shows that the three positions the County wrongly refers to as managerial, the chief deputy, first deputy, and second deputy coroner, were all found to be bargaining unit positions in 2003.⁹ In the Matter of the Employees of Berks County, 34 PPER 111 (Proposed Order of Unit Clarification, 2003), 35 PPER 25 (Final Order, 2004). Despite the County's contrary assertion, after Edmonds and Hertzog were wrongfully terminated by the Coroner, he continued to fill three full-time, bargaining unit positions.¹⁰

⁸ For a more detailed analysis of the reasoning behind that determination see 35 PPER at 279.

⁹ See C.N.T. 100-104; Berks County Exhibit 6; 34 PPER 111 at 346, ff 15. In a prior 1996 unit clarification, the Board, after hearing, found the chief deputy coroner to be a bargaining unit position. In the Matter of the Employees of Berks County, 27 PPER ¶ 27110 (Final Order, 1996). A review of the Board's docket reveals no unit clarification petitions filed for these positions subsequent to the 2004 final order.

¹⁰ During the time period in question, at least two of these positions were vacated and filled by promoting part-time employees or by outside hires. (C.N.T. 133-136).

The County has not shown that this is one of "those rare instances" where there are "changed circumstances," that when ignored, would place Edmonds and Hertzog in a "better position than [they] would have been had the improper conduct not occurred." To comply with the Board's order, then, Edmonds and Hertzog must be reimbursed as full-time employees from the date of their unlawful termination to the date of their reinstatement.

SUBSTANTIALLY EQUIVELANT EMPLOYMENT AND MITIGATION

Having established their status as full-time employees for back-pay purposes, we now turn our examination to the ways the County argues it can offset moneys owed these two employees. The first of these is based upon the County's assertion that both Edmonds and Hertzog failed to find substantially equivalent employment.

The burden of production and proof rests with the County to show the actual availability of substantially equivalent jobs. In order to limit its back-pay liability to Edmonds and Hertzog, the County has "the burden of proving the actual availability of substantially equivalent jobs for them before their efforts, if any, to mitigate their damages are even to be considered." North Schuylkill School District v. North Schuylkill Educational Support Personnel Association and Pennsylvania Labor Relations Board, 35 PPER 109, 343 (Proposed Decision and Order, 2004)(citing Delliponte v. DeAngelis, 545 Pa. 434, 681 A.2d 1261 (1996)); International Brotherhood of Firemen and Oilers, Local 1201 v. Upper Moreland Township School District, 34 PPER 36 (Proposed Decision and Order, 2003)(where the employer does not establish actual, substantially equivalent employment, the Board need not reach the question of whether the employees in question exercised reasonable diligence in securing those positions).¹¹

To reduce its back-pay liability, the County must prove that there were actual, vacant, substantially equivalent jobs available. After the County proves that, then it must show that these two employees failed to exercise reasonable diligence in securing those actual, vacant, substantially equivalent available jobs. The County cannot establish availability by merely asserting that, by the nature of the jobs, their availability is unquestionable, or by relying on speculative job duties. North Schuylkill School District v. North Schuylkill Educational Support Personnel Association and Pennsylvania Labor Relations Board, 36 PPER 1, at 2 (Final Order, 2005), *aff'd*, North Schuylkill School District v. North Schuylkill Educational Support Personnel Association and Pennsylvania Labor Relations Board, 37 PPER 2 (Court of Common Pleas of Schuylkill County, 2005).

We first need to examine whether the County has proved the existence of actual, vacant jobs. We then will examine whether the County has proved that those actual, vacant jobs were substantially equivalent to the deputy coroner job. The jobs the County alleges to be actual and vacant are: deputy sheriffs, correctional officers, juvenile correctional counselors, shelter counselors at the Youth Center, and telecommunicators at the 9-1-1 communications center.

As evidence of actual, vacant job openings the County presented a two-page exhibit covering one day, June 13, 2002,¹² that showed nine approved, unfilled sheriff positions on that date. Nevertheless, 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 to fill them. Other than some vague testimony by the County's assistant director of human relations that there are "generally" or "typically" unfilled positions in the telecommunications department, in the prison, and in the youth center, that was the extent of the County's showing.

¹¹ The County fails to mention that this proposed decision and order exists. Instead, it relies on a prior final order, Upper Moreland Township School District, 31 PPER ¶ 31106 (Final Order, 2000), on the question of due diligence. In that decision the Board did not apply the Delliponte, *supra*, test, but was subsequently ordered to do so on remand from the Court of Common Pleas of Montgomery County. International Brotherhood of Firemen and Oilers 1201 v. PLRB, 33 PPER ¶ 33065 (Court Of Common Pleas Montgomery County, 2002). When the Board applied the proper test on remand, the prior decision was reversed and the above decision resulted. 34 PPER 36. Either through incomplete legal research, or purposeful omission, the County not only ignores this proposed decision and order, but also incorrectly argues the prior final order as if it were still the law on this issue.

¹² June 13, 2002, is after Edmonds was unlawfully terminated on June 4, 2002, but before Hertzog was terminated on August 15, 2002. Therefore, even if this exhibit did prove actual, available jobs, which it does not, it could only do so for Edmonds, since Hertzog was still working for the County on June 13, 2002. (C.N.T. 205).

For those Union-covered positions the County termed "vacant," Union members have the contractual right, if qualified, to fill those positions before they are offered to the public, through a process called internal bidding. The County was unable, with certainty, to tell how many of the jobs it deemed "vacant" were filled through the internal bidding process.

The paltry evidence presented by the County has not proved that there were "actual, vacant" jobs available. Albeit, the County did produce a document that showed on June 13, 2002, there were nine deputy-sheriff's positions that the County had approved but not filled. But there is no evidence that those positions, while approved, were ever filled.

Even if the County had shown that there were actual, vacant jobs available, it certainly has not shown that any of the jobs it asserts to be actual and vacant are substantially equivalent to the job of deputy coroner.

Whether any given job is substantially equivalent to the deputy coroner's job is a legal conclusion for the Board, not the County. And, absent evidence of actual job duties for both the deputy coroner's job and those jobs the County asserts are substantially equivalent, no legal determination can be made as to whether those jobs, alleged by the County to be substantially equivalent, actually are under the law. 36 PPER 1 at 3. If the County does not prove the availability of actual, vacant, substantially equivalent jobs, the question of whether Edmonds and Hertzog exercised reasonable diligence in securing those positions is never reached, and the County is on the hook for the entire back-pay amount. Id.

The Board's definition of what makes any given job substantially equivalent to another job is a fact-based determination that is initially predicated upon an "employee's unique set of circumstances which include his abilities, skills, qualifications, experience, background, age and personal and physical limitations." Id. The term "substantially equivalent" not only refers to the hours worked, scheduling, pay and benefits of the replacement employment, but also to the very nature of the work itself. A discharged employee 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." Id. (citation to federal authority omitted). The employer "must produce evidence of the actual job duties for examination by the Board...." Id. The employer does not meet its burden by relying on speculative job duties. Id.

Having set forth the law, we now look at the record to determine whether or not the County proved that the jobs it alleges are substantially equivalent to the deputy coroner job are, under the law, just that. The jobs the County alleges are substantially equivalent to the deputy coroner job are: deputy sheriffs, correctional officers, juvenile correctional counselors, shelter counselors at the Youth Center, and telecommunicators at the 9-1-1 communications center.

Neither the job description of deputy coroner nor a complete list of deputy coroner job duties is part of this record. Absent that singularly vital evidence, the County cannot show that any of the alleged substantially equivalent jobs are, in fact, so. 36 PPER 1 at 3. On that fatal omission alone, the County cannot, as a matter of law, show any of the jobs to be substantially equivalent to that of a deputy coroner because without the deputy coroner job duties in the record, at best, all we have is half a comparative.

Nevertheless, the County expended much time on this record asking the assistant director of human resources whether or not *she* thought Edmonds and Hertzog could have "been qualified to work" as either a deputy sheriff, a correctional officer, a juvenile counselor, or a communications operator. (C.N.T. 181, 182). But for the juvenile counselor job, her answer to each of those questions was an unhesitating yes. The test is not, however, whether the County's assistant director of human resources thinks Edmonds and Hertzog are qualified to hold these jobs, but rather, whether these jobs themselves are substantially equivalent to that of a deputy coroner, under the law.

Moreover, the County's assistant director of human resources was comparing the duties of a *police officer* to the duties of a deputy sheriff and a communication's center worker. (C.N.T. 177-179). That comparison is totally irrelevant to the necessary inquiry in this case. The relevant question is whether the job of *deputy coroner* is substantially equivalent, and not whether the job of police officer is substantially equivalent to the other jobs the County asserts.

And, even if the opinion of the County's assistant director of human resources were at all relevant to this inquiry, there is no foundation that she knew anything about the qualifications of Edmonds and Hertzog, other than they were both police officers.¹³ (C.N.T. 177). Moreover, there was no foundation that she knew anything about the job description of a municipal police officer, or a deputy coroner, or any of the other County jobs (except deputy sheriffs, C.N.T. 177) about which she so freely opined. Her testimony adds nothing to the relevant inquiry.

The County's counsel also extensively questioned both Edmonds and Hertzog about whether or not they could do all the tasks and meet all the qualifications on the deputy sheriff job summary. That inquiry is also not relevant to the determination of whether the job of deputy sheriff is substantially equivalent to the job of deputy coroner. If the mere ability to do the job were determinative, then the definition of substantially equivalent would simply be any job the employe in question were capable of performing. That, however, is not the definition, so this line of questioning adds nothing to the relevant inquiry.

The County argues on page eight of its brief that because the Union asked the County to transfer Edmonds and Hertzog to other County positions, as the County did for the other eight deputy coroners unlawfully fired by the coroner, that request was a "tacit acknowledgement that AFSCME, Edmonds and Hertzog considered other County positions a viable alternative to the positions in the Coroner's Office." Evidently, the County is under the misguided impression that if one job is "a viable alternative" to another job, then those two jobs are substantially equivalent. Unfortunately, that is not the law, so this argument also adds nothing to the relevant inquiry.

The operant question is whether the jobs the County asserts are substantially equivalent are, under the law, just that. The County has fallen woefully short of proving they are. There are no job descriptions for any position (but deputy sheriff), or any recitation of job duties in this record for the positions the County asserts are substantially equivalent to the deputy coroner's job. Even if the stark absence of the deputy coroner's job duties were not fatal to the County's case, the complete absence of job duties for correctional officers, shelter counselors, juvenile corrections counselors, and telecommunicators would be the sockdolager. All told, the County's proofs have much more sail than ballast.

The County has not shown that any of the jobs it referred to were actual, vacant positions. That failure of proof, alone, stops the inquiry, and the County is liable for full back pay. But, even if the County had shown actual, vacant jobs, the County has not even come close to proving that the jobs it referred to as substantially equivalent to the deputy coroner job meet that legal definition. Consequently, Edmonds and Hertzog are entitled to back pay even if they did not make a reasonable effort to mitigate their damages. On this record, whether they "exercised due diligence in finding substantially equivalent employment after they were discharged is irrelevant." International Brotherhood of Firemen and Oilers, Local 1201 v. Upper Moreland Township School District, 34 PPER at 122.

To comply with the Board's final order, the County must pay Edmonds and Hertzog as full-time employes for the back-pay period. The County must also pay Edmonds and Hertzog six-percent interest *per annum* on any moneys owed. That interest runs from the date they were discriminatorily discharged to the date of actual payment in full of all moneys owed. Payment to Edmonds and Hertzog shall be in accordance with the amounts set forth in Union Exhibit 41 (as replaced), minus any amount already paid.

¹³ Her lack of knowledge about the qualifications of both Edmonds and Hertzog is evidenced by her candid admission that she is not aware of the educational background of either. (C.N.T. 181,182).

The County must also credit Edmonds and Hertzog with one sick day per month for the applicable period, credit Edmonds and Hertzog with full-time seniority for the back-pay period, credit Edmonds and Hertzog with full-time service for participation in the County's pension system, and credit Edmonds and Hertzog with full-time service for vacation accrual for the back-pay period.

CONCLUSIONS

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

That conclusions one through five as set forth in the amended proposed decision and order dated August 2, 2004, are hereby made a part of this order and are incorporated by reference.

That the County is not in compliance with the Board's final order.

ORDER

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

HEREBY ORDERS AND DIRECTS

That the County shall:

(a) Comply with the Board's final order as set forth in the attached affidavit of compliance.

(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 employees 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 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 at Harrisburg, Pennsylvania, this eighth day of May, 2008.

PENNSYLVANIA LABOR RELATIONS BOARD

TIMOTHY TIETZE, Hearing Examiner

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) :

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's 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 Edmonds'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 proposed decision and order as directed therein; 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