

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE, FORT :
PITT LODGE NO. 1, :
 :
 v. : Case No. PF-C-23-54-W
 :
CITY OF PITTSBURGH :

FINAL ORDER

The City of Pittsburgh (City) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) on February 20, 2024, challenging a Proposed Decision and Order (PDO) issued on February 1, 2024.¹ In the PDO, the Board's Hearing Examiner concluded that the City 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 implement an arbitration award requiring the City to reinstate Police Officer Aaron Fetty and make him whole following his termination from employment with the police force. The Fraternal Order of Police, Fort Pitt Lodge No. 1 (Union) filed a response and a brief in opposition to the exceptions on February 27, 2024.

The relevant facts of this case are summarized as follows. The City and the Union were signatories to a collective bargaining agreement (CBA), effective January 1, 2019, through December 31, 2022. (FF 3). On November 28, 2022, Arbitrator Ralph Colflesh issued an award (Colflesh Award) over a dispute between the parties concerning discipline issued by the City to Police Officer Fetty. The Colflesh Award reads, in pertinent part, as follows:

In the instant case, an accusation was made against Officer Fetty of sexual "assault" ... on another City police officer on the evening of June 19, 2021. The City knew of the allegation on June 28, 2021 when its Office of Municipal Investigation ("OMI") received an anonymous complaint regarding Officer Fetty "engaged in an indecent sexual assault" in that he "groped" a co-worker. ... The City conducted an investigation as reported on a Disciplinary Action Report known as DAR 21-088. On or about September 22, 2021 that investigation resulted in Officer Fetty's acceptance of a 3-day unpaid suspension, a forced transfer from the police Zone in which he and his putative victim worked, and a five-year last chance agreement under which any further such incidents would result in termination.

* * *

On December 30, 2021, Officer Fetty's accuser filed an emergency motion [in Court] for Sexual Violence Abuse Order ("SVPO") based

¹ On May 7, 2024, the Secretary denied the City's untimely request to file a brief in support of exceptions.

on the same set of June 2021 allegations for which Officer Fetty was disciplined earlier in the year. Also on December 30, 2021, the accuser sent an email to all members of the City's Police Bureau, making the same charge of sexual assault against Officer Fetty. ... The following day the accuser's motion was granted on an interim basis by a Family Court Judge, and on March 23, 2022, after a plenary hearing, the same Judge issued a Final Order for Protection of Victims of Sexual Violence. The Judge found Officer Fetty committed "sexual violence" and characterized Officer Fetty's behavior "at a minimum" as "sexual assault." ... On July 14, 2022, the City issued the instant DAR [22-059, which led to Fetty's termination and the Union's grievance]

Award:

The FOP's grievance is granted. The City's termination of Officer Aaron Fetty based on disciplinary action taken in September 2022 was barred by the 120-day limit in the [CBA]. The City shall reinstate him to his pre-termination paygrade and duty as soon as practical and make him whole for all lost wages with an offset for any unemployment benefits or wages from other work performed at the same time he would otherwise have worked for the City while separated, and for all lost City benefits, and seniority. Further, his termination shall not be considered in any future decisions concerning any aspect of his employment with the City.

(FF 4).

Thereafter, on December 29, 2022, the City filed an appeal of the Colflesh Award to the Allegheny County Court of Common Pleas, which was denied on April 20, 2023. (FF 5, 6). On May 19, 2023, the City filed an appeal to the Commonwealth Court, but no motion to stay was filed by the City.² (FF 7, 9). As of the date of hearing, eleven (11) months after the arbitration award was issued, the City had not returned Officer Fetty to work in any capacity. (FF 10).

On May 26, 2023, the Union filed a Charge of Unfair Labor Practices with the Board, alleging that the City violated Section 6(1)(a) and (e) of the PLRA by failing to abide by the Colflesh Award which required the City to make Officer Fetty whole in all regards, including providing him with back pay, compensation for lost benefits, and putting him back to his pre-termination pay grade and duty on the police force "as soon as practical." On July 21, 2023, the Secretary issued a Complaint and Notice of Hearing, assigning this matter to a Hearing Examiner. A hearing was held before the Hearing Examiner on October 13, 2023, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine

² On March 12, 2024, the Union filed a Motion to Reopen the Record to submit the Commonwealth Court Opinion and Order, issued on March 6, 2024, affirming the trial court decision and the Colflesh Award. The Board takes official notice of the existence of the Memorandum Opinion in City of Pittsburgh v. FOP, Fort Pitt Lodge No. 1 (Aaron Fetty), 316 A.3d 656, 535 C.D. 2023 (Pa. Cmwlth. March 6, 2024), and as such, the motion to reopen the record is unnecessary and hereby denied.

witnesses and introduce documentary evidence. Both parties filed post-hearing briefs.

On February 1, 2024, the Hearing Examiner issued a PDO, concluding that the City's refusal to abide by the Colflesh Award was a violation of its obligation to bargain in good faith pursuant to Section 6(1)(a) and (e) of the PLRA. After noting that the Colflesh Award was final and binding when it was affirmed by the Allegheny County Court of Common Pleas on April 20, 2023, the Hearing Examiner held that the Union had sustained its evidentiary burden of proving that the City had not implemented the Colflesh Award by putting Officer Fetty back on duty nor providing him with backpay. As a remedy, the Hearing Examiner ordered the City to comply with the Colflesh Award by immediately reinstating Officer Fetty and making him whole.

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;³ 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 labor 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).

Initially, the City asserts that it cannot put Officer Fetty back on active duty due to the "sensitive nature" of his offense. The City claims that Officer Fetty's reinstatement would negatively effect morale among fellow officers, and significantly undermine public confidence in its police force.

To the extent the City asserts that the Colflesh Award violates public policy and should not be implemented, this argument is rejected as meritless. First, the Commonwealth Court expressly rejected the City's "public policy" argument on direct appeal of the Colflesh Award. City of Pittsburgh v. FOP, Fort Pitt Lodge No. 1 (Aaron Fetty), 316 A.3d 656, 535 C.D. 2023 (Pa. Cmwlth. March 6, 2024). Secondly, neither the Colflesh Award, nor the Commonwealth Court affirmance thereof, maybe attacked before the Board in an unfair labor practice proceeding by a refusal to comply with the final and binding award. PLRB v. Commonwealth, 387 A.2d 475 (Pa. Cmwlth. 1978) (parties cannot collaterally attack arbitration awards before the Board in unfair labor enforcement proceedings). Third, upon review of the four corners of the Colflesh Award, we concur that under the narrow certiorari test for Act 111 grievance arbitration awards, compliance with the Colflesh Award would not require the City to engage in an illegal act by reinstating Officer Fetty to his pre-termination position with the City. City of Pittsburgh, supra.;

³ Fraternal of Police, Lodge No. 5 v. City of Philadelphia, 39 PPER 9 (Final Order, 2008) (once an arbitration award has been affirmed by a common pleas court "[t]he aggrieved employer has been stripped of its ability to delay compliance with the award by seeking further redress in subsequent appeals").

Pennsylvania State Police v. Pennsylvania State Troopers Association, 902 A.2d 599 (Pa. Cmwlth. 2006) (citing Pennsylvania State Police v. Pennsylvania State Troopers Association, 741 A.2d 1248 (Pa. 1999)).

Nevertheless, in an effort to avoid compliance, the City argues that the language "as soon as practical" in the Colflesh Award renders the entire award "ambiguous" as to the immediacy and efficacy of reinstatement. An arbitration award is only considered to be "ambiguous," and thus unenforceable, where the Board is unable to discern the intent of the arbitrator from the four corners thereof. State System of Higher Education v. PLRB, 528 A.2d 278 (Pa. Cmwlth. 1987); City of Philadelphia, Office of Housing and Community Development, supra.

Here, it is clear from the language of the award that the arbitrator intended Officer Fetty to be made whole in all regards, including being put back on duty. Indeed, there is nothing in the language of the award to indicate that the City has the discretion to delay the reinstatement of Officer Fetty until they determine if, and when, it is "practical" to do so. The arbitrator's choice of the word "practical" after the phrase "as soon as," does not alter the clear intent of the arbitrator in entering the award, *i.e.*, to return Officer Fetty to his pre-termination status without delay.

To be sure, in the Award, Arbitrator Colflesh noted that Officer Fetty worked in Zone 1, away from the accuser, for approximately one year after the incident, without any complaints or problems under a last chance agreement. Despite that intervening year, Officer Fetty was terminated a year later for the same offense for which he received the 3-day suspension, transfer to Zone 1, and issued a 5-year last chance agreement. Clearly, it is reasonably construed that the arbitrator's intent in the Colflesh Award to remedy the unjust termination a year later, is to immediately return Officer Fetty to the same position he had been working for one year without incident in Zone 1 under the last chance agreement.⁴

After a thorough review of the exceptions, the briefs of the parties, and all matters of record, the Hearing Examiner properly concluded that the City violated Section 6(1)(a) and (e) of the PLRA, as read in *pari materia* with Act 111, when it refused to abide by the Colflesh Award, which directed it to return Officer Fetty to duty and otherwise make him whole for all lost wages and benefits. Accordingly, the Board shall dismiss the City's exceptions and make the Proposed Decision and Order final.

⁴ Indeed, contrary to the City's argument, the award clearly states that Officer Fetty shall be reinstated "to his pre-termination ... duty", which was as a police officer in Zone 1 of the Pittsburgh Police Bureau. (Joint Exhibit 4 at 3).

ORDER

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

HEREBY ORDERS AND DIRECTS

that the exceptions filed by the City of Pittsburgh are dismissed, and the February 1, 2024, Proposed Decision and Order be and the same is hereby made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, James M. Darby, Chairman, and Gary Masino, Member this seventeenth day of September, 2024. 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.

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FRATERNAL ORDER OF POLICE,
FORT PITT LODGE NO. 1

v.

CITY OF PITTSBURGH

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AFFIDAVIT OF COMPLIANCE

The City of Pittsburgh hereby certifies that it has ceased and desisted from its violations of Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act; that it has complied with the Proposed Decision and Order and Final Order, as directed herein by immediately reinstating Officer Fetty to his pre-termination duty, restoring the status quo ante, and making Officer Fetty whole pursuant to the Colflesh Award; that it has posted a copy of the Proposed Decision and Order and Final Order; 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