

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

WYOMING BOROUGH POLICE DEPARTMENT :
 :
 v. : Case No. PF-C-10-59-E
 :
 WYOMING BOROUGH :

FINAL ORDER

Wyoming Borough (Borough) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) on April 22, 2011 to a Proposed Decision and Order (PDO) issued on April 7, 2011, in which the Hearing Examiner concluded that the Borough violated Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA), as read in *pari materia* with Act 111, by failing to comply with the terms of a grievance arbitration award reinstating Officer Joseph Broda. Following an extension of time granted by the Secretary of the Board, the Borough filed a brief in support of its exceptions on May 5, 2011. The Wyoming Borough Police Department (Union), was granted an extension of time to file a brief in response to the exceptions, and timely filed its brief on June 22, 2011. After a thorough review of the exceptions and all matters of record, the Board makes the following:

ADDITIONAL FINDINGS OF FACT

25. On November 12, 2008, the Borough Solicitor wrote to the Union's attorney as follows:

In light of Mr. Broda's resignation and the Borough's obligation to abide by the Arbitration Award..., I would like to resolve any back pay owed to your client. In that regard, kindly provide all relevant documents that may mitigate the damages the Borough is obligated to provide Mr. Broda.... To the extent that he is seeking reimbursement for uncovered out-of-pocket expenses, please provide copies of all supporting documentation. I expect that the Borough will be able to complete its calculation within two weeks after receiving all supporting documents....

(Police Exhibit 1, November 12, 2008 letter).

26. On May 7, 2009, the Borough Solicitor sent to the Union its proposed back pay calculation. Under the Borough's calculation Mr. Broda was owed \$9,424.00 in back pay from 2006 to the date of Mr. Broda's resignation in 2008. (Police Exhibit 1, May 7, 2009 letter).

27. On October 12, 2009, the Borough wrote to the Union as follows:

Officer Broda had submitted his resignation to the Borough many months ago and it was accepted by Borough Council. As a result, Mr. Broda is no longer an officer for the Borough of Wyoming and has no right to return to work.

As for Officer Broda's back pay and any benefits he might be due, I sent you a letter on August 13, 2009, outlining our position regarding his Holidays, Sick Days, and Back Pay. I have never received a response to that letter. If you wish to resolve this matter; I would be willing to set up another meeting with Mr. Broda and the Mayor and anyone from Council wishing to attend.

(Police Exhibit 1, October 12, 2009 letter).

DISCUSSION

In 2006, the Borough discharged Officer Broda, and the Union processed a grievance to arbitration protesting the discharge. On November 27, 2006, Arbitrator Robert Kyler issued an award ordering that Officer Broda "be returned to work within two (2) weeks of

the date of this award[, and] receive no back pay and no benefits for the period of time he was on suspension and termination." (Kyler Award).

The Borough appealed the Kyler Award to the Luzerne County Court of Common Pleas, which affirmed the Award. The Borough took a subsequent appeal to the Commonwealth Court of Pennsylvania. Commonwealth Court affirmed the Kyler Award on February 8, 2008.

While the appeals were pending, on December 21, 2007, Broda was arrested and charged with crimes for which a potential prison sentence in excess of two years applied. The Borough took no action at the time, however, following the Borough's appeals of the Kyler Award, the Borough scheduled an internal investigatory interview with Officer Broda for April 10, 2008. On or about April 9, 2008, Joseph Mangin, on behalf of the Union, spoke with Borough Mayor Robert Boyer about the investigatory interview. The Mayor informed Mr. Mangin that the interview concerned new matters unknown to the Borough at the time of Broda's original termination. A few hours later, Mr. Mangin telephoned the Mayor and proposed that Broda would resign and the Borough could give Broda back pay from the date of the Kyler Award to the date of Broda's resignation. The Mayor agreed to honor any financial obligations owed to Broda without committing the Borough to any specific dollar amount. On April 10, 2008, Broda communicated his resignation to the Borough effective April 11, 2008. Broda's resignation advised that the Union's attorney would be in contact with the Borough Solicitor concerning any money owed.

On June 18, 2008, Broda entered and was accepted into the Accelerated Rehabilitative Disposition (ARD) program as a result of his December 21, 2007 arrest. Broda signed his ARD application agreeing to the terms of the ARD, which included the revocation of his Act 120 certification.

The parties continued to actively communicate about a back pay amount for Broda, and in late 2008, the Mayor expressed to Union Representative Mangin that the Borough wished to defer the financial burden and delay some payments until the 2009 tax year. During the same discussion, the Mayor represented to Mangin that he was having difficulty obtaining Borough Council's approval for any payment to Broda. The Mayor indicated that he may be able to obtain Council approval if the Union lowered the back pay amount sought.

As part of the ongoing discussions, on November 12, 2008, the Borough Solicitor wrote to the Union's attorney as follows:

In light of Mr. Broda's resignation and the Borough's obligation to abide by the Arbitration Award..., I would like to resolve any back pay owed to your client. In that regard, kindly provide all relevant documents that may mitigate the damages the Borough is obligated to provide Mr. Broda.... To the extent that he is seeking reimbursement for uncovered out-of-pocket expenses, please provide copies of all supporting documentation. I expect that the Borough will be able to complete its calculation within two weeks after receiving all supporting documents....

After receiving the information to enable it to calculate the back pay, on May 7, 2009, the Borough Solicitor sent the Union its proposed back pay calculation. Under the Borough's calculation, Mr. Broda was owed \$9,424.00 in back pay from 2006 to the date of his resignation in 2008. The Union disagreed with the Borough's calculation, and sought reinstatement if the parties could not resolve Broda's back pay. On October 12, 2009, the Borough wrote to the Union as follows:

Officer Broda had submitted his resignation to the Borough many months ago and it was accepted by Borough Council. As a result, Mr. Broda is no longer an officer for the Borough of Wyoming and has no right to return to work.

As for Officer Broda's back pay and any benefits he might be due, I sent you a letter on August 13, 2009, outlining our position regarding his Holidays, Sick Days, and Back Pay. I have never received a response to that letter. If you wish to resolve this matter; I would be willing to set up another meeting with Mr. Broda and the Mayor and anyone from Council wishing to attend.

On December 1, 2009, the parties met again to discuss the resolution of Broda's back pay. On March 15, 2010, the Union outlined the discussions, the agreements reached during the December 1, 2009 meeting, and set forth its back pay calculation. To date, the Borough has not responded to the Union's March 15, 2010 letter, or paid any money to Broda. Nor has the Borough reinstated him.

The Hearing Examiner found that the Borough and Union were negotiating the implementation of the Kyler Award through the date of the Union's March 15, 2010 letter, and therefore the Union's Charge of Unfair Labor Practices was timely filed on April 28, 2010. The Hearing Examiner concluded that the Borough violated Section 6(1)(a) and (e) of the PLRA by failing to abide by the Kyler Award, and directed the Borough to pay Broda back pay and benefits from December 11, 2006, two weeks after the Kyler Award, to June 18, 2008, the date Broda lost his Act 120 certification.

On exceptions, the Borough argues that the Hearing Examiner erred in finding that the Union's Charge of Unfair Labor Practices was timely filed within the six-week statute of limitations. Section 9(e) of the PLRA imposes a six-week limitation period in which to file a charge with the Board, and provides, in relevant part, that "[n]o petition or charge shall be entertained which relates to acts which occurred or statements which were made more than six weeks prior to the filing of the ... charge." 43 P.S. § 211.9(e). In cases involving a refusal to comply with a grievance arbitration award, the statute of limitations does not necessarily accrue immediately when the award is issued. Instead, the statute of limitations is tolled during a period of negotiations, where the employer is giving assurances of its attempt to comply with the grievance arbitration award. Fraternal Order of Housing Police v. Philadelphia Housing Authority, 38 PPER 79 (Final Order, 2007). The statute of limitations commences to run when the union knows, or should know, that the employer will not be complying with the award, such as where the employer takes a "firm and unyielding stance" regarding its obligation to comply with the award. Id.; International Brotherhood of Electrical Workers, Local No. 81 v. Scranton Housing Authority, 33 PPER ¶ 33134 (Final Order, 2002).

The Borough argues on exceptions that substantial evidence of record demonstrates that it had expressed a firm and unyielding stance regarding compliance with the Kyler Award when the Mayor stated that Borough Council was not willing to pay Mr. Broda anything, and on October 12, 2009, when the Borough stated that it would not reinstate Mr. Broda. However, the record evidence is that neither of these communications made clear that negotiation over the Borough's obligations under the Kyler Award were deadlocked, and that the Borough had no intention of complying with the award. Indeed, the Mayor's comment that Borough Council was not willing to pay Mr. Broda was made in late 2008, at, or around the time, that the Mayor also stated that the Borough would like to defer payment to the 2009 tax year, and that it may be possible to obtain Council approval if Broda lowered his demand. Additionally, around that time, on November 12, 2008, the Borough Solicitor indicated that the Borough wished to calculate its back pay liability under the Kyler Award. Further, on May 7, 2009, the Borough offered to pay Broda \$9,424.00 in back pay for the period of time from the Kyler Award to Mr. Broda's resignation in 2008.

As for the Borough's October 12, 2009 letter, the Borough clearly reiterated in that letter its desire to continue discussions of back pay in resolution of the obligations under the Kyler Award. Indeed the Borough stated, as follows:

As for Officer Broda's back pay and any benefits he might be due, I sent you a letter on August 13, 2009, outlining our position regarding his Holidays, Sick Days, and Back Pay. I have never received a response to that letter. If you wish to resolve this matter[,] I would be willing to set up another meeting with Mr. Broda and the Mayor and anyone from Council wishing to attend.

In fact, thereafter the Union and the Borough did meet again on December 1, 2009. As a result, the Union sent the March 15, 2010 letter summarizing those discussions and the agreements reached during that meeting. At no time did the Borough ever indicate that it was unwilling to further negotiate the back pay that was due Broda as a result of the Kyler Award.

On this record, the Hearing Examiner did not err in finding that the Union and the Borough continued to negotiate the Borough's obligations arising from the Kyler Award, and that the Borough had not articulated a firm and unyielding stance with regard to those obligations. As such, the Hearing Examiner did not err in concluding that the Union's April 28, 2010 Charge of Unfair Labor Practices was timely filed within the six-week statute of limitations following the Borough's failure to respond to the Union's March 15, 2010 letter.

In the alternative, the Borough argues that even if the Charge of Unfair Labor Practices is timely, under the Confidence in Law Enforcement Act (CILEA), 53 P.S. §752.4, the Borough would not be obligated to pay back pay for any period of time since Mr. Broda's arrest on December 21, 2007. The Borough asserts that it is not liable for back pay because the CILEA requires that a law enforcement officer charged with an offense carrying a prison sentence of more than one year (as was the case with Mr. Broda on December 21, 2007), "shall be immediately suspended from employment as a law enforcement officer." 53 P.S. §752.4.

However, at no time between the date of Mr. Broda's arrest on December 21, 2007, to the date of his resignation on April 11, 2008, did the Borough take any action to suspend him without pay. In rejecting a similar argument, the Commonwealth Court held in Pennsylvania State Police v. Pennsylvania State Troopers Association, 992 A.2d 969 (Pa. Cmwlth. 2010), as follows:

We reject PSP's claim that the Arbitrator's Award mandates PSP to violate the CILEA. Although that statute requires PSP to suspend from employment any law enforcement officer charged with a qualifying criminal offense, we disagree with PSP that the CILEA unambiguously mandates that the suspension be without pay.

Id. at 975. Accordingly, the CILEA does not obviate the Borough's obligation to pay back pay after the date of Broda's arrest on December 21, 2007.

The Borough argues that nonetheless, Mr. Broda's back pay should cease with the effective date of his resignation on April 11, 2008. Upon review of the record, we agree. Throughout the negotiation between the Union and the Borough there is never a dispute that the Borough's liability ceased as of Broda's resignation on April 11, 2008. Indeed, in its March 15, 2010 letter, the Union reiterates that "[p]ursuant to the Award and the agreement of the parties, Broda is eligible for back pay from the November 27, 2006 Award to the April 11, 2008 resignation." (Police Exhibit 1, March 15, 2010 letter). In its discussions with the Borough, the Union conceded that compliance with the Kyler Award meant back pay for a closed period of time ending April 11, 2008.¹ On this record, the Board will not award a contrary remedy.

With regard to the back pay owed under the Hearing Examiner's remedy, the Borough asserts on exceptions that the Hearing Examiner erred in ignoring its right to setoff interim earnings, and erred in directing the Borough to pay longevity increases, out-of-pocket medical expenses, holiday pay, accrued leave, and interest. Initially, we note that the PDO does not expressly deny the Borough's right to setoff Broda's interim earnings. The Board noted in Corry Area Education Association v. Corry Area School District, 38 PPER 155 (Final Order 2007), as follows:

Were an employee to get backpay without an offset for interim earnings, there would be a windfall to the employee over and above what the employee lost in wages. Such relief would make the employee more than whole and thus is punitive, and beyond the authority of the Board.

¹ Before the Hearing Examiner, the Borough argued that back pay commenced on March 11, 2008, the date on which the parties stipulated that the award became final and binding. However, as the record evidence of correspondence from the Borough indicates, the Borough clearly understood that back pay commenced two weeks after the issuance of the Kyler Award. Furthermore, as the Board has consistently held in rejecting similar arguments, "a pending appeal does not obviate the fact that the money owed was due on a date certain in accordance with the award." Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia, 39 PPER 9 (Final Order, 2008). Accordingly, back pay resulting from the Kyler Award commenced two-weeks after issuance of the award, on December 11, 2006.

Corry Area School District, 38 PPER at 456. Accordingly, as a matter of law, the Borough is entitled to setoff any interim earnings by Broda used to replace lost wages from the Borough.²

As for the payment of longevity increases, out-of-pocket medical expenses, holiday pay, accrued leave, and interest, these items are typical components of make-whole relief. As the Board has previously held, an appropriate remedy for the employer's failure to reinstate an employee pursuant to a grievance arbitration award includes make-whole relief. Corry Area School District, supra; AFSCME, District Council 85 v. McKean County, 16 PPER ¶16139 (Proposed Decision and Order, 1985). Longevity pay increases are part and parcel of the back pay obligation in a make-whole remedy. Likewise, out-of-pocket medical expenses that would have otherwise been covered by the employer's health insurance policy need also be reimbursed to make the employee whole. Corry Area School District, supra. As for holiday pay and payment of accrued leave, reimbursement for these losses is in accordance with the applicable collective bargaining agreement.³ The award of interest is an appropriate make-whole remedy for the unlawful withholding of the employee's pay. Lycoming County v. PLRB, 943 A.2d 333 (Pa. Cmwlth. 2007). Accordingly, the Hearing Examiner did not err in granting make-whole relief to include payment of longevity increases, out-of-pocket medical expenses, holiday pay, accrued leave, and interest.

After a thorough review of the exceptions and all matters of record, we find that the Hearing Examiner did not err in concluding that the Borough violated Section 6(1)(a) and (e) of the PLRA by failing to comply with the Kyler Award. Accordingly, Mr. Broda is entitled to make-whole relief for the period from December 11, 2006, the date of reinstatement directed by the Kyler Award, until April 11, 2008, the effective date of Mr. Broda's resignation from the Borough. Make-whole relief shall include back pay, including longevity pay increases during the applicable period, minus a setoff for applicable interim earnings. Make-whole relief shall also include payment of out-of-pocket medical, dental or optical expenses, as would have been covered under the Borough's health insurance policy, and shall include holiday pay and pay for accrued leave as may be required by the collective bargaining agreement. Mr. Broda shall also be entitled to six percent interest.⁴ Accordingly, the Borough's exceptions shall be sustained in part and denied in part, and the April 7, 2011 PDO, as modified herein, shall be made final.

ORDER

In view of the foregoing and in order to effectuate the policies of Act 111 and the Pennsylvania Labor Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed by Wyoming Borough are hereby sustained in part and denied in part. The April 7, 2011 Proposed Decision and Order, as modified herein by this Final Order, is hereby made absolute and final.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that the Borough shall

² In other words, where prior to discharge an employee has part-time employment in addition to full-time employment with a public employer, and back pay becomes due as a result of an unlawful termination by the full-time employer, the employer is only entitled to offset those interim earnings from the part-time employer that are over and above what the employee would have earned had he not been unlawfully terminated by the public employer.

³ Thus, here, if under the collective bargaining agreement in effect on April 11, 2008, an employee would not otherwise be paid for unused leave upon resignation, then Mr. Broda would not be entitled to such a payout for leave under the Board's remedial make-whole relief.

⁴ The make whole relief directed herein, as well as offsets for interim earnings and interest, shall be computed in calendar quarter increments. Corry Area School District, supra; David Braymer, Mary Jane Braymer v. Beaver Valley Intermediate Unit, 21 PPER ¶21,006 (Final Order, 1989).

1. Cease and desist from interfering, restraining or coercing employees in the exercise of the rights guaranteed in the PLRA.

2. Cease and desist from refusing to bargain collectively with the exclusive bargaining representative of its police employees.

3. Take the following affirmative action, which the Board finds necessary to effectuate the policies of Act 111, as read in pari materia with the PLRA:

(a) Immediately pay John P. Broda and make him whole for all wages and benefits that he would have earned from December 11, 2006 to the date of his resignation on April 11, 2008, including but not limited to wage and longevity increases received by the bargaining unit during the back pay period, out of pocket dental, medical and optical expenses that would have been covered by the employer's health insurance policies, and holiday pay and accrued sick and vacation time to the extent required by the collective bargaining agreement;

(b) Immediately pay Mr. Broda interest at the rate of six percent per annum on any and all back pay owed. Interest shall be computed, on a quarterly basis, from December 11, 2006 to the date of actual payment;

(c) Post a copy of the April 7, 2011 Proposed Decision and Order and this Final Order within five (5) days from the effective date hereof in a conspicuous place readily accessible to the bargaining unit employees and have the same remain so posted for a period of ten (10) consecutive days; and

(d) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this Final Order by completion and filing of the attached affidavit of compliance.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, and James M. Darby, Member, this nineteenth day of July, 2011. 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.

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

WYOMING BOROUGH POLICE DEPARTMENT :
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 v. : Case No. PF-C-10-59-E
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 WYOMING BOROUGH :

AFFIDAVIT OF COMPLIANCE

Wyoming Borough hereby certifies that it has ceased and desisted from its violations of Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act, as read in pari materia with Act 111; that it has paid back pay to Mr. Broda for the period of time between December 11, 2006 and April 11, 2008; that it has paid Mr. Broda interest at the rate of six percent per annum on the back pay owed, on a quarterly basis, from December 11, 2006 until the date of actual payment; that it has posted a copy of the Proposed Decision and Order and Final Order in the manner prescribed therein; and that it has served a copy of this affidavit on the Union at its principal place of business.

Signature/Date

Title

SWORN AND SUBSCRIBED TO before me
the day and year first aforesaid.

Signature of Notary Public