COMMONWEALTH OF PENNSYLVANIA Pennsylvania Labor Relations Board

E.B. JERMYN LODGE NO. 2 FRATERNAL ORDER OF POLICE

:

v. : Case No. PF-C-05-101-E

:

CITY OF SCRANTON

PROPOSED DECISION AND ORDER

On October 1, 2007, the E.B. Jermyn Lodge No. 2 of the Fraternal Order of Police (FOP or Complainant) filed a motion for compliance with the Final Order of the Pennsylvania Labor Relations Board (Board) and /or sanctions against the City of Scranton (City or Respondent) for failure to comply with the Final Order issued on January 24, 2007.

The Board directed the Hearing Examiner to conduct a hearing on the motion. The Hearing Examiner scheduled a hearing for January 23, 2008 in Scranton. The hearing was held as scheduled. An additional day was required on April 29, 2008, but was continued to October 28, 2008 at the request of the Union, without objection from the City, in an effort the resolve the dispute without additional hearing days. That hearing date was not used, but the parties later informed the Hearing Examiner that a hearing was necessary. A hearing was held on February 20, 2009. Following the conclusion of the hearing, the parties requested additional time to present argument on the admissibility of proposed Union Exhibits 13 and City Exhibit 14.

On March 26, 2009, the FOP informed the Examiner that it was withdrawing its offer of Exhibit 13.

On April 16, 2009, the Hearing Examiner issued a ruling that City Exhibit 14 was inadmissible.

On the merits of the dispute, the FOP submitted a brief on May 20, 2009 and the City submitted a brief on July 16, 2009

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

FINDINGS OF FACT

- 1. The City of Scranton is an employer within the meaning of Section 3c) of the Pennsylvania Labor Relations Act (Act)and Act 111.
- 2. That the Fraternal Order of Police, E.B. Jermyn Lodge 2 (FOP) is a labor organization within the meaning of Section 3(f) of the Act.
- 3. That the FOP Lodge 2 is the exclusive bargaining representative of all police officers of the City of Scranton.
- 4. That the City and the FOP have been parties to a series of collective bargaining agreements (CBAs), including an agreement with a stated term of January 1, 1996 through December 31, 2002 (Joint Exhibit 2)
- 5. That the CBA contains a grievance and arbitration procedure which ends in "final and binding" arbitration. (Joint Exhibit 2, at 15-17)agreement also the
- 6. That the CBA also contains an agreement referred to as the Strategic Implementation Team ("SIT") Agreement. This agreement provided for the civilianization of certain police functions.

CIVILIANIZATION OF POLICE DEPARTMENT FUNCTIONS

FOP agrees that designated bargaining unit work historically performed by Police officers may be performed by civilian employes to be employed by the City.

With the exception of the civilians working directly for the Chief of Police and Deputy Chief, all Civilians will be under direct commend of the Administrative Support Lieutenant.

With the exception of the civilians working directly for the Chief of Police and Deputy Chief, civilian clericals will work in "pool" concept without specific task dedication.

To the extent necessary, additional civilians will be equipped with office equipment and other necessary supplied from fund, in accordance with the Recovery Plan developed by the PEL and will be phased into operation on a regular periodic basis over the course of the 1995, 1996 and 1997 fiscal years.

Civilians will work two shifts structured to meet the needs of the officers and detective that they will serve.

Distribution of additional civilian employes within the Police Department as compared to existing complement:

CURRENT PROPOSE ADD

| 1. | Civilian Information Spec. | 0 | 1 | 1 |
|----|--------------------------------|---|----|----|
| 2. | Clerk/Typist Detective-Days | 1 | 1 | 0 |
| 3. | Clerk/Typist Detective-Evening | 0 | 1 | 1 |
| 4. | Records/Administration | | | 2 |
| 5. | Training | 0 | 1 | 1 |
| 6. | Deputy Chief | 0 | 1 | 1 |
| 7. | Desk (2 for 2 shifts) | 0 | 4 | 4 |
| 8. | Grant Writer | 0 | 1 | 1 |
| | | | | |
| | TOTAL | 5 | 16 | 11 |

(Joint Exhibit 2 at 13-14)

- 7. That in early 2004, the City eliminated a number of contractually required SIT positions. As a result, the FOP initiated a grievance under the parties' contractual grievance arbitration procedure. (Joint Exhibit 2 at 13-14)
- 8. On September 13, 2004, Arbitrator Robert Light issued an arbitration award in AAA Case No. 14 390 00644 03 sustaining a grievance filed by the FOP over the failure of the City to abide by the terms of he parties' Strategic Implementation Teams ("SIT") Agreement (Joint Exhibit 1). Among the Arbitrator's findings was the following:

The oft-quoted phrase in these kinds of cases is that the Arbitrator is simply a "creature of the contract" and derives his authority therefrom. That having been said, it is his responsibility to enforce the Collective Bargaining Agreement as he finds it and to make certain that each side fulfills its bargain in adhering to its terms. Simply put here, the City has failed to do so. Of relevance here is the quid pro quo which would inure to the benefit of the FOP for the concessions that it granted to the City in the past. Specifically, that quid pro quo was that the City would employ SIT clerks to perform all the clerical tasks that had been previously performed by police officers so that, as was the objective of the City, have more police officers on the streets. That was the bargain that was negotiated between these parties and both sides must be held to it terms.

(Joint Exhibit 1 at 16-17)

9. That Arbitrator Light issued the following remedy:

The City violated the Collective Bargaining Agreement by failing to maintain the number of Clerks specifically provided in Paragraph XI(G) of the SIT Agreement. As the appropriate remedy:

- 1. The City's complete failure to employ the designated number of additional SIT clerical employes specifically described in Paragraph X(F)(sic) of the SIT Agreement violates that agreement and does not violate the City's obligations under Act 47. The grievance of Lodge No. 2 of the Fraternal Order of Police challenging that failure is granted.
- 2. In order to remedy the violations of Paragraph X are [sic] herein before stated, the City of Scranton is hereby directed to immediately take the following action:
 - A. Immediately employ not less than the additional SIT clerical positions of one "Clerk/Typist Detective-Evening" (Article XI, section G(3)), two additional SIT Clerks in "Records Administration" (Article XI, Section G(4)), one SIT Clerk for "Deputy Chief/Captain" (Article XI, Section G(6)), and four Additional SIT Clerks for the "Desk" (Article XI, Section G(7)) to perform the functions described in Paragraph X of the SIT Agreement to equip those employes with office space and equipment to perform the functions within the Police Department envisioned by the SIT Agreement; and
 - B. Until such time as the underlying contractual language is modified to otherwise provide, the City shall continue to employ the number of additional SIT Clerks as provided in the SIT Agreement and completely equip those employes with office space and equipment to perform the functions within the Police Department envisioned by the SIT Agreement; and
 - C. Make the FOP whole for the failure to continuously employ the eleven additional SIT clerical employees described in Article XI(G) of the SIT Agreement by paying to the members of the FOP bargaining unit who were on payroll at any time on and after February 14, 2003 (the date of the grievance) the full cash value of the wages and fringe benefits that would have been paid to the eleven additional SIT clericals that the City failed to employ during the duration of the January 1, 1999 contract.
 - D. In making those payments, the following conditions shall apply:
 - 1. For purposes of computing the back pay it shall be assumed that each clerical thus employed was compensated at the then-prevailing arithmetic average of all SIT clerical classifications with the City.
 - 2. The back payment due under this Order shall include not only the wage computed in accordance with (B) above, but also the full City cost of health insurance at the family level and the cash value of all other fringe benefits payable under the collective bargaining agreement between the City and IAM Lodge No. 2462.
 - 3. The back pay shall be computed from the date that the City failed to employ the full complement of eleven additional SIT clerks starting with the duration of the agreement (January 1, 1999) until the appropriate number of clerical employees are actually on the payroll and shall include interest computed in accordance with Article XX(9) of the collective bargaining agreement between the City and FOP.
 - 4. The back pay shall be distributed to FOP bargaining unit members who were on payroll with the city at any time on or after February 14, 2003 (including those on temporary work-related disability during that period) until such time as the city actually employes the appropriate number of clerical employees required by the SIT agreement. Each full month of service shall equal one unit. Each member's entitlement to the back pay

shall be determined by dividing the total amount payable by the total number of units and then multiplying that members units by the result.

5. The City's failure to constantly employ the additional clerical employes as explicitly required by Paragraph XI of the SIT Agreement, as amended on May 14, 1999, is hereby declared to be in bad faith as provided by Article XX, Section (9) of he parties' collective bargaining agreement. Accordingly, the City is further directed to pay the FOP for reasonable attorneys' fees to be presented to the City within thirty days of the parties' receipt of this Award. To the extent that the fees are not paid within thirty days after the date of such presentation, they shall thereafter bear interest in a [manner] to be computed with Article XX, Section 9 of the collective bargaining agreement."

(Joint Exhibit 1 at 19-21)

- 10. That the City filed a petition to vacate the award in the Court of Common Pleas of Lackawanna County. This petition was denied, and the award was confirmed by the Court on June 22, 2005 (N.T. 36)
- 11. The City filed an appeal to the Commonwealth Court, seeking to have the lower court overturned and the award vacated. On July 20, 2006, the Commonwealth Court, in a unanimous en banc decision, affirmed the decision of the Court of Common Pleas. City of Scranton v. E.B. Jermyn Lodge No. 2 of the Fraternal Order of Police, 903 A. 2d 129 (Pa. Cmwlth. 2006), Petition for Allowance of Appeal Denied, 591 Pa. 717, 919 A. 2d 959 (2007)
- 12. That on July 15, 2005, the City filed the present charge of unfair labor practices, alleging that the City failed and refused to comply with the Light Award.
- 13. That on October 30, 2006, this Hearing Examiner found that the City had failed to comply with the provisions of the Award and, accordingly, had violated Sections 6(1)(a) and (e) of the PLRA. The order directed the City, inter alia, to "[i]mmediately comply with each and every provision of Arbitrator Light's Award dated September 13, 2004." City of Scranton, 37 PPER 150 (Proposed Decision and Order, 2006).
- 14. That the City filed exceptions to the Proposed Decision and Order (PDO). On January 23, 2007, the Board affirmed the PDO in all respects. <u>City of Scranton</u>, (No PPER citation available)(Final Order, 2007). The City did not seek review of this Order by the Commonwealth Court.
- 15. That from the period of January 23, 2007 (Board's Final Order) the City did not comply with the award. This was due to questions that the City had over the Arbitrator's reference to a January 1, 1999 agreement because the City did not believe there was such an agreement. (N.T. January 23, 2008, 17-23)
- 16. That the City did not seek clarification from the arbitrator under his retained jurisdiction. On April 28, 2006, the City had filed an objection with the American Arbitration Association (AAA) to Arbitrator Light's continued service in another grievance arbitration due to his alleged lack of impartiality that it believed he demonstrated in his Award. On May 8, the AAA notified the parties and the arbitrator that it denied the City's objection. On May 10, 2008 the Arbitrator notified AAA of his voluntary withdrawal from the case because of his staying on the case would be a "no win" situation for him. (N.T. January 23, 2008, 17-27, 29 City Exhibit 3)
- 17. That in June, 2007, counsel for the FOP contacted the Board concerning the City's failure to take any steps towards complying with the award. By letter dated June 28, 2007, Assistant Counsel Samuel B. Ickes confirmed a conversation with City Solicitor Robert Farrell, wherein Farrell advised that the City was "progressing toward complying with the Board Order []" in this matter. (Union Exhibit 10)
- 18. That City Solicitor Farrell admitted, however, at the time, the only steps the City had taken towards compliance was that it may have posted for some of the vacant positions. (N.T. 32-33)

- 19. That after the June 28, 2007 letter, the City submitted an undated Affidavit of Compliance, indicating that it had complied with the Board's Final Order and had complied with the award. $(N.T.\ Union\ Exhibit\ 2)$
- 20. That at the time the affidavit had been submitted (approximately July 20, 2007, the date of the copy of the affidavit was mailed to the FOP, see Union Exhibit 3), the City had not paid any amount in backpay; had not hired a single SIT Clerk; had not paid attorneys fees, and directed by the Award and had not posted the notice ordered by the Board. (N.T. 28, 36, 55-56)
- 21. That on August 13 2007, the City hired individuals to fill the vacant SIT positions $(N.T.\ 44)$
- 22. That while the Light Award called for the hiring of eight SIT Clerks, the city only hired six. (N.T. 50)
- 23. That one of the individuals hired as an SIT Clerk was immediately transferred to the Chief's office to serve as his personal assistant. (N.T. 73-74)
- 24. That in March, 2008, the City paid employes backpay as required by the Award in the amount of \$954.261.02, an amount it believed to be accurate. (2/20 N.T. 25-26, 27), City Exhibits 11 and 12)

\$ 23,946.35

- 25. That the City payment comprised SIT Wages & Benefits of \$789,606.68 and Interest of \$164,654.34 at an interest rate of 4.05% for 1,878 days. (City Exhibit 12)
 - 26. That the City arrived at that sum as follows:

SIT Salary

| No. of Positions | 6 |
|--|---|
| Annual Amt | \$ 143,678.10 |
| Salary Computation: | |
| Positions Vacant | |
| January 15, 2003 to August 13, 2007 2003 2004 2005 2006 2007 | \$ 137.691.51 143,678.10 143,678.10 143,678.10 101,771.99 |
| Total Salary | \$ 670,497.80 |
| Bonus \$500 Paid in Dec. 2003 \$600 Paid in Dec. 2004 \$800 Paid in Dec. 2005 \$900 Paid in Dec. 2006 Total Bonus | \$ 3,000.00 3,600.00 4,800.00 5,400.00 |
| Longevity | |
| 2% 2% 2% 2% 2% 2% | \$ 2,753.83 2,873.56 4,310.34 4,310.34 4,070.88 |
| Total Longevity | \$ 18,318.96 |
| GRAND TOTAL SALARY | \$ <u>705,616.76</u> |

Healthcare Family Computation:

Family Coverage-Monthly Buyout Annual Amount

| Healthcare-2003 Healthcare-2004 Healthcare-2005 Healthcare-2006 Healthcare-2007 | \$ 17,247.93 17,997.84 17,997.84 17,997.84 12,748.47 |
|---|---|
| Total Healthcare | \$ 83,989.92 |
| TOTAL AWARD | \$ <u>789,606.68</u> |
| SIT Wages & Benefit Award | \$ 789,606.68 |
| Interest Rate | 4.05% |
| No. of Days Owed | 1,878 |
| Amount of Interest | \$ 164.654.34 |
| TOTAL AWARD | \$ 954,261.02 |

(City Exhibit 12)

DISCUSSION

Background

This is more litigation in the long dispute arising out of the City of Scranton's failure to follow the 1999 Strategic Implementation Team (SIT) agreement that civilianized certain clerical duties that had been performed by police officers.

The present litigation stems from a 2004 arbitration award by Robert Light upholding a grievance over the City's failure to hire and maintain civilians in positions formerly held by police officers as set forth in the SIT agreement. On October 30, 2006, this examiner found that the City had failed to comply with the terms of the arbitration award and issued a Proposed Decision and Order (PDO) finding that the failure to comply was an unfair labor practice. On January 23, 2007, the Board issued a Final Order dismissing exceptions to the PDO.

I. Introduction

The present litigation is the FOP's motion for compliance and/or sanctions against the City for its failure to comply with the Final Order.

To decide this motion, it is necessary to restate the law for determining whether an employer has complied with the provisions of the arbitrator's decision. Under the law, the Board looks at the four corners of the arbitration award to determine the intent of the arbitrator as expressed in the award. City of Philadelphia, 33 PPER ¶33171 (Proposed Decision and Order, 2002); City of Philadelphia, 30 PPER ¶30179 (Final Order, 1999); City of Philadelphia, Office of Housing and Community Development, 24 PPER ¶24052 (Final Order, 1993). So strict is the Board's fidelity to the "four corners" doctrine that it will not even allow the collective bargaining agreement – the very document being interpreted by arbitrators in grievance arbitrations – to complement an award when trying to determine an arbitrator's intent. Pittsburgh Parking Authority, 39 PPER 34 (Proposed Decision and Order, 2008); East Hempfield Township, 38 PPER 118 (Proposed Decision and Order, 2007).

In determining the intent of the arbitrator, the inquiry cannot require the Board to add to the award or fill gaps or holes in the award. AFSCME, Local 1971 v. City of Philadelphia, Office of Housing and Community Development, 24 PPER \P 24052 (Final Order, 1993).

The City contends that it has complied with the Light Award. At the hearing, the City introduced City Exhibits 11 and, a list of the back pay made to the members of the bargaining unit pursuant to the Light Award and a computation of that amount. The City also offered testimony of Mr. Stuart Renda, the Business Administrator, who discussed the method of his back pay calculations and the payment that was made to the FOP members. The City's back pay amounted to a total of \$954,261.02.

The FOP contends that the City's calculations are not correct and that more money is owed to the members. The FOP argues that when the "four corners" of this Award are looked at, the only conclusion that can be reached is that the City has not fully complied with the Light Award. As set forth above, the Light Award has several facets. The Award is complex and lengthy, with three pages alone devoted to the issue of relief. The Award provides both make whole relief, which requires a look backwards at staffing levels that should have been maintained, and prospective relief, which requires a determination of whether the City staffed the correct number of employes after the date of the Award. Because of this retroactive and prospective relief, the parties provided the Hearing Examiner with thorough and involved calculations of the amounts that would have to be made to find the City in had complied with the Award.

The FOP has presented clear and convincing evidence that the City has not complied with several aspects of the Light Award. Despite paying the FOP \$954,261.02, the City based these payments on erroneous readings of the Light Award. The City continued to adhere to these readings of the Award in the hearing before me. As discussed below, the FOP has successfully rebutted the City's contentions. The points of dispute and their resolution are set forth below.

II. The City Has Failed to Comply With the Award's Hiring Directions

As a preliminary matter, it is important to resolve the dispute over the number of SIT Clerks the City should have hired to comply with the Light Award. The FOP contends that the Award called for the City to hire eight employees to cover vacant positions. The City contends that the Award required the hiring of six employes. The FOP's contention is correct for the reasons set forth below.

The Light Award provides:

- 2. In order to remedy the violations of Paragraph X are [sic] herein before stated, the City of Scranton is hereby directed to immediately take the following action:
 - A. Immediately employ not less than the additional SIT clerical positions of one "Clerk/Typist Detective-Evening" (Article XI, section G(3)), AND FOUR ADDITIONAL SIT Clerks for the "Desk" (article XI, Section G(7)) to perform the functions described in Paragraph X of the SIT Agreement to equip those employees with office space and equipment to perform the functions within the Police Department envisioned by the SIT Agreement; and
 - B. Until such time as the underlying contractual language is modified to otherwise provide, the City shall continue to employ the number of additional SIT clerks as provided in the SIT Agreement and completely equip those employees with office space and equipment to perform the functions with the Police Department envisioned by the SIT Agreement...

(Joint Exhibit 1 at 19).

This language clearly and unambiguously provides that the City was to hire - and continuously maintain: one Clerk/Typist Detective (Evening); two Records Administration Clerks; one Deputy Chief/Captain Clerk and four Desk clerks.

The record in this case shows that the City has failed to hire in accordance with these requirements.

In August 2007, the City filled six positions - one Records Administration Clerk, one Deputy Chief/Captain clerk, and four desk clerks (1/23 N.T. 50). The City did not

hire a Clerk/Typist Detective for the evening shift. Further, the Records Administration employee (Maggie McLane) was immediately assigned to work as the Police Chief's confidential secretary. (Union Exhibit 4). Confidential secretary is not a position covered by the SIT Agreement.

Thus, to date, the City remains in non-compliance with the Light Award. The Award requires compliance with the contract - in particular, the "add" column of the SIT Agreement. As Arbitrator Light stated, "[t]he City's complete failure to employ the designated number of additional SIT clerical employees specifically described in Paragraph X(F) of the SIT Agreement violates that agreement ..." (Joint Exhibit 1 at 19). As noted above, Paragraph X(F) required the following:

| | CURRENT | PROPOSE | ADD |
|--------------------------------------|---------|---------|-----|
| 1. Criminal Information Spec. | 0 | 1 | 1 |
| 2. Clerk/Typist Detectives - Days | 1 | 1 | 0 |
| 3. Clerk/Typist Detectives - Evening | 0 | 1 | 1 |
| 4. Records/Administration | 4 | 6 | 2 |
| 5. Training | 0 | 1 | 1 |
| 6. Deputy Chief | 0 | 1 | 1 |
| 7. Desk (2 for 2 shifts) | 0 | 4 | 4 |
| 8. Grant Writer | 0 | 1 | 1 |
| | _ | | |
| TOTAL | 5 | 16 | 11 |

(Joint Exhibit 2 at 13-14)

Here is where the City stands today:

| SIT TITLE | "ADD" | CURRENT |
|----------------------------------|-------|---------|
| Criminal Information Specialist | 1 | 1 |
| Clerk/Typist Detective - Evening | 1 | 0 |
| Records Administration | 2 | 1 |
| Training | 1 | 1 |
| Deputy Chief/Captain | 1 | 1 |
| Desk | 4 | 4 |
| Grant Writer | 1 | 0 |
| TOTALS | 11 | 8 |

It is not in dispute that the City is not now employing a Clerk/Typist for the evening detectives $(2/20~\rm N.T.~32-33)$. It is also not in dispute that the City only hired one employee for the Records Administration position, even though the Award required two $(2/20~\rm N.T.~30)$ – the City also offered no argument to the point that even this one individual is now working in a non-SIT capacity $(2/20~\rm N.T.~35)$. Finally, the City admits that, effective January 2008, the SIT Grant Writer was instructed to stop writing grants for the police department. $(2/20~\rm N.T.~33,~64)$.

In sum, the City remains three employees short as far as its continuing SIT obligations, and obligations under the Light Award. As will be, shown, this has an impact on the back pay owed to FOP members. However, because of the safety concerns designed to be addressed by the SIT Agreement, it is even more important to note that the City must be directed to immediately employ individuals to fill these positions in order to effect full compliance with the Light Award.

The City's argument in defense of this failure is easily summarized: following the plain language of the Light Award would result in a "windfall" as it would result in more SIT Clerks than required by the contract (i.e., 13 instead of 11). There are two problems with this argument. First, as shown above, the current numbers clearly indicate no "windfall" - the City remains three short of the required complement.

Second, the arbitrator's language was clear and concise. To the extent the City felt that it was in error, it could have petitioned the arbitrator to correct the alleged error. It did not do so. As a consequence, it is bound to the terms of the Award as written.

As has been stated above, in deciding whether an employer has complied with the provisions of the arbitrator's decision, the Board looks at the four corners of the arbitration award to determine the intent of the arbitrator as express in the award. City of Philadelphia, supra. City of Philadelphia, Office of Housing and Community Development, supra.

The "four corners" of this Award plainly state that the City was to hire eight employees to cover vacant positions. It is not in dispute that it did not do so.

At the hearing, the City offered into evidence the transcript of the underlying arbitration case to prove that the Award could not be read as requiring eight (8) SIT vacancies be covered by the award but only could be read as requiring six(6) vacancies be covered. The transcript was marked as City Exhibit 14. Following the hearing in this matter, the parties briefed the question of the admissibility of City Exhibit 14. The City argues that the transcript of the underlying arbitration case contains alleged admissions by the FOP counsel that the FOP was only seeking six (6) positions. The City argues that if the Board admitted this document and gave it proper weight, that it would prove that the Arbitrator did not intend to award eight (8) positions. The FOP argued that admitting the transcript of the hearing to determine compliance with the Award is contrary to well established Board precedent that the Board is not to look beyond the Award itself to determine whether the employer has complied with the Award.

After reviewing the respective arguments, on April 16, 2009, I ruled that City Exhibit 14 is not admissible. In further explanation of the ruling, the Board precedent directs me not to look beyond the four corners of the arbitration award itself in determining the intent of the arbitrator. City of Philadelphia, 30 PPER ¶30179 (Final Order, 1999); City of Philadelphia, Office of Housing and Community Development, 24 PPER ¶24052 (Final Order, 1993). In divining the intent of the arbitrator, the inquiry cannot require the Board to add to the award or fill gaps or holes in the award. AFSCME, Local 1971 v. City of Philadelphia, Office of Housing and Community Development, 24 PPER ¶. 24052 (Final Order, 1993). Therefore, it would be error for me to look into the transcript of the arbitration hearing to try to discern the arbitrator's intention.

III. The City's Flawed Back Pay Calculations

The City did eventually attempt to comply with the Award by issuing back pay to FOP members in March 2007. The FOP has set forth how the calculations were flawed, and why its members are still owed additional money. Following the FOP's argument, the points of difference between the parties' calculations will be discussed here.

a. The Award

The Light Award required the following in connection with the calculation of back pay:

- C. Make the FOP whole for the failure to continuously employ the eleven additional SIT clerical employees described in Article XI(G) of the SIT Agreement by paying to the members of the FOP bargaining unit who were on payroll at any time on and after February 14, 2003 (the date of the grievance) the full cash value of the wages and fringe benefits that would have been paid to the eleven additional SIT clericals that the City failed to employ during the duration of the January 1, 1999 contract.
- D. In making those payments, the following conditions shall apply:
 - 1. For purposes of computing the back pay it shall be assumed that each clerical thus employed was compensated at the then-prevailing arithmetic average of all SIT clerical classifications with the City.
 - 2. The back payment due under this Order shall include not only the wage computed in accordance with (B) above, but also the full City cost of health insurance at the family level and the cash value of all other fringe benefits payable under the collective bargaining agreement between the City and IAM Lodge No. 2462.

- 3. The back pay shall be computed from the date that the City failed to employ the full complement of eleven additional SIT clerks starting with the duration of the agreement (January 1, 1999) until the appropriate number of clerical employees are actually on the payroll and shall include interest computed in accordance with Article XX(9) of the collective bargaining agreement between the City and FOP.
- 4. The back pay shall be distributed to FOP bargaining unit members who were on payroll with the city at any time on or after February 14, 2003 (including those on temporary work-related disability during that period) until such time as the city actually employes the appropriate number of clerical employees required by the SIT agreement. Each full month of service shall equal one unit. Each member's entitlement to the back pay shall be determined by dividing the total amount payable by the total number of units and then multiplying that members units by the result.

(Joint Exhibit 1 at 19-20)

Thus, the elements of the back pay calculation can be broken down as follows:

- 1. The back pay is owed for any period where the City failed to employ the eleven additional SIT clerks during the duration of the collective bargaining agreement (i.e., from 1999 to the present);
 - 2. Compensation will be based on the arithmetic average of all SIT classifications;
- 3. Back pay will also include the full City cost of health insurance at the family level and the cash value of all other fringe benefits payable under the collective bargaining agreement between the City and IAM Lodge No. 2462;
- 4. Back pay shall include interest pursuant to Article XX(9) of the collective bargaining agreement.

b. Base Wage and Benefits

At the hearing, the City testified that it used a base pay figure of \$23,946.35 for the SIT Clerks, based upon the collective bargaining agreement between the City and IAM Lodge No. 2462 (2/20 N.T. 18). The FOP agrees that this is the proper wage rate for the period of 2002 to 2007.

For purposes of FOP calculations, however, it must be noted that there are other wage rates in play, as follows:

| | 1999 | \$21,246.35 |
|------------------|------|-------------|
| | 2000 | \$22,146.35 |
| | 2001 | \$23,046.35 |
| | 2008 | \$28,440.00 |
| \triangleright | 2009 | \$29,400.00 |

(Union Exhibits 6 and 8)

The City also properly included one-time bonuses for the years 2003 to 2006 (2/20 $\,$ N.T. 18).

The City also included longevity in the calculations. Specifically, the City applied the 2% longevity rate for the years 2003 and 2004, 3% in 2005 and 2006, and 4% for 2007 (2/20 N.T. 18-19). The FOP agrees that longevity should be included but, for the reasons that follow, argue that the calculations yield different results.

The City made no attempt to calculate overtime in the base wage package. City operating budgets reveal that there was overtime paid in 2002, 2003, 2004 and 2005 (Union Exhibit 11). Thus, by taking those numbers and dividing by the number of clericals employed (it is not in dispute that for 2003 to 2005 the number was 63 (2/20 N.T. 36, 80)), a per-employee overtime total can be added to the figure.

c. Health Care Costs

As noted, the Light Award plainly states that back pay must also include the "full City cost of health insurance at the family level." (emphasis added).

The City testified that, notwithstanding this language, it instead only credited employees with the payment they would have received had they "opted out" of health insurance. As a result, employees were only credited with \$2,999 per year as the "full cost of City insurance." (2/20 N.T. 22).

This figure represents only 40% of what the City would have had to pay - in other words, only 40% of the "full costs." See Union Exhibit 6 at 41-42. Clearly, this figure is not in compliance with the Light Award's edict that the full cost be paid.

The City offered that there was some difficulty in determining actual costs because the city is self-insured. However, the FOP submitted evidence demonstrating that the City has had little difficulty identifying "actual costs" in the past.

First, for the years 1999 to 2002, the City's actual cost is easily determined: the cost for family coverage is delineated in the IAM 2462 collective bargaining agreement. Under the terms of the agreement, the City was responsible for \$6,622 for family coverage (Union Exhibit 6 at 37). In addition, employees were responsible for half of any costs over that - which means, of course, that the City was responsible for the other half (Union Exhibit 6 at 38). In early 2002, the City distributed a document indicating the costs of the "50%" for employees (Union Exhibit 7); IAM 2462 President Nancy Krake testified without contradiction that these rates had been in effect since 1999 (2/20 N.T. 74). Thus, for the years 1999 to 2002, the actual "full cost" for family coverage was as follows:

| | 1999 | \$7,124.16 |
|------------------|------|------------|
| \triangleright | 2000 | \$7,124.16 |
| \triangleright | 2001 | \$7,124.16 |
| \triangleright | 2002 | \$6,222.00 |

In 2003, the City presented evidence concerning its "actual health care costs" for that year (Union Exhibit 10). In that exhibit, the actual cost can be determined by taking the total actual cost (i.e., not including employee contributions) for health care (\$309,654.98) plus the actual cost for dental claims (\$87,957.70), divided by the number of employees in the unit (63), yielding a figure of \$6,312.90.

Fortunately, figures for 2004 to 2007 are easier to determine. In response to an information request filed by the city unions, the City provided actual total perunit costs for health insurance for those years (Union Exhibit 9). Taking the "Clerical Active" figures on the document and dividing by 63, the actual costs are:

| 2004 | \$6,395.33 |
|------|-------------|
| 2005 | \$8,001.72 |
| 2006 | \$9,021.63 |
| 2007 | \$10,885.22 |

Although it is quite likely health care costs have continued to increase, the FOP had not been provided any data for 2008 or 2009. Of course, the City did not present any evidence that costs have decreased. Thus, for the purpose of the FOP's computations, it has been assumed that the 2007 rate is still in effect for 2008 and 2009.

d. Total Package

Using the above data, the following reflects the actual yearly cost per SIT Clerk:

¹ "For each full month that the [health care waiver] is in effect the Bargaining Unit member shall receive 40% of the City's savings attributable to that election, i.e. the gross cost of providing the benefits provided by this Agreement."

| YEAR | SALARY | OT | LONG. | HEALTH | BONUS | TOTAL |
|------|-------------|---------|------------|-------------|----------|-------------|
| 1999 | \$21,246.35 | | \$424.93 | \$7,124.16 | | \$28,795.44 |
| 2000 | \$22,146.35 | | \$442.93 | \$7,124.16 | | \$29,713.44 |
| 2001 | \$23,046.35 | | \$691.39 | \$7,124.16 | | \$30,861.90 |
| 2002 | \$23,946.35 | \$24.39 | \$718.39 | \$6,622.00 | | \$31,311.13 |
| 2003 | \$23,946.35 | \$39.00 | \$957.85 | \$6,312.90 | \$500.00 | \$31,756.11 |
| 2004 | \$23,946.35 | \$23.81 | \$957.85 | \$6,395.33 | \$600.00 | \$31,923.34 |
| 2005 | \$23,946.35 | \$7.94 | \$1,197.32 | \$8,001.72 | \$800.00 | \$33,953.33 |
| 2006 | \$23,946.35 | | \$1,197.32 | \$9,021.63 | \$900.00 | \$35,065.30 |
| 2007 | \$23,946.35 | | \$1,436.78 | \$10,885.22 | | \$36,268.35 |
| 2008 | \$28,440.00 | | \$1,706.40 | \$10,885.22 | | \$41,031.62 |
| 2009 | \$29,400.00 | | \$2,058.00 | \$10,885.22 | | \$42,343.22 |

The evidence in this record shows that the City has failed to continuously employ a night Clerk Typist since 1999 (2/20 N.T. 32, 63; City Exhibit 10). As a consequence, the longevity numbers reflect the City's calculations (i.e., 2% of salary), but start in 1999. As a result, increasing the longevity every two years as per the IAM 2462 collective bargaining agreement (and as the City did in its calculations), the rates change accordingly (i.e., 3% in 2001 and 2002; 4% in 2003 and 2004; 5% in 2005 and 2006; 6% in 2007 and 2008; 7% in 2009).

e. Total Back Pay

Stated simply, the City based its back pay on a total number of six SIT Clerks, representing the number that the City believed to be short. However, the Light Award plainly states eight.

Further, the Light Award states that back pay shall be for the period during which the City failed to continuously employ the eleven additional SIT clerks, going back to 1999.

In this case, it is not in dispute that the City failed to employ a night Clerk Typist from 1999 to date. Thus, from 1999 to 2002, the City owes back pay for the equivalent of *one* SIT clerk.

It is also not in dispute that, in early 2003, the City eliminated a number of SIT Clerks, resulting in the grievance in this case. Pursuant to the plain language of the Light Award, this number equals eight for the period of 2003 to August 2007.

As shown above, the City has only hired five of the required eight SIT positions. Thus, from August 2007 to date, the City has a continuing back pay obligation equaling three SIT Clerks.

Using these numbers results in the FOP calculating that, as of May, 2009, the date of the submission of it brief, the City has a total back pay liability of the following:

| YEAR | SIT | TOTAL |
|-------|-----|----------------|
| 1999 | 1 | \$28,795.44 |
| 2000 | 1 | \$29,713.44 |
| 2001 | 1 | \$30,861.90 |
| 2002 | 1 | \$31,311.13 |
| 2003 | 8 | \$254,048.84 |
| 2004 | 8 | \$255,386.73 |
| 2005 | 8 | \$271,626.62 |
| 2006 | 8 | \$280,522.40 |
| 2007 | 8 | \$290,146.82 |
| 2008 | 3 | \$123,094.86 |
| 2009 | 3 | \$127,029.66 |
| TOTAL | | \$1,722,537.85 |

Of course, assuming the City has entered 2010 still not having hired the three additional SIT clerks, the liability will be higher and the City is directed to use this higher number in calculating its liability.

f. Interest Calculations

The Light Award dictated that interest was to be applied in accordance with Article XX(9) of the collective bargaining agreement. This article provides:

...Furthermore, should the Arbitrator direct a financial remedy, such remedy shall commence to run from the date of the violation and shall bear an interest rate from that date equal to the six (6) month United States treasury bill rate, adjusted for each calendar quarter that such remedy is payable, as was in effect from the date that the violation occurred until that payment is made.

(Joint Exhibit 2 at 16-17 (emphasis added)).

Notwithstanding this plain language, the City nevertheless used a calculation that resulted in a simple flat rate being applied to its total amount (2/20 N.T. 23-24, 42-43). Nothing in the contractual language supports this approach, nor is there anything in the Light Award that endorses such an approach. Instead, the City should apply the U.S. Treasury Bill rate for the period in question.

The FOP has provided a T-Bill calculation that was computed as of March 31, 2009. Because of the passage of time since those calculations were done, the City should make new calculations, using the Light Award's U.S. Treasury bill rate formula, to compute the amounts now owed to the FOP. If necessary, the City should consult with the FOP to do the calculations.

IV. The Effect of Commonwealth Court Case

Finally, the City also argues that the amount that it paid the FOP in March, 2008 is correct and that the amount the FOP now seeks in this compliance proceeding by the calculations set forth above is inconsistent with the Commonwealth Court's decision in City of Scranton v. E. B. Jermyn Lodge No. 2 of the Fraternal Order of Police, 965 A. 2d 359 (Pa. Cmwlth. 2009). In that case the Court affirmed the Court of Common Pleas of Lackawanna County decision on January 15, 2008 vacating the Act 111 interest arbitration award for the period of January 1, 2003 through December 31, 2007 (i.e. the successor collective bargaining agreement) and ordered "the Award[][is] hereby modified to incorporate the terms of the Revised Recovery Plan, until the Revised Recovery Plan is amended or the City's designation as 'distressed' under Act 47 is removed. " (City Exhibit 7 at 2). The City attached the Commonwealth Court Opinion to its brief.

The City argues because the Recovery Plan allows for modification of the SIT Agreement (City Exhibit 8 at II-B-11), it is free to comply with the Light Award in a way that was consistent with the Revised Recovery Plan. It argues that Arbitrator Light did not have the authority to order the City to hire more clerks than those set forth in the SIT agreement, "based on the Commonwealth Court decision superimposing the Revised Recovery Plan to that Agreement." (City Brief, p. 23).

The Commonwealth Court decision did not affect the SIT Agreement or Arbitrator Light's Award on the grievance alleging a violation of the SIT Agreement. The Court did indeed significantly modify the 2003-2007 interest arbitration award. Rather than replacing the interest arbitration award with the Recovery Plan, the Commonwealth Court made narrowly tailored revisions to the interest arbitration award. The Commonwealth Court specifically retained the SIT Agreement:

We expressly reject the City's argument that unidentified portions of the surviving SIT Agreement restrain its management rights, for two reasons. First, we reject the notion that the SIT Agreement is totally abrogated, since the 2002 Recovery Plan does not specifically provide for anything other than a modification of the SIT Agreement. In this regard, it is important to note that the SIT Agreement and its predecessor Agreement were products of collaboration

between the City, the FOP and Act 47 Coordinator. We believe it unreasonable to assume that the Act 47 Coordinator would draft the 2002 Recovery Plan in such a way as to implicitly and totally unravel its earlier accomplishment.

Id. at 375 (Internal citation omitted).

Reading this Commonwealth Court order, there is no mention of the SIT Clerks. It is difficult to see how the Commonwealth Court order could be construed so as not to follow the Light Award. The Light Award should be given its proper weight as a binding award.

CONCLUSIONS

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

- 1. The City of Scranton is an employer under section 3(c) of the PLRA as read in pari materia with Act 111.
- 2. The E.B. Jermyn Lodge No. 2, Fraternal Order of Police 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 City is not in compliance with the Light Arbitration Award dated September 13, 2004.

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 City shall

- 1. Immediately hire the three remaining SIT Clerks as required by the Light Award.
- 2. Pay the FOP a sum consistent with the discussion above, minus the \$954.261.02 it has already paid the FOP.
 - 3. Pay the FOP 6% interest on the sum from paragraph 2.
- 4. 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 employes and have the same remain so posted for a period of ten (10) consecutive days; and
- 5. 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 with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty days of the date hereof, this order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this seventh day of June, 2010.

PENNSYLVANIA LABOR RELATIONS BOARD

Thomas P. Leonard, Hearing Examiner