

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

UTILITY WORKERS UNION OF AMERICA :
LOCAL 433, AFL-CIO :
 :
v. : Case No. PERA-C-23-108-W
 :
CITY OF MCKEESPORT :
CITY OF MCKEESPORT MUNICIPAL :
AUTHORITY :

FINAL ORDER

The City of McKeesport and the City of McKeesport Municipal Authority (collectively City) filed exceptions and supporting brief with the Pennsylvania Labor Relations Board (Board) on April 16, 2024, challenging a Proposed Decision and Order (PDO) issued on March 26, 2024. The City excepts to the Hearing Examiner's conclusion that it violated Section 1201(a)(1), (5) and (8) of the Public Employee Relations Act (PERA) by failing to comply with a grievance arbitration award ordering the City to pay the employees of the City Municipal Authority their vacation and sick leave earned in 2017. The Utility Workers Union of America Local 433, AFL-CIO (Union) filed a response to the exceptions on April 26, 2024.

The relevant facts of this case are summarized as follows. The Union and the City Municipal Authority were subject to a collective bargaining agreement (CBA) effective from January 1, 2017, through December 31, 2017. This was the last CBA between the parties prior to the sale of the City Municipal Authority to Pennsylvania American Water Company (PAWC). (FF 3). On December 18, 2017, the City sold the assets of the City Municipal Authority to PAWC. (FF 4).

Prior to the completion of the sale of the assets of the City Municipal Authority to PAWC, the Union and the City disputed the payment of earned vacation and sick time for the bargaining unit employees. (FF 5). On December 17, 2017, the Union filed a grievance over this issue. After delays, on February 23, 2021, Arbitrator Bernard Fabian issued an arbitration award (Fabian Award) in favor of the Union over the issue of earned vacation and sick leave pay. (FF 6). The Fabian Award states, in relevant part, as follows:

Historically, the CBA between the Parties, the Authority and [the Union], had been in effect for over 40 years. At the time that the negotiations for the first CBA occurred, the Parties agreed on no vacation or sick entitlement for the first year of work. They also set January of the new year as the date to trigger the vesting or accrual of the previous year's work for vacation and sick time. ... Over the years, the same scheme continued in effect for all successor CBA's.

* * *

The position that the vacation and sick benefits earned during the year but [did not vest or accrue] until January of the next

year is what the City argues. Given the factual situation, this is form without substance. The basic concept of the vacation and sick benefits since the CBA inception has been that the benefits earned in the year worked, were eligible to be taken the following year. This compact was broken by the sale of the assets and the closing of the Authority by the City. The benefits, vacation and sick time are then due at that time. They had been previously earned through all but the last 13 days of the year.

* * *

Therefore, it is my opinion that the demise of the Authority and its CBA did trigger the eligibility for the employees to have their prior year of work service credited and vested for vacation eligibility and sick pay benefits. Such a triggering event did occur on December 18, 2017, and the employees, therefore became eligible for same as if it was in fact 13 days later on January 1[, 2018].

AWARD

The employees were vested for the prior work year 2017 on December 18, 2017. They are to be paid their earned vacation pay and sick benefits for the year and service for 2017.

(FF 6). The City unsuccessfully appealed the Fabian Award, and has not complied with the Award. (FF 7, 8).

At the end of 2017, David DeNardo, Vice President of the Union, requested and received from the City Municipal Authority a document entitled Vacation Seniority List, which shows how much vacation time bargaining unit employes had earned in 2017 that they would have accrued on January 1, 2018, based on their years of service. (FF 9, 10). Per the CBA, vacation is computed on the basis of a forty-hour work week of five eight-hour days, and no unused vacation can be carried over from one year to the next. (FF 10).

Vice President DeNardo also requested and received from the City Municipal Authority a spreadsheet with the bargaining unit employes used and unused sick time from 2017. The spreadsheet shows how many sick days an employe had used in 2017, the date on which the particular sick day was used,¹ and a total of "banked" sick days rolled over from previous years. Bargaining unit employes could carryover up to five sick days per year, but could not have more than fifteen sick days in the bank. If the bargaining unit employe had more than fifteen sick days in the bank, the City Municipal Authority would pay the employe for up to five of those sick days over fifteen days. Bargaining unit employes received ten sick days per year and would have received ten new sick days on January 1, 2018. (FF 11).

Vice President DeNardo received paystubs from the end of 2017 for the bargaining unit employes from the City Municipal Authority as well. These paystubs are the last full statements before the sale of the City Municipal Authority. The hourly rates in each paystub reflect base rates of pay and

¹ The spreadsheet contains "X"s in some entries instead of dates. These "X"s refer to sick days used but no date was recorded. (FF 11).

also supplemental and incentive rates. The base rate of pay for bargaining unit employees is used for paid vacation and sick time. (FF 12).

On May 4, 2023, the Union filed a Charge of Unfair Practices, alleging that the City violated Section 1201(a)(1), (5) and (8) of PERA by failing to comply with the Fabian Award. On June 13, 2023, the Secretary issued a Complaint and Notice of Hearing and assigned this matter to a Hearing Examiner. The hearing was held on November 3, 2023, at which time the parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Both parties filed post-hearing briefs.

In the PDO, the Hearing Examiner concluded that the Fabian Award was final, and binding, and that the City violated Section 1201(a)(1), (5) and (8) of PERA by refusing to comply with the Award and pay the bargaining unit employees for their vacation and sick leave earned in 2017. The Hearing Examiner further dismissed the City's argument that the bargaining unit employees had been "made whole" through interim earnings from PAWC and, therefore, calculated the amount of vacation and sick leave owed to each bargaining unit employee. By way of remedy, the Hearing Examiner ordered the City to, among other things, post a copy of the PDO in a conspicuous place accessible to the bargaining unit employees and to immediately make the bargaining unit employees whole by paying them the amounts listed in the PDO with 6% interest from December 18, 2017 to the date of payment.

Initially, the Union argues that the City's exceptions are untimely because they were not filed in accordance with Sections 95.42 and 95.98 of the Board's Rules and Regulations. Section 95.98(a)(1) of the Board's duly promulgated and published Rules and Regulations provides in pertinent part as follows:

A party may file with the Board within 20-calendar days of the date of issuance with the Board an original of a statement of exceptions and a supporting brief to a proposed decision...
Exceptions will be deemed filed in accordance with ... § 95.42 (relating to filing of papers), or on the date deposited in the United States mail, as shown on a United States Postal Form 3817 Certificate of Mailing enclosed with the statement of exceptions.

34 Pa. Code § 95.98(a)(1). Section 95.42(c) of the Board's Rules and Regulations provides that the filing of documents with the Board shall be (1) in person at the Board's offices in Harrisburg or Pittsburgh; (2) through the mail; or (3) by electronic filing to the Board's designated email address. 34 Pa. Code § 95.42(c). Exceptions are to be filed with the Board before the close of business of the last day of the 20-day time limit for filing of exceptions. 34 Pa. Code § 95.42(a).

On April 15, 2024, the City emailed its exceptions and brief to the Hearing Examiner and two other Board employees who are all not designated to accept the filing of exceptions for the Board. Further, the City did not hand deliver or mail a copy of its exceptions to the Board. Therefore, the Board finds that this filing does not comply with Section 95.42 of the Board's Rules and Regulations concerning the method for filing of exceptions. Although the City's exceptions and brief were forwarded to the Board's designated email address on April 16, 2024, they are untimely as the last day for filing of exceptions was April 15, 2024. Accordingly, the City's exceptions are untimely and the Hearing Examiner's PDO became final and

binding on April 15, 2024. However, because this is a case of first impression, the Board will address the City's exceptions.

The County initially asserts that the Board does not have jurisdiction to hear this matter as the proper forum for the parties' dispute over the amount of vacation and sick leave owed to the employees is through arbitration. However, the Board is not divested of jurisdiction over a charge of unfair practices merely because the parties could have also proceeded before an arbitrator. Millcreek Township School District v. PLRB, 631 A.2d 734 (Pa. Cmwlth. 1993), *appeal denied*, 641 A.2d 590 (Pa. 1994) (citing PLRB v. General Braddock Area School District, 380 A.2d 946 (Pa. Cmwlth. 1977)). Indeed, here, the Union alleged that the City committed an unfair practice by refusing to comply with the Fabian Award, which the Board has jurisdiction to hear. 43 P.S. § 1101.1301 ("The [B]oard is empowered ... to prevent any person from engaging in any unfair practice listed in Article XII of this act."); 43 P.S. § 1201(a)(8) ("Public employers ... are prohibited from ... [r]efusing to comply with the provisions of an arbitration award deemed binding under section 903 of Article IX [of PERA].").

In that respect, the Board's inquiry for an alleged refusal to comply with a grievance arbitration award is limited to determining (1) whether an award exists; (2) whether the award is final and binding in that it is not subject to a stay on appeal; and (3) whether the respondent has failed to comply with the provisions of the award. East Hempfield Township Police Association v. East Hempfield Township, 38 PPER 138 (Final Order, 2007); Teamsters Local 401 v. Hazle Township, 38 PPER 157 (Final Order, 2007). In determining whether the respondent has committed an unfair practice by failing to comply with a final and binding grievance arbitration award, the Board's review of the award is limited to ascertaining the arbitrator's intent from the four corners of the award. Hazle Township, supra.; AFSCME, Local 1971 v. City of Philadelphia, Office of Housing and Community Development, 24 PPER ¶ 24052 (Final Order, 1993); AFSCME, District Council 47, Local 2187 v. City of Philadelphia, 36 PPER 124 (Final Order, 2005).

The City argues that the Fabian Award is not a "final award" because there is a dispute on the amount of vacation and sick leave owed to the bargaining unit employees. However, the parties' inability to come to an agreement on the amount owed is not the determining factor for when a grievance arbitration award is deemed final and binding. Rather, a grievance arbitration award becomes final and enforceable once it is affirmed by a court of common pleas and no stay of the award has been issued. City of Scranton v. PLRB, 50 A.3d 774 (Pa. Cmwlth. 2012); North Hills Education Association PSEA/NEA v. North Hills School District, 38 PPER 78 (Final Order, 2007); FOP, Lodge No. 5 v. City of Philadelphia, 32 PPER ¶ 32102 (Order Directing Remand to Secretary for Further Proceedings, 2001). The City's appeal of the Fabian Award through the appellate courts was unsuccessful (FF 7) and, therefore, the Fabian Award is final and binding.²

² The Board takes notice of the Memorandum Opinion in Municipal Authority of the City of McKeesport v. Utility Workers Union of America, AFL-CIO, Local 433, 282 A.3d 389 (Pa. Cmwlth. June 15, 2022) (affirming the Allegheny Court of Common Pleas decision denying the City's petition to vacate the Fabian Award), and the Per Curiam Order of the Supreme Court in In re Municipal Authority of the City of McKeesport, 290 A.3d 646 (Pa. January 4, 2023) (denying the City's Petition for Allowance of Appeal).

Further, the record establishes that the City has never paid the bargaining unit employees their vacation and sick leave earned in 2017. In defense of its failure to pay the bargaining unit employees their vacation and sick leave as required by the Fabian Award, the City argues that the employees were "made whole" through the sick and vacation benefits they received with PAWC in 2018. However, the City presented no evidence to show that PAWC credited or reimbursed the vacation and sick leave that the employees earned in 2017 to be used in 2018. See Corry Area Education Association v. Corry Area School District, 38 PPER 155 (Final Order, 2007). Therefore, the Hearing Examiner did not err in concluding that the City failed to comply with the provisions of the Fabian Award.

The City next argues that the Hearing Examiner erred in admitting into evidence and relying on the Vacation Seniority List (Union Exhibit 4) and the Banked Sick Day List (Union Exhibit 5) in calculating the amount owed to the bargaining unit employees because those documents were not properly authenticated, citing to 225 Pa. Code § 901 (authenticating or identifying evidence). Pursuant to the Board's Rules and Regulations, the hearing examiner "shall have full authority to control the conduct and procedure of the hearing and the record thereof, to admit or exclude testimony or other evidence, and to rule upon motions and objections...." 34 Pa. Code § 95.91(f). Additionally, the hearing examiner "shall see that a full inquiry is made into the matters in issue and to obtain a complete record of facts necessary for a fair determination of the issues by the Board." 34 Pa. Code § 95.91(g). Furthermore, strict rules of evidence do not apply to administrative hearings before the Board. 43 P.S. § 1101.1302 ("the rules of evidence prevailing in the courts ... shall be followed but shall not be controlling."); 2 Pa.C.S.A. § 505 ("Commonwealth agencies shall not be bound by technical rules of evidence at agency hearings, and all relevant evidence of reasonably probative value may be received").

For purposes of the exceptions, the Hearing Examiner's Findings of Fact will be sustained by the Board where there is substantial evidence in the record to support the finding. Pennsylvania State Rangers Association v. Commonwealth of Pennsylvania, Department of Conservation and Natural Resources, 45 PPER 1 (Final Order, 2013). Substantial evidence is such "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." PLRB v. Kaufman Department Stores, 29 A.2d 90 (Pa. 1942). Further, absent compelling circumstances, the Board will defer to its Hearing Examiner's credibility determinations supporting findings of fact. Mt. Lebanon Education Association v. Mt. Lebanon School District, 35 PPER 98 (Final Order, 2004).

Concerning the Vacation Seniority List, Vice President DeNardo testified that the Superintendent of the City Municipal Authority provided the Vacation Seniority List to him after he had requested a copy of it from the City Municipal Authority in December 2017. (N.T. 25-27, 47). Vice President DeNardo further stated that the Vacation Seniority List contained the names of the bargaining unit members employed by the City Municipal Authority in 2017, their hire date, how much vacation leave each employee earned annually, and that the list was similar to vacation seniority lists posted in prior years. (N.T. 27-28). As for the Banked Sick Day List, Vice President DeNardo testified that he had requested this document from the Business Manager of the City Municipal Authority due to the grievance the Union filed on December 17, 2017 regarding the payment of earned vacation and sick leave, and that the document showed the used and unused sick leave for the bargaining unit employees for 2017. (N.T. 29-30). The Hearing Examiner

credited the testimony of Vice President Denardo concerning these documents and how he obtained them and there are no compelling circumstances warranting reversal of the Hearing Examiner's credibility determinations in this regard. Therefore, the Hearing Examiner did not err in admitting these documents into evidence and making findings concerning these documents.

The City next alleges that the Hearing Examiner's calculation of the amount of vacation and sick leave owed to the bargaining unit employees is contrary to the Fabian Award as it improperly awards a payout of vacation and sick leave for 2018 instead of 2017. In the Fabian Award, the arbitrator explained the manner in which the bargaining unit employees earned vacation and sick leave as follows:

The CBA between the Authority and [the Union] required that sick leave and vacation benefits be earned in a year prior to the year in which they were to be taken. That is, in the first year of employment for any employees, that employee did not receive vacation or sick days during that year. Then, on January of the next year, the employee accrued those benefits of vacation and sick days from working the first year without any vacation or sick days. He could then take the accrued or earned benefits from the first year of his labor, during the second year of employment.

* * *

Historically, the CBA between the Parties, the Authority and [the Union], had been in effect for over 40 years. At the time that the negotiations for the first CBA occurred, the Parties agreed on no vacation or sick entitlement for the first year of work. They also set January of the new year as the date to trigger the vesting or accrual of the previous year's work for vacation and sick time. ... Over the years, the same scheme continued in effect for all successor CBA's.

* * *

The basic concept of the vacation and sick benefits since the CBA inception has been that the benefits earned in the year worked, were eligible to be taken the following year. This compact was broken by the sale of the assets and the closing of the Authority by the City. The benefits, vacation and sick time are then due at that time. They had been previously earned through all but the last 13 days of the year.

(Union Exhibit 2 at 8, 15-16). Therefore, the arbitrator concluded that the City was required to pay the vacation and sick leave earned by the bargaining unit employees in 2017 that would have been given to them on January 1, 2018, if not for the sale of the City Municipal Authority.

In that regard, the parties' CBA provides a schedule for the amount of vacation due to the bargaining unit employees each year based upon the number of years worked, e.g., a bargaining unit employee receives 5 weeks of vacation after 15 years of service, which must be used during the year and cannot be carried over to the next year. (Union Exhibit 1 at 13-14). The amount of vacation leave owed to the

bargaining unit employees is based upon a 40 hour work week calculated at their base rate of pay. (Union Exhibit 1 at 13). A review of the Vacation Seniority List (Union Exhibit 4) along with the paychecks of the bargaining unit employees (Union Exhibit 6) supports the Hearing Examiner's determination of the amount owed to the bargaining unit employees as to the vacation leave they would have received on January 1, 2018.

As for the sick leave owed to the bargaining unit employees, the parties' CBA provides as follows:

Each employee of the Authority shall be permitted a total of ten (10) days sick leave per year with pay and shall have the right to carryover five (5) or fewer of any of those unused sick days to a maximum accumulation of fifteen (15) unused paid sick days. If and when an employee reaches the maximum accumulated number of fifteen (15) unused sick days, and so that the employee does not lose the benefit of carryover sick days beyond the maximum number of fifteen (15), at the end of each calendar year of this Agreement the employee shall be reimbursed by the Authority for up to five (5) unused sick days beyond the accumulated maximum number of fifteen at his/her then current hourly rate.

(Union Exhibit 1 at 15-16). Therefore, per the sick leave provisions of the CBA, each bargaining unit employee would have received 10 days of sick leave on January 1, 2018, and would also have been permitted to carryover up to 5 days of unused sick leave from 2017 to be put in their sick leave bank. If the bargaining unit employee's sick leave bank had reached the maximum 15 banked sick days, the employee would have been reimbursed for up to 5 sick days over the 15 banked sick days. Reviewing the Banked Sick Day List (Union Exhibit 5) along with the paychecks of the bargaining unit employees (Union Exhibit 6) supports the Hearing Examiner's calculation as to the sick leave owed to the bargaining unit employees. Thus, the Hearing Examiner's calculation of the vacation and sick leave owed to each employee is in accordance with the arbitrator's decision.

The City finally excepts to the Hearing Examiner's order requiring the City to post a copy of the PDO in a conspicuous place readily accessible to the bargaining unit employees. Specifically, the City alleges that it does not have access to post the PDO at the Municipal Authority owned by PAWC and seeks guidance on how it is to effectuate the notice requirement to the bargaining unit employees.

In order to effectuate the policies of PERA, the Board is authorized under Section 1303 to issue an order requiring the respondent to "cease and desist from such unfair practice, and to take such reasonable affirmative action ... as will effectuate the policies of [PERA]." 43 P.S. § 1101.1303. The Board's authority to remedy unfair practices is remedial in nature, not punitive. Uniontown Area School District v. PLRB, 747 A.2d 1271 (Pa. Cmwlth. 2000). It is within the Board's discretion to determine the appropriate relief for an employer's unfair practices. Mid Valley Education Association v. Mid Valley School District, 25 PPER ¶ 25138 (Final Order, 1994). The Hearing Examiner's order to post the PDO is remedial and in furtherance of the purposes and policies of PERA. Therefore, in order to effectuate compliance with the posting requirement, the City should post the PDO in its municipal building in a conspicuous place readily accessible to the bargaining unit employees.

After a thorough review of the exceptions and all matters of record, the exceptions filed by the City are dismissed as untimely. Alternatively, the Hearing Examiner did not err in concluding that the City violated Section 1201(a)(1), (5) and (8) of PERA by failing to pay the bargaining unit employees their vacation and sick leave earned in 2017 as required by the Fabian Award. Accordingly, the Board shall dismiss the exceptions and make the Proposed Decision and Order final.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the exceptions filed by the City of McKeesport and the City of McKeesport Municipal Authority are hereby dismissed, and the March 26, 2024 Proposed Decision and Order be and the same is hereby made absolute and final.

SIGNED, SEALED, DATED and MAILED this nineteenth day of November, 2024.

PENNSYLVANIA LABOR RELATIONS BOARD

JAMES M. DARBY, CHAIRMAN

ALBERT MEZZAROBA, MEMBER

GARY MASINO, MEMBER

COMMONWEALTH OF PENNSYLVANIA
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AFFIDAVIT OF COMPLIANCE

The City of McKeesport and the City of McKeesport Municipal Authority hereby certifies that it has ceased and desisted from its violations of Section 1201(a) (1), (5) and (8) of the Public Employe Relations Act; that it has complied with the Proposed Decision and Order and Final Order as directed therein; that it has immediately made the bargaining unit members whole by paying them the amounts listed in the Proposed Decision and Order together with 6% interest per annum calculated from December 18, 2017 to the date of payment; that it has posted a copy of the Proposed Decision and Order and Final Order as directed therein; and that it has served an executed 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