

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

TEAMSTERS LOCAL UNION NO. 776 :
 :
 v. : CASE NO. PF-C-20-42-E
 :
BOROUGH OF GETTYSBURG :

PROPOSED DECISION AND ORDER

On July 6, 2020, the Teamsters Local Union No. 776 (Union) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) alleging that the Borough of Gettysburg (Borough) violated Section 6(1)(a), (c) and (e) of the Pennsylvania Labor Relations Act (Act or PLRA), as read with Act 111. The Union specifically alleged that the Borough refused to implement a final and binding Act 111 grievance arbitration award reinstating and making whole a bargaining unit member, by refusing to provide certain requested information, and by threatening "unspecified consequences" in the event the Borough implemented the arbitration award.

On October 8, 2020, the Secretary of the Board issued a Complaint and Notice of Hearing designating a hearing date of Friday, April 16, 2021, in Harrisburg. The parties agreed to conduct the hearing via Microsoft Teams video, due to the ongoing COVID pandemic. During the hearing on that date, the Commonwealth's computer/network system failed, necessitating a second day of hearing. The second day of hearing was rescheduled 2 more times due to misunderstandings regarding the hearing format and an individual's exposure to COVID. The second day of hearing was held on October 21, 2021, in person and in Harrisburg. During the hearing on that day, both parties were afforded a full and fair opportunity to present documents and testimony and to cross-examine witnesses. For multiple and various reasons, I granted several brief extensions to the Union. Both parties simultaneously filed post-hearing briefs on Friday, July 15, 2022.

The examiner, based upon all matters of record, makes the following:

FINDINGS OF FACT

1. The Borough is a public employer and political subdivision within the meaning of Act 111, as read with the PLRA. (N.T. 5)

2. The Union is a labor organization within the meaning of Act 111, as read with the PLRA. (N.T. 5)

3. Michael Carricato was a police officer employed by the Borough from March 2014 until his termination on November 14, 2017. ((N.T. 350; Joint Exhibit 2)

4. The Union grieved Carricato's termination, and the parties arbitrated the grievance before James M. Darby, Esquire. Arbitrator Darby issued an award (Award or Darby Award) on May 19, 2019, sustaining the grievance. (Joint Exhibit 2)

5. Arbitrator Darby issued the following Award:

The Borough did not have just cause to terminate the Grievant, Michael Carricato. The Grievant shall be immediately reinstated and made whole with respect to pay and benefits (minus interim earnings), subject to his satisfying all physical fitness for duty requirements, as well as any necessary training obligations.

(Joint Exhibit 2)

6. The Borough appealed the Darby Award to, and sought to have it vacated by, the Adams County Court of Common Pleas, which affirmed the Award on September 20, 2019. (Joint Exhibit 3)

7. The Borough again appealed the Darby Award to the Commonwealth Court of Pennsylvania, which affirmed the Award on June 5, 2022. The Borough did not appeal the Commonwealth Court decision. (N.T. 172-173; Joint Exhibit 4)

8. At the time of Carricato's termination, Joseph Dougherty was the Chief of Police for the Borough, and Theodore Streeter was the Borough's Mayor. (N.T. 100; Joint Exhibit 2)

9. Charles Gable has been the Borough Manager since May 5, 2014. On June 16, 2020, Mr. Gable issued a letter to Carricato to report to work on June 22, 2020, at 0800 hours. Carricato reported to work that day as directed. (N T. 31, 55-59, 170, 321-322; Union Exhibit 2; Employer Exhibit 6)

10. Robert Glenny has been the Borough's Chief of Police since March 2019. (N.T. 314-315)

11. Edgar Thompson is the President and Business Agent for the Union assigned to the bargaining unit of police officers at the Borough. (N.T. 29-30)

12. After the Commonwealth Court decision affirming the Darby Award, the Borough requested that the Union provide Carricato's tax returns for 2017, 2018, 2019 and pay stubs from 2020, because the 2020 tax year was incomplete. (N.T. 42-43)

13. Mr. Thompson requested that the Borough provide the Union with the Borough's actual and projected costs of medical, dental and vision insurance for Carricato for 2017, 2018, 2019 and 2020. The Union also requested the Borough's actual and projected pension contributions on behalf of Carricato for 2017, 2018, 2019 and 2020. (N.T. 44-45)

14. Mr. Thompson also requested all overtime worked, including holidays and special events, by any officer hired after Carricato, unused sick and vacation leave and the leave Carricato would have accumulated during his separation from employment. (N.T. 44-45)

15. Several days later, the Union emailed Carricato's tax returns for 2017, 2018, 2019, and pay stubs for 2020, as attachments. The Borough could not access the tax return for 2018 because the attachment file was "corrupted," i.e., unreadable. The Borough did receive Carricato's W-2s for 2018. A couple of days after the Union provided information, the Borough responded that it would not pay overtime to someone who had not worked the overtime and that, because Carricato was not vested in the pension plan, he

was not entitled to pension contributions. The Borough did provide a spreadsheet showing what the Borough believed to be the expenses and offsets. (N.T. 46-48, 176-177, 192-194, 215, 255-256, 258; Employer Exhibit 5)

16. The current collective bargaining agreement (CBA) is effective from January 1, 2018, through December 31, 2022. The CBA provides for a salary scale in Exhibit E attached to the CBA and longevity increases beginning the 61st month of employment. Carricato would have been entitled to begin receiving longevity pay in April of 2019 had he not been terminated, as well as leveling pay. (Joint Exhibit 5)

17. Under the CBA, Carricato's base salary was \$59,722 in 2017. In 2018, Carricato's contractually provided wages were \$60,319, including \$203 leveling pay at an hourly rate of pay of \$29.00 per hour. In 2019, Carricato's contractually provided wages were \$62,687, including \$467 longevity increase and no leveling increase, at an hourly rate of \$30.14. In 2020, Carricato's contractually provided wages were \$65,604, including a longevity increase of \$1,049, at an hourly rate of \$31.54. (Joint Exhibit 5; Employer Exhibit 9)

18. Carricato received unemployment compensation benefits from November 2017 through March 2018. His 2017 tax return shows that he received unemployment compensation in the amount of \$2,755 for 2017. There is no UC-1099G unemployment benefits payment form for the tax year 2017, in the record. The Borough was Carricato's only employer in 2017. His 2017 tax return shows taxable interest of \$2,489. (N.T. 351-353; Employer Exhibit 5)

19. In 2018, Carricato has a W-2 from Otis Elevator showing a gross income from that company of \$49,109.25, for that year. Carricato has a W-2 from C & Z Construction Service showing a gross income of \$367.50 for 2018. Carricato's unemployment compensation payment form UC-1099G shows that he received \$7,101 in benefits in the tax year 2018. There is no 2018 tax return on the record. (N.T. 353-354, 374-375; Employer Exhibit 5)

20. Carricato has a W-2 from Kone, Inc. showing gross pay of \$32,106.72 for 2019, a W-2 from Otis Elevator showing a gross pay of \$9,877.63 for 2019, a W-2 from National Elevator Co. showing a gross pay of \$4,172.15 for 2019, a W-2 from Hadfield Elevator Co. showing a gross pay of \$2,182.76 for 2019, a W-2 from Paul A. Carlevale showing a gross pay of \$280 for 2019, and a W-2 from C & Z Construction showing a gross pay of \$1,268.75 for 2019. Carricato again received approximately 7 weeks of unemployment compensation benefits through August and September of 2019 because he was laid off by Otis Elevator. Carricato's 2019 tax return shows that he received unemployment compensation benefits in the amount of \$3,282 for 2019. (N.T. 353-354, 374-375; Employer Exhibit 5)

21. Carricato has a year-to-date earnings statement from Kone, Inc., dated June 10, 2020, showing year-to-date earnings of \$24,083.67. Carricato was re-employed by the Borough as of June 22, 2020. Carricato may have received unemployment compensation benefits between March and May of 2020. (N.T. 353-354; Employer Exhibit 5)

22. Carricato received health insurance from the Elevator Union at times. At times, he did not have health insurance during the interim period because he was laid off several times. When Carricato was reinstated at the Borough on June 22, 2020, he waived health insurance coverage from the Borough and received coverage through the Elevator Union, which received the

health care premium cost for Carricato from Kone, Inc. This coverage is outside the backpay period. (N.T. 355-356, 359, 373-374)

23. After receiving the tax returns and W-2s, Mr. Gable coordinated with Chief Glenny to initiate Carricato's return to work. On June 22, 2020, Chief Glenny issued a memo to Carricato informing him of 3 primary tasks that he needed to complete to effectuate his full return to active duty once reinstated. The 3 tasks included obtaining his MPOETC certification, his JNET and PSP CLEAN clearances, and completing field training. Without JNET and CLEAN clearances, Carricato was not permitted to have unescorted access to confidential criminal histories on individuals. (N.T. 194, 315-320, 365-366; Employer Exhibit 27)

24. When Carricato reported for work on June 22, 2020, the Chief directed him to remain in the public vestibule of the Police Department. He was then moved to a more private space within the Police Department but separate from the squad room. Carricato could not perform any patrol duties that day because he lacked a MPOETC certification. (N.T. 321-322)

25. On June 22, 2020, Mayor Streeter, Chief Glenny, and Mr. Thompson discussed Carricato using 2 weeks of banked vacation time to permit him to organize his affairs and transition back to the Borough. Mayor Streeter approved that leave request. (N.T. 322-324, 347; Union Exhibit 2; Employer Exhibits 7 & 8)

26. Also on June 22, 2020, after the meeting, Mr. Thompson wrote Mr. Gable, in relevant part, as follows:

In conformity with our agreement orally reached today, Carricato will begin a 2-week paid vacation period starting on Tuesday, June 23, 2020. During that period of time the Borough will adequately respond to the Union's outstanding information requests regarding the Carricato grievance and the Union will provide all information available to it regarding the Borough's request for information about Carricato's earnings during the period of his wrongful termination. If the parties are able to agree on acceptable resolution of other outstanding issues, Officer Carricato may submit his resignation on or before the expiration of his current 2-week paid vacation period.

(N.T. 58, 195-196; Union Exhibit 2; Employer Exhibits 7 & 8)

27. As of June 22, 2020, Carricato was a reinstated employe of the Borough. The agreement that Carricato would resign was contingent upon the parties reaching a mutually acceptable resolution of the backpay owed to Carricato, which did not occur. (N.T. 66-67, 196-198; Employer Exhibit 8)

28. On June 23, 2020, Mr. Gable provided a spreadsheet containing the information that was in the Borough's possession at the time for 2017-2020, listing credits and debits, and seeking more information from the Union pertaining to offsets for interim employer provided benefits for Carricato, which it did not receive. (N.T. 216, Employer Exhibit 9)

29. The Borough acknowledged that it owed Carricato unused, accrued vacation and sick leave, Borough paid premiums for health, dental, vision, life, disability insurances on behalf of Carricato. The Borough relied on the

Borough's costs for a comparable bargaining unit employe who was of similar age receiving single, non-family insurance. (N.T. 204-207)

30. Carricato's paystub for December 30, 2016, shows a year-to-date earned overtime amount of \$11,625.87. Although terminated on November 14, 2017, Carricato received \$4,124.65 in overtime pay for that year. All Borough officers receive .5 hours of overtime every 2-week pay period because each officer works 7 shifts in 2 weeks that are 11.5 hours long resulting in 80.5 hours for the period. The Borough credited Carricato for the CBA mandated .5 hours per pay period overtime, but it did not credit Carricato for any other overtime during the backpay period. Every full-time officer received overtime pay in excess of the .5 hours of overtime per pay period from 2017 through 2020. (N.T. 67-68, 135, 333, 265-266, 270-272, 285, 305-307; Union Exhibit 10; Employer Exhibit 13)

31. Pension contributions are made by the Borough on behalf of employes regardless of whether they are vested in the pension plan. The CBA between the parties provides that officers would pay 5% of their salaries to the pension fund. Due to the health of the fund, the officers do not contribute part of their pay to their pensions. The Borough pays into the pension a "minimum municipal obligation" (MMO) set by an actuary. Part of the MMO is state aid. (N.T. 47, 146-147, 215-216)

32. Carricato, at times, received health insurance benefits by and through his interim employment. The Union did not provide the Borough with the cost of health insurance paid by any interim employers on behalf of Carricato or Carricato's contribution to that health insurance, if any. The Borough is seeking an offset credit for the money that Carricato contributed to his health insurance, and the Borough did not pay any health insurance, life insurance or disability insurance premiums during his termination period. Carricato was laid off several times during the interim period, and he did not have any insurance coverage during those periods. (N.T. 49, 68-69, 216, 355-356, 359, 373-374)

33. The officers have other overtime opportunities through a system which has been in place since before Carricato was terminated in November 2017. Court overtime results when an officer involved in an incident or arrest goes to court on his/her off shift. This overtime is only available to the officer(s) involved in or who witnessed the matter before the court. Special detail overtime is prescheduled and results from planned special events such as parades or demonstrations. These overtime opportunities are assigned on a voluntary, rotating seniority basis. The more senior officer is offered the overtime first and may decline at which point the overtime is offered to the next senior officer down the list and the more senior officer's name may go to the end of the list. Task force overtime involves only the officers assigned to a particular task force, such as the drug task force or DUI task force. General overtime arises for shift holdovers occurring when incidents or arrests occur late in an officer's shift requiring the officer to work past his/her normal shift. General overtime also occurs when an officer is off for sick, vacation, unplanned personal matters, or training, and another officer is asked to fill in the vacant shift. The seniority-based overtime in practice exists only near the beginning of the year. Once senior officers decline or take the overtime and their names go to the bottom of the list; the overtime is, in effect, equally distributed throughout the calendar year. (N.T. 329-332)

34. The CBA provides that, in an emergency situation, the Chief shall have the authority to assign overtime without regard to seniority. The CBA further provides: "Overtime work shall be at the discretion of the BOROUGH, and shall be assigned by the Chief of Police among the Department members on a rotating basis, according to seniority (most senior first) whereby the annual opportunity for overtime work shall be equitably afforded to each officer." The CBA also provides that the "equitable allocation" of overtime does not apply to Detectives or task force officers. (Joint Exhibit 5)

35. On June 29, 2020, Mr. Thompson emailed Mr. Gable in relevant part stating: "I still have not received the information I requested on June 12, [2020] specifically the amount of pension contributions due. Just because an officer is not vested does not eliminate the contributions. Also the overtime worked by all officers below Officer Carricato[']s seniority date." (Union Exhibit 2)

36. On June 30, 2020, Mayor Streeter and Mr. Thompson exchanged emails. Mayor Streeter began the exchange and stated:

Ed: I read with a great deal of disappointment the recent exchange between you and Charles. I thought that when we met a couple of weeks ago that we had a man-to-man good faith agreement that we shook hands on. Now this.

I have always been naïve in that I trust people until they give me a reason not to. Unfortunately, this is another instance in which I'm wrong. I urge you to play it straight and honest in this matter. The consequences of not doing so will be extremely unfortunate all around. Regards.

Mr. Thompson responded that same day, by email stating, in relevant part, as follows:

I am also extremely disappointed, the exchange we had last week very clearly was an effort on the Union[']s part to come to a fair agreement. I have provided everything the Borough requested, on the other hand the Borough has not provided the Union with everything that we requested. Instead Charles feels he will dictate and provide his own interpretation of what the award states. I am more than willing to sit down and lay all the cards on the table with you, the Chief, Council, Chuck, who ever but it will be fair not a dictated settlement from some one trying to cover his own ass and blame everyone else. This mess falls squarely on Charles and no one else. I am a reasonable person please do not mistake that for weakness. Also please provide the information I requested in the email shared with you. I do not seek to further litigate this mess but will do what needs to be done to bring it to an end.

Mayor Street responded:

Ed: I understand your position, but again urge you to work through this. The consequences of not doing so will be extremely unfortunate for Carricato and the GPD [Gettysburg Police Department]. Regards.

(Union Exhibit 2)

37. In the summer of 2020, due to the economic shutdown to contain the pandemic, the Borough lost revenue and discussed furloughs with the Union. The Union understood that the Borough had concerns over raising revenue to meet its annual budget. One officer and one non-uniformed employe took a voluntary furlough. As a result of federal funding pertaining to the pandemic, the Borough will receive more than its lost revenues suffered as a result of the pandemic. In this context, Mr. Thompson perceived the Mayor's email as a threat to the job security of bargaining unit members if the Borough had to pay Carricato. (N.T. 158-159, 229-233, 278-279; Employer Exhibits 15-17)

38. On July 5, 2020, the Chief approved a third week of vacation for Carricato. (Union Exhibit 2)

39. On July 9, 2020, Mr. Thompson emailed Mr. Gable stating that he has called and emailed multiple times to try to obtain information to come to a reasonable settlement. (N.T. 217; Employer Exhibit 10)

40. The same day, Mr. Gable responded that he was on vacation and further stated, in relevant part, the following:

Like I've stated to you before, the Union has not provided relevant information regarding the cost to provide Carricato various benefits by Ottis [sic] Elevator and other employers that Carricato has had since 2017. The detailed spreadsheet provided to you is proof the Borough is in fact attempting to reach resolution on this matter. The Borough worked diligently to get this information to you by the close of business on Friday, June 27th—keeping our finance department in the office beyond normal work hours to comb through copious amounts of information to provide to you. The spreadsheet is incomplete because you have not provided relevant benefits information. It is in fact the Union that has not been responsive.

Carricato is to report to work once his extended vacation is over.

. . . .

Any further communication on this matter should be done through our respective attorneys.

(Employer Exhibit 10)

41. On July 29, 2020, Mark Andreozzi, a Pennsylvania resident who was working for the International, filed a Right-To-Know (RTK) request with the Borough seeking the police pension plan document and a breakdown of contributions made by the Borough on behalf of the officers for 2017 through 2020 up to the date of the request. Mr. Andreozzi's RTK request also sought the amount of overtime worked in hours and wages per officer for 2017 through 2020 until the date of the request and all legal invoices related to the litigation of the Carricato case. (N.T. 122-123, 126-127; Union Exhibit 3; Employer Exhibits 11 & 12)

42. On September 1, 2020, the Borough responded to the RTK request by providing the pension plan document and ordinances, and overtime for officers, but not a breakdown of pension contributions on

behalf of officers similarly situated to Carricato. (N.T. 126, 155, 217-219; Union Exhibit 3; Employer Exhibit 13)

43. On October 14, 2020, the Borough issued a payment to Carricato for what the Borough believed to be the backpay owed to Carricato under the Darby Award and attached its calculations. The Borough has still not received information regarding Carricato's interim employer paid benefits. The gross payment amount was \$9,035.08, and the net amount, after withholdings, was 7,958.65. At this time, Carricato was still on the Borough payroll as an employe, but he did not, at any time, return to patrol duties after his reinstatement, and he did not obtain necessary credentials for patrol duties. Carricato remained an employe of the Borough on paid leave until November 2020. In calculating the backpay owed Carricato under the Darby Award, the Borough took an offset for Carricato's post-reinstatement earnings from other employers. (N.T. 225-227, 234, 251-253, 290, 302; Union Exhibit 2)

44. During Carricato's separation from employment, he received interest income from interest bearing accounts and/or stocks that was separate and apart from earnings from interim employers. This income was supplemental to his earnings at the Borough, as reported on his 2017 tax return. The Borough took an offset for the interest Carricato earned and reported on his tax returns. (N.T. 256-258, 289-290; Employer Exhibit 5)

45. The Borough may have taken offsets for reimbursed or unreimbursed travel expenses for meals and hotel expenses that was not earned income from interim employers, but the Borough included as income. (N.T. 303; Employer Exhibit 25)

46. On October 14, 2020, Sarah Stull, the Assistant Borough Manager and Benefits Coordinator wrote Carricato memorializing that the Borough had been permitting him to take paid accrued time off. Ms. Stull further warned Carricato that, if he did "not return to work, [his] last day of paid sick leave will be exhausted on November 28, 2020. (N.T. 292-293, 363-364; Employer Exhibit 23)

47. On November 20, 2020, Chief Glenny wrote to Carricato indicating that he became aware that Carricato had not taken any steps to regain his MPOETC certification or his access to PSP CLEAN or JNET and that Carricato was still out of compliance with the Borough's outside employment policy. Carricato admitted at the hearing that he did not contact MPOETC or JNET/PSP CLEAN. On November 25, 2020, Chief Glenny ordered Carricato to report for work on December 2, 2020 and that it was expected that Carricato address his MPOETC certification and JNET access. (N.T. 365-366; Employer Exhibit 28)

DISCUSSION

The Union argues that the Borough has frustrated the post-arbitration process by manipulating the make-whole remedy directed by the Darby Award, by taking unilateral and indefensible positions regarding the actual calculations of backpay while also refusing to provide essential information regarding 2.5 years of lost work/pay, benefits, paid leave, seniority and pension credits. (Union Brief at 6). The Union additionally claims that Mayor Streeter threatened the Union with unspecified "consequences" if the Darby Award were to be implemented.

The Borough contends that, under the Darby Award, the Borough is permitted to take offsets for Carricato's interim earnings including unemployment compensation benefits. (Borough Brief 5-6). The Borough further contends that it does not have to contribute to the pension fund on behalf of Carricato for several reasons: Carricato did not contribute to the fund; the Borough did not receive state subsidy for the fund on behalf of Carricato; and Carricato was not vested in the pension. Accordingly, there is no money paid by Carricato that he should receive back. (Borough Brief 6-7). While the Borough acknowledges that it owes Carricato the .5 hours of mandatory overtime pay every 2-week pay period, the Borough contends that unearned and unworked overtime should not be part of the backpay calculation because it was not part of the Darby Award and the overtime calculation is too speculative and unsupported by the record. (Borough Brief 6-7). Also, the Borough argues that there are no records indicating how much overtime that Carricato would have been offered or how much offered overtime that he would have accepted during the interim period and, therefore, overtime is not relevant to implementing the Darby Award. (Borough Brief at 9-10).

The Borough further maintains that the Darby Award is ambiguous precluding the Board from determining the intent of the Award or whether the Borough complied with it, *citing, City of Philadelphia*, 772 A.2d 460 (Pa. Cmwlth. 2001). (Borough Brief at 15-16). The Darby Award, argues the Borough, is ambiguous with respect to unworked overtime in the calculation of backpay. (Borough's Brief 19). Relying on *UFCW v. Dunmore Borough*, 37 PPER 115 (Proposed Decision and Order, 2006), the Borough contends that the Board has sustained unfair practice charges for non-compliance with an arbitration for not including overtime in the backpay remedy where the award was explicitly "written in terms of overtime opportunities lost." (Borough Brief 19). Citing this examiner's decision in *Teamsters Local 205 v. Brentwood Borough*, 48 PPER 74 (Proposed Decision and Order, 2017), the Borough further contends that calculating overtime for Carricato would be too speculative. (Borough Brief 20-21).

The Borough also acknowledges that each party alleges that the other party failed to provide requested information. (Borough Brief at 9). For its part, however, the Borough maintains that information regarding overtime and pension contributions were not relevant inquiries because Carricato did not make any pension contributions and the Award did not require the payment of unworked overtime. (Borough Brief 10). Also, the Borough emphasizes that it requested that the Union provide information about Carricato's interim benefits and insurances since 2017, which the Borough did not receive from the Union. (Borough Brief 10-11).

The Borough also argues that its bargaining obligation to provide requested information is limited to providing only relevant information pertaining to the Union's duties as bargaining representative after articulating the reason for the requested information. (Borough Brief 22-24). The Borough contends that it provided the Union with information regarding pension contributions and overtime payments during the backpay period for other officers and the issue is moot because, even if the Borough did not provide the information in response to the Union's request, the Union received the information in response to an RTK request. (Borough Brief 24-25).

Furthermore, the Borough posits that the record lacks substantial evidence that it engaged in discrimination against, or coercion regarding, the Union or Carricato. (Borough Brief 26-30). The Union's claims, contends

the Borough, are rooted in a single email from Mayor Streeter which related to the budgetary impact of paying Carricato while the Borough was facing financial difficulties from the COVID shutdown, *citing, City of Johnstown*, 22 PPER 22191 (1991) (concluding that the employer's statements, that a favorable interest award would result in furloughs, reflected economic reality and were not threats or motivated by anti-union animus). The Borough asserts that Mayor Streeter's comments expressed a fiscal reality in the Borough rather than an unlawful threat and that a reasonable person would not be coerced by the comment, understanding that well-known fiscal reality. (Borough Brief 27-30). The Mayor's comments will be addressed later in this Decision and Order.

Where the refusal to comply with an arbitration award is alleged, the Board's inquiry is limited to determining if an award exists; if the appeal period has expired; and the respondent failed to comply with the provisions of the arbitration award. *PLRB v. Commonwealth of Pennsylvania*, 478 Pa. 582, 378 A.2d 475 (1978). In this case, there is no dispute that the Darby Award exists and that it became final and binding when the Borough decided not to appeal the Commonwealth Court's June 5, 2020 affirmance of the Darby Award and reinstated Carricato on June 22, 2020.

Generally, the parties disagree over the manner of calculating Carricato's backpay, what offsets to take, and what benefits and compensation to include in backpay. The record lacks sufficient documentation and information to calculate a reasonable backpay amount herein. Understanding that no backpay calculation is perfect, the best that can be achieved by the parties is a negotiated backpay that is fair and reasonable under the circumstances. Accordingly, this decision and order will hopefully provide guidance for the parties to return to the bargaining table in person with all requested and necessary documents to negotiate a fair and reasonable backpay amount, as with any other collective bargaining negotiation in pursuit of a settlement agreement, MOU, or CBA.

The email communications employed thus far should be avoided and has taken too long. The Darby Award directed that Carricato be made whole with respect to pay and benefits minus interim earnings. Although Arbitrator Darby did not explicitly define the meaning of "made whole," this Board and the NLRB have, through caselaw defined the parameters of that term of art, which has become commonly understood to include certain pay, benefit and offset criteria. This Board and the NLRB have recognized that neither negotiated backpay settlements or backpay determinations imposed by the Board can be completely accurate even when properly applying the principles delineating each party's obligations. The goal is to be fair and reasonable. NLRB Compliance Manual (III) § 10540.1.

In Corry Area Education Association v. Corry Area School District, 38 PPER 155 (Final Order, 2007), the Board reiterated its adoption of the NLRB Compliance Manual for determining make whole remedies. In Corry, the Board stated that "the NLRB provides guidance as to appropriate make-whole relief. For the NLRB, make-whole relief requires comparing each emolument of employment separately, and employer offsets for a particular benefit are permitted only where that same benefit is offered through an interim employer." Id.

There are several types of payments, benefits, and emoluments of employment at issue in this case either to be credited to Carricato or to be offset by the Borough as part of Carricato's interim earnings. The bookends of the backpay period are from the date of Carricato's termination on

November 14, 2017, until the date of his reinstatement on June 22, 2020. The Borough does not dispute that it owes Carricato his Borough salary plus the mandatory .5 hours of overtime per pay period for the backpay period. The disputes involve other Borough overtime, Borough pension contributions, medical insurance offsets from interim employers and the lack of information sharing from both the Borough and the Union to enable the parties to calculate a reasonable backpay amount owed to Carricato.

Turning first to the parties dispute regarding overtime. Contrary to the Borough's position in this case, the Board has recognized that make-whole arbitration awards clearly seek and intend to place the employee in the same economic position they would have been in had the employee not been unlawfully terminated. The Board has included overtime in make-whole remedies where the employer had claimed that unworked overtime during the backpay period is too speculative to calculate. Stating that overtime cannot be paid because it was not worked is like saying that back wages cannot be paid because they were not worked. In City of Philadelphia, 30 PPER 30105 (Proposed Decision and Order, 1999), the 3 reinstated officers at issue had earned significant overtime prior to their terminations. In that case, the examiner stated that "[w]hile it is impossible to ascertain exactly how many overtime hours these three officers would have worked in the time period during which they were improperly terminated, that limitation cannot be used by the City to relieve itself of the overtime pay liability. It must be remembered that if it were not for the City's improper termination of these three officers there would be no question about the overtime hours they would have actually worked." Id.

The Board affirmed that decision in City of Philadelphia, 30 PPER 30204 (Final Order, 1999). The grievance arbitration award reinstating the 3 officers directed that the officers be made whole, without explicitly defining make whole or including overtime in the backpay. The Board opined that mere base salary reimbursements do not make the employee whole or return them to the economic position they would have had without the contractual violation. In this context, the Board stated that "[t]he City [employer] cannot now hide behind its contention that overtime is not guaranteed and is therefore speculative. In its make-whole awards, the NLRB will compute back pay on the basis of a forty-hour week plus the adjusted average overtime hours worked by each employe." Id. (citations omitted) (emphasis added). The Board concluded: "Thus, overtime is certainly warranted under the award here and is not so speculative as to be incapable of calculation." Id.

Also, in AFSCME DC 47, Local 2186 v. City of Philadelphia, PERA-C-20-282-E (Proposed Decision and Order, 2022), the City employer argued, as the Borough does here, that the make-whole relief ordered in an arbitration award did not explicitly provide for the payment of lost overtime and that the award was ambiguous regarding backpay. In dismissing the City's argument, the examiner stated that "[t]he Board has long held that an arbitrator's make-whole remedy includes the payment of overtime, even if the award does not expressly direct such a payment, where the record supports that the employe in question earned overtime wages prior to the separation. Citing, FOP Lodge 5 v. City of Philadelphia, 30 PPER ¶ 30105, supra, and 30 PPER ¶ 30204, supra. Significantly, the Darby Award states that make whole with respect to pay and benefits should be offset by interim earnings, but it does not explicitly mention offsets for health insurance premiums paid by the interim employer(s). If the Borough's argument regarding alleged ambiguity in the Darby Award regarding overtime were to be applied here, it would also work against the Borough for taking offsets for the interim employer paid health

insurance, which are also not explicitly included in the "interim earnings" language of the Award.

Thus, where conditions that existed prior to the unlawful termination of the reinstated employe would have continued unchanged during the backpay period, it is appropriate, if not necessary, to project those conditions and average earnings, including overtime prior to the termination, through the backpay period to place the employe in the same economic position he/she would have been in sans the unlawful discharge. In this regard, the Carricato overtime projection is distinguishable from the case in Teamsters Local 205 v. Brentwood Borough, 48 PPER 74 (Proposed Decision and Order, 2017), cited by the Borough for the proposition that determining Carricato's overtime would be too speculative.

Clearly, attaining any exact or accurate amount of overtime during the backpay period would be elusive in any and every case; but overtime is part of make whole backpay. Brentwood Borough, supra, involved the employer's failure to implement a new scheduling system pursuant to an arbitration award, which the mayor refused to implement and which became the subject of a charge of unfair labor practices. This examiner ordered the Borough to implement the new scheduling system and comply with the arbitration award. Thereafter, the matter returned to the Board in a compliance posture. In the compliance case, I concluded that it was too speculative to calculate overtime for officers when there was no track record of overtime under the new schedule to approximate the projected overtime individual officers would have earned.

In this case, however, the overtime system remained the same as it was prior to Carricato's termination. Therefore, an average of Carricato's overtime prior to his termination under that system can be applied to the backpay period. There are disparities among the officers regarding task force assignments and court appearances. Thus, a comparison to other officers is not appropriate on this record which lacks a breakdown of the task force assignments and overtime as well as court appearances and special events coverage. However, a comparison to Carricato's prior overtime is an appropriate metric. Carricato worked overtime in the years prior to his termination. To eliminate that overtime pay as too speculative would give a windfall to the Borough that unlawfully terminated him.

Carricato earned \$11,625.87 in overtime in 2016.¹ As of his termination date of November 14, 2017, Carricato earned \$4,124.65 in overtime pay for that year, which is an average of approximately \$392.82 per month in 2017. Had Carricato worked through the end of 2017, he would have made approximately \$4,517.50. The average of the overtime Carricato earned during both 2016 and 2017 is \$8,071.69. Accordingly, the fair and reasonable projected average overtime for the backpay period is \$8,071.67 per year for 2018, 2019 and half of 2020. The Borough properly credited Carricato for the CBA mandated .5 hours per pay period overtime, but it did not credit Carricato for any other overtime during the backpay period. Every full-time officer received overtime pay in excess of the .5 hours of overtime per pay period in 2017 through 2020. In addition, the Borough shall pay Carricato the extra \$392.82 in overtime for the remainder of 2017.

¹ The Union mistakenly argues in its brief that Carricato earned \$17,612.38 in overtime for 2016. However, Union Exhibit 10 shows a year-to-date overtime amount of \$11,625.87, as of the end of December 2016.

Regarding pension benefits, the NLRB Compliance Manual provides as follows:

[Employees] should generally be made whole for lost contributions to pension funds or retirement plans. When the gross employer made contributions to a pension fund, retroactive contributions and appropriate credit should be obtained from respondent. . . . Retirement benefits are not offset by interim wage earnings. Equivalent retirement benefits earned from interim employment are appropriately offset against gross retirement benefits.

NLRB Compliance Manual (III) § 10544.3.

This Board and its examiners have consistently ordered employers to make pension contributions on behalf of the reinstated employe as part of make-whole relief. Corry, supra, (concluding that, in order to make the reinstated employe whole, the school district employer "must make the necessary employer contributions to PSERS for the [backpay] period."); AFSCME DC 87 v. Tioga/Bradford County Housing and Tioga County Redevelopment Authority, 53 PPER 11 (Proposed Decision and Order, 2021); Teamsters Local 401 v. Hazle Township, 38 PPER 119 (Proposed Decision and Order, 2007) (dismissing employer's argument that an arbitrator's failure to use traditional make-whole language in her award evidenced the arbitrator's intent not to award pension credits or accumulated sick leave). Accordingly, the Borough in this case must pay Carricato the would-have-been pension contributions on his behalf for the remainder of 2017, all of 2018 and 2019, and from January 1, 2020 through June 22, 2020, when he was reinstated.

The Borough contends that the Borough cannot now make the Borough's contributions to the pension fund because a part of that money is paid by state subsidies for that purpose which the Borough did not receive from the state on behalf of Carricato while he was separated from the Borough. However, the MMO is the Borough's responsibility, and the Borough is legally responsible for those contributions, not the state. Therefore, the Borough will have to pay Carricato for those contributions on its own. The Borough contends that because Carricato was not vested in the plan, is no longer an employe, and made no financial contributions to the pension, he cannot cash out his pension benefits and the Borough's contribution would not go to Carricato.

However, Carricato was entitled to immediately resume his pension benefit upon the date of his reinstatement, which perfected his rights to the pension plan and back contributions. As of June 22, 2020, Carricato was in the same position as any other officer employed by the Borough who was not vested in the plan and receiving Borough provided pension contributions. Whether or not Carricato was or is vested did not negate the Borough's obligation to pay its pension contributions for Carricato, as with the other officers who are not vested.

The fact that Carricato may not be able to cash out or currently benefit from Borough paid pension contributions without being vested does not change the fact that permitting the Borough to forego the contributions would result in a windfall for the Borough and reward the Borough for not timely complying with the Darby Award regarding those contributions after reinstatement. The Board does not permit windfalls to employes, and it does

not permit windfalls to employers. The Borough's contributions would have been made on behalf of Carricato but for its illegal termination.

The Borough's contribution to the pension on behalf of Carricato is analogous to the Borough's premium payments to the health insurance carrier on behalf of Carricato. Carricato derives an economic benefit from the Borough for having paid for the coverage even if he does not use the health insurance for anything. Carricato could not have used employer provided health insurance during the backpay period because he was not covered at the time. However, the Borough does not dispute that it owes Carricato for those health insurance contributions during the backpay period. If Carricato is entitled to receive backpay for the economic benefit of employer paid health insurance, then he is entitled to the economic benefit of employer paid pension contributions. I have found no case law requiring an employee to be vested in an employer's pension system in order to receive backpay for those contributions. The pension contributions are owed to Carricato because there is an economic benefit to having the pension plan coverage (like health insurance coverage) while employed and during the backpay period, when he should have been employed. Therefore, the Borough owes Carricato the would-have-been MMO on behalf of Carricato for the backpay period. The Borough must pay Carricato the cash value of the economic benefit he should have had.

The Borough maintains that the bargaining violation charge against the Borough relating to the provision of pension and overtime information of officers in the bargaining unit is moot because the Union received that information in response to an RTK request. The Board has held that a bargaining charge becomes moot when the parties involved enter into a new agreement that resolves the bases of the dispute because continued litigation over alleged misconduct during negotiations, which have no present effects, unwisely focuses the parties' attention on a divisive past rather than a cooperative future. *United Transportation Union Local 1594 v. SEPTA*, 37 PPER 119 (Final Order, 2006).

The basis for the Union's bargaining claim is that the Borough violated its bargaining obligation to provide relevant, requested information in a timely manner to the Union. That dispute was not resolved by any accord between the parties that settled the conflict over providing or obtaining the information. Instead, the Union received that information after the Borough provided it to a non-party, RTK requester. Having already concluded that the information was relevant to the backpay determination for Carricato, the Borough did violate its bargaining obligation to provide the information directly to the Union as requested, and it committed an unfair practice in not doing so in a timely manner. The statutory violation of its bargaining obligation to the Union did not evaporate because the Union ultimately received the information through other channels. Absent an agreement between the parties regarding the backpay negotiations generally or the manner in which the information was ultimately provided to the Union, the bargaining violation was not mooted. Moreover, the matter is also not moot because the RTK response did not contain pension contribution information, as the Union requested.

Also, the NLRB's Compliance Manual requires that make-whole remedies include employer paid premiums for any and all insurance plans or employer provided benefits, including but not limited to disability insurance, sick leave, life or injury insurance, or other employee plans that would otherwise have been paid or provided during the backpay period. NLRB Compliance Manual (III) § 10544.4. The Borough must reimburse Carricato for any expenses

incurred by him for paying for health insurance or medical services. To the extent that Carricato's paid premiums, payments and co-pays exceeded those amounts paid by Carricato under the Borough's health plan, those amounts must be reimbursed to Carricato. However, the Borough may take an offset credit for amounts paid by interim employers. NLRB Compliance Manual (III) § 10544.2.

In this case, the Union has not provided the Borough with necessary information regarding Carricato's interim insurance and benefits costs to interim employers or co-pays or out of pocket expenses paid out by Carricato during the interim period. The Borough's obligation to calculate and pay backpay under the terms of this order is not triggered until the Union provides that information. Notably, Carricato was not covered by insurance at times during his backpay period. The Borough needs to know whether and to what extent it can take offsets for insurance plans and other benefits, or if it owes Carricato money because those interim employers paid less on his behalf or provided a lesser benefit or coverage. Also, it appears that Carricato exhausted any and all accrued leave time after his reinstatement. In essence, the Borough has already paid that out to him and is no longer obligated to include accrued paid time off as part of the backpay calculation. However, to the extent that Carricato may have any accrued leave remaining, the Borough must include that leave in the backpay. Also, because Carricato was not covered by health insurance for the full interim period, the Borough must pay Carricato the value of the Borough's would-be insurance contributions during those times when Carricato was not covered. Again, the parties are going to have to be fair and reasonable about the proper comparisons to other employees for determining what the Borough's premiums would have been on behalf of Carricato for any and all insurances and other benefits.

The Borough took an offset for the wages Carricato earned after he was reinstated by the Borough but continued working for another employer and received paid leave from the Borough. However, this period of time is beyond the backpay period. My inquiry in determining whether the Borough complied with the make-whole directive in the Darby Award is limited to the backpay period from the date of Carricato's termination until his reinstatement on June 22, 2020. Accordingly, the Borough was not permitted to calculate an offset for his secondary employment after June 22, 2020, because it was not interim employment; rather it became secondary employment, and it was beyond the backpay period. An employer is not entitled to take offsets for secondary employment. Whether or not Carricato violated a Borough policy prohibiting secondary employment after his reinstatement is not before the Board in this case. Rather the inquiry here is limited in scope to the backpay period. Accordingly, the Borough must return his earnings from secondary employment between June 22, 2020 and the date of his second termination in November 2020. If the Borough believes that Carricato's secondary employment after his Borough reinstatement was improper, it must seek another form of redress.

Upon reinstatement, the parties discussed Carricato's resigning within 2 weeks, if a backpay amount could be agreed upon. Thus, immediately after reinstatement, most of Carricato's sick and vacation leave accumulations during the backpay period, and carried over from before termination, were to be part of his backpay calculation. It was only because the parties could not agree on backpay that Carricato continued to receive paid leave as an employee of the Borough. If the parties had properly conducted themselves in exchanging all necessary information, Carricato would have resigned and his post June 22, 2020 secondary employment would not have been an issue.

Accordingly, it was the Borough's bargaining violations, as well as the Union's, preventing any agreement that caused Carricato to remain in the employ of the Borough beyond a 2-week time frame. Since Carricato's intent was to resign from the Borough in a very short period of time, he could not forfeit his employment from the secondary employer.

The Borough must also pay interest at the rate of 6% per annum on any and all backpay including the value of insurances, wages, overtime, paid leave, and other emoluments of employment, including the money the Borough has already paid Carricato and any accrued paid leave remaining while Carricato did not have access to those benefits and money during the backpay period. The interest is owed on anything and everything the Borough owed Carricato looking back from reinstatement to his termination in November 2017. Although the Borough paid Carricato \$9035.08, the fact remains that the money was owed and outstanding during the backpay period to which interest applies. The interest period will continue to run on the backpay amount for the backpay period until the date that Carricato is paid in the future. The money already paid to Carricato will have no interest applied to it after the date it was paid.

To the extent that the Borough took an offset for the taxable earned interest reported on Carricato's tax returns, those offsets were in error and must be returned to Carricato. Carricato's private investments in accounts, stocks or a 401(k) are beyond, and secondary to, the income he earned at the Borough and during his interim employment. Carricato earned that income secondary to his Borough employment prior to his termination, as evidenced by his 2017 tax return. It was always supplemental to any earned income either before his termination or during the interim period.

To the extent that the Borough took offsets for travel reimbursement payments to Carricato from interim employers, those offsets too must be returned to Carricato. Travel reimbursements for hotels, meals and/or mileage do not constitute earned income but a replacement of money already spent by Carricato out of pocket and returned to him.

Additionally, the Union claims that the Borough "failed to deduct from its credit calculation the obvious cost to [Carricato] of traveling back and forth to the Philadelphia area." (Union Brief 8). The National Board has held that "[t]he law is settled that transportation expenses incurred by [employees] in connection with obtaining or holding interim employment, which would not have been incurred but for the [unlawful termination], and the consequent necessity of seeking employment elsewhere, are deductible from interim earnings." *Aircraft and Helicopter Leasing and Sales, Inc.*, 227 NLRB 644 (1976), *citing, Hoosier Veneer Co.*, 21 NLRB 907 n.26 (1940); and *Crosset Lumber Company*, 8 NLRN 440 (1938).

Carricato's tax returns indicate that his primary residence is in Steelton, Pennsylvania, which borders the City of Harrisburg. Carricato must reasonably quantify the cost of his fuel, tolls, parking, etc. resulting from his commuting from Steelton to the Philadelphia area to maintain interim employment during the backpay period. However, it seems as though Carricato's commute from Steelton to Gettysburg Borough was not short or inexpensive either. Therefore, Carricato must deduct his pre-termination commuting expenses from his interim commuting expenses and arrive at a reasonable difference in the increase in commuting expenses. The net increase in commuting expenses for Carricato to travel to Philadelphia must be deducted from his interim earnings producing a net interim earnings value to be used

by the Borough to offset interim earnings. It is noteworthy that, while employed as a police officer for the Borough, Carricato did not have to work or commute everyday as a result of his 11.5-hour shifts, thereby decreasing his commuting costs while at the Borough.

The Union also alleged in its charge and argued in its brief that the Mayor made threatening and coercive comments to Mr. Thompson. (Union Brief 5). On June 30, 2020, Mayor Streeter, in an email exchange with Mr. Thompson, stated: "I urge you to play it straight and honest in this matter. The consequences of not doing so will be extremely unfortunate all around." Mr. Thompson responded complaining that the Borough had not provided requested information, that he was willing to meet with Borough officials to reach a fair settlement and blaming Mr. Gable for dictating terms as well as his own interpretation of the Darby Award. Mayor Streeter then responded: "Ed: I understand your position, but again urge you to work through this. The consequences of not doing so will be extremely unfortunate for Carricato and the GPD [Gettysburg Police Department]. Regards."

The Union's charge alleges a violation of Section 6(1) (c), for these statements. The Union's charge does not allege discrimination against the Borough for the manner in which the Borough negotiated the implementation of the Award. The Board has ruled that to establish a violation of Section 6(1)(c) under the PLRA, the charging party must show that the employee was engaged in protected activity, the employer knew of that protected activity, and there was an adverse employment action motivated by the protected activity. Pennsylvania State Troopers Ass'n v. Commonwealth of Pennsylvania, PA State Police, 33 PPER ¶ 33011 (Final Order, 2001). There is no need to recite the remainder of the discrimination analysis here because the record contains no evidence of an adverse employment action against Carricato, the Union or any other employees as a result of the Union's and Carricato's protected activity of advocating and negotiating for Carricato's reinstatement and backpay. An adverse employment action is a necessary element of a discrimination claim. Also, the Borough's refusal to agree to the backpay terms advocated by the Union and its requests for information to process Carricato's backpay do not constitute adverse employment actions. Accordingly, the Union did not meet its burden of establishing a prima facie case of discrimination. In the discrimination cause of action, the statement may have been relied on to support the inference of unlawful motive for some adverse employment action. Absent the adverse employment action, there can be no cause of action for discrimination, as a matter of law.

The Union also contends that the Mayor's statements were threatening and coercive under Section 6(1)(a) of the Act. An employer commits an independent violation of Section 6(1)(a) of the Act where, in light of the totality of the circumstances, the employer's action has a tendency to coerce a reasonable employee in the exercise of protected rights. E.B. Jermyn Lodge No. 2 of the Fraternal Order of Police v. City of Scranton, 38 PPER 104 (Final Order, 2007). The employer's motive is irrelevant for an alleged independent violation of that Section. Pennsylvania State Troopers Association v. Commonwealth of Pennsylvania, Pennsylvania State Police, 41 PPER 33 (Final Order, 2010). Actual coercion of the employees and improper motive on the part of the public employer need not be shown in order to find a violation of Section 6(1)(a). Teamsters Local No. 249 v. Millvale Borough, 36 PPER 147 (Final Order, 2005). Even an inadvertent act may constitute an independent violation of Section 6(1)(a). Northwestern School District, *supra*. However, an employer does not violate the PLRA where, on balance, its legitimate reasons justifiably outweigh concerns over the interference with

employe rights. Ringgold Educ. Ass ' n v. Ringgold Sch. Dist., 26 PPER ¶ 26155 (Final Order, 1995).

In Palmyra Police Officers Association v. Palmyra Borough, 46 PPER 72 (Final Order, 2015), the Board concluded that a series of rapid memoranda issued by the chief of police changing work rules, but lacking any anti-union statements, during and after interest arbitration proceedings were coercive and violated Section 6(1)(a) of the Act. Under 6(1)(a), statements do not have to contain any hint of anti-union animus and the declarant's state of mind is irrelevant. The inquiry is whether the statement has a coercive effect on a reasonable person in the exercise of some protected activity.

The Borough cites to City of Johnstown, supra, wherein the examiner concluded that statements made by a city negotiator, that if the union obtained certain provisions in an interest award, there would be furloughs, did not constitute a threat. The finding of fact in that case regarding the statement at issue was follows:

During at least two of these sessions Andrew Gleason, one of the City's negotiators, advised FOP officials that, if an Act 111 interest arbitration panel awarded provisions requiring additional revenue from the City, a layoff of bargaining unit members would result; Mr. Gleason explained to the FOP representatives that this result would be occasioned by the City's poor financial situation.

(City of Johnstown, supra, F.F. 9) The City of Johnstown negotiator explicitly referenced the city's revenues and poor financial situation. The examiner deemed the statements to not be unlawfully motivated and not a threat where the City's negotiators communicated the city's financial crisis to the union to inform the union going into Act 111 interest arbitration and to, perhaps, influence the union to adjust its demands. Basically, it is not a threat for an employer to inform a union in bargaining that it does not have the money to cover the costs of the union's demands and that achieving those demands could force the employer to furlough employes.

Also, in PLRB v. City of Easton, 9 PPER ¶ 9109 (Nisi Decision and Order, 1978), the Board held that a public official may make non-threatening statements concerning the financial impact on the public employer resulting from union demands and that it is not evidence of animus to say that a union costs more money. In City of Easton, the mayor made statements indicating that layoffs could result if an arbitration award provided in excess of the six percent wage increase that the employer had budgeted for the firefighters. The union claimed that the statement intimidated the firefighters and evidenced a take-it-or-leave-it approach to bargaining. The Board opined as follows:

The Complainant has not satisfied us that the Mayor threatened to layoff firefighters or that the statements worked to interfere with the right to proceed to arbitration. Instead, we believe these statements to be nothing more than an expression of one of the avenues left to Respondents. That this was the eventual course pursued by the City does not transcend this statement into a threatening, coercive, and/or intimidating statement. The Mayor's expression was an economic reality. As a public official in the midst of contract negotiations it is not unusual and may in fact be his responsibility to keep the public informed as to the progress at the bargaining table.

City of Easton, 9 PPER at 229. There is a fine line between truthful influence and a threat of retaliation for bargaining in a certain manner. The Mayor's comments here did not mention the Borough's financial crisis and did not limit the "consequences" to financially required furloughs.

The Mayor in this case accused the Union of not being straight and honest in pursuing the make-whole remedy in the Darby Award, and threatened *extremely unfortunate consequences*. Because the Mayor's comments were not tailored to address limited financially required consequences that may stem from implementing the Darby Award while in a financial crisis, it constituted a threat of retaliation for the Union's protected intransigence regarding its position on implementing the Award. Had the Mayor explicitly stated that implementing the Darby Award could further hurt the Borough financially and could result in furloughs, the statement may have been analogous to the statement of city negotiators in City of Johnstown, *supra*, or the mayor in City of Easton, *supra*. However, the Mayor's statement in this case broadly threatened extremely unfortunate consequences for Carricato and the Police Department, and attempted to coerce the Union to yield to the Borough's position, thereby interfering with the protected right to seek full relief under the Darby Award. The statement simply did not contain a truthful recitation of the Borough's finances.

The Board will balance an employer's legitimate business interest against the coercive effect on unions or employees. However, the Mayor's purported interests in the fiscal infirmity of the Borough resulting from the effects of the pandemic do not outweigh the coercive effect on Mr. Thompson and Carricato to back off their advocacy for backpay under the Darby Award because those interests were absent from his communications. The Mayor's interests in the Borough's finances were not related in the context of his statements. Unlike the statement in City of Johnstown, a reasonable understanding of the Mayor's statements here is that the Borough would retaliate against the Police Department and Carricato if Mr. Thompson did not start being straight and honest, without reference to the finances of the Borough, which chilled Mr. Thompson's protected advocacy on behalf of Carricato. Accordingly, the Borough independently violated Section 6(1)(a) when the Mayor threatened "extremely unfortunate" "consequences" to the entire Police Department and Carricato for the pursuit of Carricato's backpay.

In summary, the Borough engaged in unfair labor practices by failing to fully implement the Darby Award. However, part of the failure to implement the Award falls squarely on the Union. The Union hamstrung the Borough's efforts, and it was recalcitrant in obtaining necessary interim employer paid benefit information and providing it to the Borough. Both parties share an obligation to continue working toward full implementation of the Darby Award. The Borough, however, also engaged in unfair practices by failing to provide directly to the Union relevant information requested about pension contributions and overtime. The Borough also engaged in unfair labor practices by refusing to attempt to negotiate a proper overtime calculation for Carricato or pension contributions for the backpay period and by taking improper offsets in determining backpay. The Mayor's emailed comments to Mr. Thompson also constituted an unfair labor practice.

CONCLUSIONS

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

1. The Borough is a public employer and a political subdivision within the meaning of the PLRA as read in pari materia with Act 111.
2. The Union is a labor organization within the meaning of the PLRA as read in pari materia with Act 111.
3. The Board has jurisdiction over the parties hereto.
4. The Borough has committed an independent unfair labor practice within the meaning of Section 6(1)(a) of the PLRA, as read in pari materia with Act 111.
5. The Borough has committed independent and derivative unfair labor practices within the meaning of Section 6(1)(e) of the PLRA, as read in pari materia with Act 111.
6. The Borough has not committed unfair labor practices within the meaning of Section 6(1)(c) of the PLRA, as read in pari materia with Act 111.

ORDER

In view of the foregoing and in order to effectuate the policies of the PLRA and Act 111, the hearing examiner

HEREBY ORDERS AND DIRECTS

that the Borough shall:

1. Cease and desist from interfering, restraining or coercing employees in the exercise of the rights guaranteed in the PLRA and Act 111;
2. Cease and desist from refusing to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative.
3. Take the following affirmative action, which the hearing examiner finds necessary to effectuate the policies of Act 111 as read in pari materia with the PLRA:
 - (a) Immediately meet in person with Union representatives and exchanged information as directed in the body of this Decision and Order and negotiate a backpay resolution for Carricato under the Darby Award. The backpay period is defined as November 14, 2017, through June 22, 2020. The Borough's ultimate implementation of the Award is contingent upon the Union's provision of any and all economic value of interim employer paid wages, benefits, insurances, and commuting costs.

(b) Immediately calculate and pay Carricato for .5 hours of overtime every 2-week pay period, to the extent not done so, throughout the backpay period;

(c) Immediately calculate and pay Carricato backpay wages Carricato would have received from the Borough including wage increases, leveling pay, and longevity pay, during the backpay period;

(d) Immediately calculate and pay Carricato average overtime using the averages provided in this Decision and Order throughout the backpay period;

(e) Immediately calculate and pay Carricato the pension contribution that the Borough would have made on behalf of Carricato throughout the backpay period;

(f) Immediately calculate and pay Carricato medical, dental, vision, life and disability insurance premiums that the Borough would have paid on behalf of Carricato during the backpay period in excess of the interim employer(s) payments for those benefits, once the Borough receives the information from the Union regarding the value of those benefits, and pay Carricato's out-of-pocket expenses for health costs and co-pays exceeding those costs while under the Borough's health insurance;

(g) Immediately calculate and pay back Carricato for improper offsets taken for Carricato's earnings with other employers after his reinstatement on June 22, 2020;

(h) Immediately calculate and pay back Carricato any offsets the Borough took for taxable interest that Carricato earned from personal and/or investment accounts;

(i) Immediately calculate and pay back Carricato any offsets taken by the Borough for travel, lodging, and meal reimbursements to Carricato by interim employers;

(j) Immediately pay Carricato quantifiable commuting costs for interim employment commuting to Philadelphia less Carricato's commuting costs to the Borough after the Union provides that information to the Borough;

(k) Immediately calculate and pay Carricato interest at the rate of 6% per annum on any and all backpay including the value of benefits, wages and insurances and monies already paid, less offsets during the backpay period. The interest period runs from November 14, 2017 until the date Carricato is paid in the future. The Borough does not have to pay interest on the money it has already paid Carricato after the date of payment of that money;

(l) Once a final backpay amount is settled upon between the parties, that amount will be divided by two week pay periods throughout the backpay period for purposes of determining withholdings instead of taxing Carricato on a lump sum;

(m) Post a copy of this decision and order within five (5) days from the effective date hereof in a conspicuous place readily accessible to its employees and have the same remain so posted for a period of ten (10) consecutive days; and

(n) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this decision and 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 and become final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this fourth of August, 2022.

PENNSYLVANIA LABOR RELATIONS BOARD

Jack E. Marino/s

JACK E. MARINO
Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

TEAMSTERS LOCAL UNION NO. 776 :
 :
 v. : CASE NO. PF-C-20-42-E
 :
 BOROUGH OF GETTYSBURG :

AFFIDAVIT OF COMPLIANCE

The Borough hereby certifies that it has ceased and desisted from its independent 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 immediately done the following: calculated and paid Carricato for .5 hours of overtime every 2-week pay period, to the extent not done so, throughout the backpay period; immediately calculated and paid Carricato backpay wages Carricato would have received from the Borough including leveling and longevity pay during the backpay period; Immediately calculated and paid Carricato average overtime using the averages provided in this Decision and Order throughout the backpay period; Immediately calculated and paid Carricato the pension contribution that the Borough would have made on behalf of Carricato throughout the backpay period; Immediately calculated and paid Carricato medical, dental, vision, life and disability insurance premiums that the Borough would have paid on behalf of Carricato during the backpay period in excess of the interim employer(s) payments for those benefits provided the Union produced that information; Immediately calculated and paid back Carricato for improper offsets taken for Carricato's earnings with other employers after his reinstatement on June 22, 2020; Immediately calculated and paid back Carricato any offsets the Borough took for taxable interest that Carricato earned from personal and/or investment accounts; Immediately calculated and paid back Carricato any offsets taken by the Borough for travel and meal reimbursements to Carricato by interim employers; Immediately paid Carricato quantifiable commuting costs for interim employment commuting to Philadelphia less Carricato's commuting costs to the Borough after the Union provided that information to the Borough; Immediately calculated and paid Carricato interest at the rate of 6% per annum on any and all backpay including the value of benefits, wages, insurances and the amount of money already paid, less offsets during the backpay period; calculated withholdings on backpay by dividing the total amount by 2-week pay periods throughout the backpay period for tax purposes; and Posted a copy of this decision and order as directed therein.

Signature/Date

Title

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

Signature of Notary Public