COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, DISTRICT COUNCIL 13	:	
v.	:	CASE NO. PERA-C-20-141-W
CITY OF PITTSBURGH	:	

PROPOSED DECISION AND ORDER

On July 10, 2020, the American Federation of State, County, and Municipal Employees, District Council 13 (AFSCME or Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (PLRB or Board) alleging that the City of Pittsburgh (City or Employer) violated Section 1201(a)(1) and (8) of the Public Employe Relations Act (PERA or Act) when the City failed to comply with a grievance arbitration award.

On August 25, 2020, the Secretary of the Board issued a complaint and notice of hearing, assigning the charge to conciliation for the purpose of resolving the matters in dispute through mutual agreement of the parties, and designating November 9, 2000, in Pittsburgh, as the time and place of hearing.

The hearing was continued on October 22, 2000, and again on December 2, 2021, due to the litigation over the arbitration award in question in the Allegheny County Court of Common Pleas.

On March 3, 2022, AFSCME filed an amended charge of unfair practices with the Board alleging that the City violated Section 1201(a)(1) and (8) of PERA when the City failed to comply with a grievance arbitration award.

On March 30, 2022, the Secretary of the Board issued an amended complaint and notice of hearing, assigning the charge to conciliation for the purpose of resolving the matters in dispute through mutual agreement of the parties, and designating June 10, 2022, via Microsoft Teams, as the time and manner of hearing.

A hearing was necessary and ultimately held on July 18, 2022, via Microsoft Teams, before the undersigned Hearing Examiner, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. AFSCME submitted a post-hearing brief on October 13, 2022. The City submitted a post-hearing brief on November 13, 2022.

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

FINDINGS OF FACT

1. The City is a public employer within the meaning of Section 301(1) of PERA. (N.T. 6).

2. AFSCME is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 6).

3. AFSCME is the exclusive bargaining agent for a bargaining unit certified at PERA-R-8833-W which includes a number of employees of the City, such as investigators in the City's Commission on Human Relations. (N.T. 7).

4. AFSCME and the City were parties to a collective bargaining agreement effective January 1, 2015, to December 31, 2019. (N.T. 7; Union Exhibit 1).

5. Richard Rogow was an investigator in the City's Commission of Human Relations and a member of the Union's bargaining unit. He received a five-day suspension pending termination from the City on July 23, 2018. He was subsequently discharged. (N.T. 8).

6. The Union filed a grievance contesting Rogow's discharge and an arbitration hearing concerning the grievance was held and presided over by Arbitrator Robert H. Shoop. (N.T. 8; Union Exhibit 2).

7. By decision dated March 3, 2020, (the Shoop Award) Arbitrator Shoop ordered: "Therefore, based upon the record as a whole, I find the grievance is sustained in part. Effective the start of the next payroll period, after the date of this decision, the grievant shall be reinstated to the position of investigator with the City Human Relations Commission, or an equivalent position with full seniority, but without back pay or benefits." (N.T. 8-9; Union Exhibit 2).

8. The next payroll period following the March 3, 2020 Shoop Award started on March 14, 2020. (N.T. 9).

9. The City did not reinstate Rogow or otherwise implement any portion of the Shoop Award. (N.T. 10).

10. The City filed an appeal of the Shoop Award in the Allegheny County Court of Common Pleas on June 11, 2020. (N.T. 10; Union Exhibit 4).

11. On December 2, 2021, Judge Patrick J. Connelly issued a Decision and Order, denying the City's appeal and affirming the Shoop Award. (N.T. 10-11; Union Exhibits 3(a), 3(b)).

12. The City did not appeal the Court of Common Pleas order. (N.T. 15; Union Exhibit 4).

13. At the time of the hearing, the City had not implemented the Shoop Award. (N.T. 15).

DISCUSSION

The Union charges that the City committed an unfair practice when it failed to fully comply with the Shoop Award. The law regarding this matter is well settled. In determining whether an employer complied with a grievance arbitration award, the Union has the burden of proving

that an award exists, the award is final and binding and that the employer failed or refused to properly implement the award. State System of Higher Education v. PLRB, 528 A.2d 278 (Pa. Cmwlth. 1987). The relief provided in an arbitration award that has been affirmed on appeal is effective dating back to the date of the award or another effective date expressly provided in the award. Fraternal Order of Police, Lodge 5 v. City of Philadelphia, 39 PPER 9 (Final Order, 2008); Wyoming Borough Police Department v. Wyoming Borough, 43 PPER 22 (Final Order, 2011); Allegheny County Prison Employees Independent Union v. County of Allegheny, 50 PPER 70 (Proposed Decision and Order, 2019).

In this matter, the record is clear that the Shoop Award exists. The record is clear that the Shoop Award is final and binding. The record shows that the City did not appeal the December 2, 2021, Judge Connelly decision and order which denied the City's appeal and affirmed the Shoop Award. Finally, the record is clear that the City has not done anything to implement the Shoop Award. AFSCME has met its burden.

However, this Proposed Decision and Order cannot end here as the City makes arguments in its defense which can be generalized and summarized as asserting that the request for grievance arbitration from the Union was not timely and, therefore, the arbitrator lacked subject matter jurisdiction and, therefore, the failure to implement the Shoop Award by the City is not an unfair practice.

As stated above, the law on this issue is well settled. Parties cannot collaterally attack arbitration awards in unfair labor practice enforcement proceedings before the PLRB. Borough of Lewistown v. PLRB, 735 A.2d 1240, 1246 (Pa. 1999) ("This court has made clear that when a party fails to appeal an arbitration award, the party waives the right to contest the illegality of the arbitration award in an unfair labor practice proceeding regarding enforcement of the arbitration award."); PLRB v. Commonwealth, 387 A.2d 475 (Pa. Cmwlth. 1978) (holding that when an arbitration award is not appealed it is final and binding on the parties and the employer may not collaterally attack the award in an unfair labor practice enforcement proceeding); see also, Clearfield County, 31 PPER ¶31 (Final Order, 2000). If questions are raised as to the legality of an award, they are appropriately addressed on appeal. PLRB v. Commonwealth, supra; Clearfield County, supra, at 59 ("The County cannot now, in an unfair labor practice proceeding, raise issues of the legality of the unappealed award.").

Employers do not have the right to unilaterally determine which grievances are arbitrable. Arbitrability is for the arbitrator to decide in the first instance. Permitting an employer's interpretation to control would permit employers to effectively deny any and all grievances. East Pennsboro Area School District v. PLRB, 467 A.2d 1356 (Pa. Cmwlth. 1983). The Board has held that even frivolous grievances must be submitted to an arbitrator and that, even if the employer's position regarding arbitrability is correct, the employer must submit the grievance to arbitration and argue arbitrability to the arbitrator. City of Pittsburgh, 481 Pa. 66 (1978); Palmerton Area Education Association v. Palmerton Area School District, 41 PPER 153 (Proposed Decision and Order, 2010). As the Hearing Examiner in Palmerton Area School District, supra, explained: "The Board and the courts have been absolutely, unequivocally, unwaveringly, unyieldingly, inflexibly,

immutably, irrevocably, unalterably and inveterately consistent in repeatedly holding that ARBITRABILITY IS FOR THE ARBITRATOR TO DECIDE!" Once the arbitrator decides such an issue, the Supreme Court of Pennsylvania has made it clear: when a party fails to appeal an arbitration award, the party waives the right to contest the illegality of the arbitration award in an unfair labor practice proceeding regarding enforcement of the arbitration award. PLRB v. Commonwealth, supra.

With the above in mind, I move to this matter. The City's attacks on the jurisdiction of the Shoop Award cannot be entertained before the Board. The proper venue for such an argument is before the arbitrator. After losing before an arbitrator and the Court of Common Pleas, the City cannot thereafter collaterally attack the arbitration award in an unfair practice enforcement proceeding before the Board.

I will now go through and specifically address each of the City's arguments in turn as they are presented in the City's Brief. In its brief the City argues that: "The City's defense against this enforcement action is that the grievance award cannot be "binding" as required by Section 903 where the terms of the CBA limit the scope of the arbitrator's jurisdiction to only those cases that are **timely brought to arbitration.** Stated otherwise, **the award at issue suffers from lack of subject matter jurisdiction.**" City's Brief at 6 (emphasis added). The City raised its timeliness argument before the Arbitrator and before the Court of Common Pleas. The Arbitrator and the Court of Common Pleas both rejected the City's timeliness arguments. Arbitrator Shoop wrote in his Award:

> The City alleges that the grievance was appealed to arbitration in an untimely manner and therefore it should be dismissed. Based on the third step and the appeal to arbitration, the City argues that citing disagreement with the response and indicating it will be moved to arbitration is not sufficient. Arbitrators generally are desirous of deciding grievances on the merits and require clear and convincing evidence of a procedural defect.
>
> Here, there is a dispute if language of the November 8 email from the Union properly appeals the case to arbitration. **The Union did not agree with the City's response and it is clear the Union wanted the case to proceed to arbitration. The City was on notice of that fact.**
>
> Moreover, at no time during any of the correspondence leading up to the hearing did the City raise the issue of timeliness of the appeal to arbitration. **While I believe the request for arbitration was timely on its face, failure to raise the timeliness waived the timeliness issue.**

Union Exhibit 2 (citations omitted, emphasis added). The Court of Common Pleas also considered and rejected the City's timeliness arguments. Judge Connelly held:

> ARBITRABILITY/TIMELINESS . . . **[T]he City raised its own timeliness issue by arguing that the arbitrator erred on the subject of arbitrability in regard to the timeliness of the Union's request for arbitration**. We write briefly to address this point. The City argued before the arbitrator that the Union did not request arbitration until July 26, 2019, when it sent a letter to the PLRB. The CBA at Article XV Section 4 provides that if the City's decision in Step III is not appealed to arbitration within twenty (20) workdays, the grievance shall be considered settled on the basis of such decision. We find that the record supports the arbitrator's factual finding that the Union requested arbitration via email on November 8, 2018 -- six days after the Step III letter upholding termination. The City responded to that e-mail the next day by assigning a solicitor to the "grievance arbitration." The City argues that an e-mailed statement "we are moving this case to arbitration" is not sufficient. The arbitrator resolved the issue by finding that "it is clear the Union wanted the case to proceed to arbitration ... the City was on notice of that fact." The arbitrator also found that "arbitrators generally are desirous of deciding grievances on the merits and require clear and convincing evidence of a procedural defect." **We again find no reason to reverse the arbitrator on this point.**

Union Exhibit 3a (citations omitted, emphasis added). The City cannot now again raise its concerns about timeliness and subject matter jurisdiction to the Board. That was for the arbitrator to decide. When a party fails to appeal an arbitration award, the party waives the right to contest the illegality of the arbitration award in an unfair practice proceeding regarding enforcement of the arbitration award. Questions over the legality of an arbitration award are appropriately addressed on appeal, in this case before the Commonwealth Court. The City did not do so. The City cannot now collaterally attack the arbitration award before the Board.

Moving on, the City argues:

> The CBA between the Union and the City contains a few explicit terms that prohibit a grievance arbitrator from altering the grievance process by interpretation. First, Articles XV and XVI provide a strict time process for arbitration. Second, Article XXIII provides a strict prohibition to altering the terms of this

> agreement. These three sections of the CBA, taken together, curtail the scope of a grievance arbitrator's jurisdiction to encompass only those grievances processed in strict conformity with the contract's procedural mandates.

City's Brief at 6. On its face, this argument is one of contract interpretation which should be made to an arbitrator and questions of an arbitrator's jurisdiction are for the arbitrator. Parties cannot collaterally attack arbitration awards in unfair labor practice enforcement proceedings before the Board. The City cannot now, in an unfair practice proceeding, raise issues of the legality of an award it did not appeal to the Commonwealth Court. When a party fails to appeal an arbitration award, the party waives the right to contest the illegality of the arbitration award in an unfair practice proceeding regarding enforcement of the arbitration award.

The City goes on to argue:

> The record is devoid of evidence that the parties' practices deviated from the contract terms either in general or in this case. Here, there is no evidence of record indicating the parties deviated from the explicit procedures through their practices. Regarding this case, counsel for the City asserted its procedural rights under the contract at the first opportunity, asserted the Union's failure to follow the strict time processes, and consistently asserted the objection to the arbitrator's jurisdiction. Accordingly, the City did not waive the procedural aspect of the arbitrator's jurisdiction.

City's Brief at 7. As stated above, questions of an arbitrator's jurisdiction are for the arbitrator. Parties cannot collaterally attack arbitration awards in unfair labor practice enforcement proceedings before the Board. If the City had questions about the jurisdiction of the arbitrator, it could have raised them on further appeal. It did not do so.

The City continues its arguments in the same vein:

> The arbitrator's lack of subject matter jurisdiction to entertain the merits of the case leads to the conclusion that the City has not committed an unfair labor practice. . . . Here, the CBA is the governing enactment between the parties. While the CBA does subject employee discharges to the grievance process, see, City-1 at Article XV Section 9, it only permits arbitration where the procedural time limitations are either honored or waived. The Union did not act within the CBA's time limitations for selection of an arbitrator. The City did not consent to waiving the time limitations. The

> Union's failure cannot divest the City of its contractually mandated process rights. See, Martinov.Transp.Workers'Union,Local234, 480 A.2d 242, 245 (Pa. 1984) ("the union's misconduct should not deprive the employer of all the procedural and substantive benefits of the bargained for grievance procedure, a procedure which PERA mandates."). Where the procedural aspect of subject matter jurisdiction was not followed and the City properly objected to the arbitrator's jurisdiction, the arbitrator's award on the merits must be void.

City's Brief at 7-8. As above, questions of an arbitrator's jurisdiction are for the arbitrator. Parties cannot collaterally attack arbitration awards in unfair labor practice enforcement proceedings before the Board. Questions over the legality of an arbitration award are appropriately addressed on appeal, in this case before the Commonwealth Court.

The City continues its arguments:

> The legal authority cited by the Union does not address subject matter jurisdiction. To support its claim that the City's defense of lack of procedural timeliness is not a valid defense to an enforcement claim the Union refers to several court and PLRB decisions addressing circumstances under which arbitration awards are "deemed binding" under Section 903. None of the cases referenced by the Union addresses lack of subject matter jurisdiction. In fact, the reasoning of one of the cited decisions, PLRB V. Commonwealth, 387 A.2d 475 (Pa 1978) strongly supports the City's defense. There the Court interpreted PERA section 903's term "binding" pursuant to the policies and objectives of orderly and constructive relationships promoted by the right to collectively bargain underlying enactment of PERA and concluded all awards are "deemed binding" for enforcement purposes under section 1301.

City's Brief at 7-8. The City continues its efforts to collaterally attack the Shoop Award. Parties cannot collaterally attack arbitration awards in unfair practice enforcement proceedings before the Board. Questions over the legality of an arbitration award are appropriately addressed on appeal. The City had the opportunity to raise all of its concerns, including subject matter jurisdiction, with the Commonwealth Court and failed to do so, which made the Shoop Award final. The City's citation to PLRB v. Commonwealth, 387 A.2d 475, as a case which supports its position is without merit. The Supreme Court in that case held explicitly:

> The Commonwealth argues here, however, that the Board must examine the validity of the

> arbitrator's decision in order to determine if that award is one "deemed binding" under Section 903. We do not agree. Section 903 requires the parties to a collective bargaining agreement to submit to binding arbitration those disputes which cannot voluntarily be resolved. Section 903, however, does not specify what constitutes "binding" arbitration. **We believe that the language of Section 903, when read in light of the policies and objectives underlying the enactment of PERA, dictates that any decision of an arbitrator made pursuant to Section 903 is "deemed binding" for purposes of enforcement under Section 1301 as soon as that decision becomes final in the sense that it is no longer appealable. . . .**"

PLRB v. Commonwealth, 387 A.2d 475 (emphasis added). The Shoop Award is final. The City must implement it. The City could have argued its position regarding timeliness and subject matter jurisdiction to the Commonwealth Court but chose not to do so.

The City continues with its arguments:

> PERA's policy objectives will be offended by application of the "deemed binding" standard to the award at issue here. In this case, CBA Article XXIII expresses an informed and unequivocal intention by both the City and the Union to strict adherence to the express terms of the CBA's grievance process during the term of the CBA and further to relinquish the right to bargain over any mandatory subject of bargaining during the term of the agreement. Furthermore, that agreement was made with explicit recognition that it is contrary to PLRB's "zipper clause" policy, specifically that "such clauses may only be employed as a shield by either party to prevent incessant demands during the contract term made by the other party seeking to alter the status quo. Use of the clause as a sword by one seeking to impose unilateral changes without first bargaining is not favored." Commonwealth v. Commonwealth, Pa. Labor Relations Bd., 459 A.2d 452, 457 (Pa. Commw. 1983). The record evidence shows that the Union did not proceed to arbitration within the mandated time frame for the stated reason that the case "fell through the cracks." Timeliness can be extended by mutual agreement however the City did not agree. The parties' zipper clause is not ambiguous. It does not permit alteration of the agreed-upon terms during the term of the contract. Considered in the light of Article XXIII, the CBA does not authorize a grievance arbitrator to dictate a different grievance process. The party alleging

> an unfair labor practice caused by non-compliance with an arbitration award has the burden to show substantial evidence that the opposing party has failed to comply with the arbitrator's decision. Harbough v PLRB, 528 A.2d 1024 (Commw. 1987); PLRB v. Commonwealth, 387 A.2d 475 (Pa, 1978) (Hearing Examiner's and Board's finding in support of an award for payment of missed overtime was reversed where it was not supported by substantial evidence.). By seeking enforcement of this grievance Award-which through interpretation of the grievance process alters the agreement–the Union violates PERA's policy of good-faith bargaining. The Union itself is committing an unfair labor practice by engaging in an enforcement action for this award.

City's Brief 9-10. The City had the opportunity to raise such arguments before the Arbitrator and the Court of Common Pleas. The City lost in both of those forums and chose not to appeal to the Commonwealth Court. The City cannot thereafter collaterally attack the arbitration award in unfair practice enforcement proceedings before the Board. Questions over the legality of an arbitration award are appropriately addressed on appeal, in this case to the Commonwealth Court. The PLRB is not the court of appeal for a decision and order from the Court of Common Pleas in Allegheny County regarding enforcement of an arbitration arising out of a collective bargaining agreement. Finally, if the City truly believed that AFSCME committed an unfair practice under PERA, it could have filed a charge with the Board, subject to PERA and Board rules.

The City concludes its arguments:

> The Board has exclusive jurisdiction to determine whether an ULP has occurred: the Board can entertain the City's defense to the Union's claim of ULP on these facts. PLRB is vested with exclusive original jurisdiction by Section 1301 of PERA to prevent unfair labor practices such as a union's failure to bargain in good faith in violation of Section 1201(b)(3). Hollinger v. Dep't Public Welfare, 365 A.2d 1245, 1249 (Pa. 1976). According to the City's interpretation of PERA, it was not appropriate to appeal the Common Pleas Order affirming the Award. Considered in the light of this interpretation, the City's defense to the Union's claim is properly before the Board rather than before a court on a claim of an excess of arbitral authority.

City's Brief at 10. This matter is not about any alleged unfair practice by the Union under Section 1201(b)(3). If the City truly believed the Union committed an unfair practice, it could have filed a charge with the Board, subject to PERA and Board rules. Moving on, the City's interpretation of Pennsylvania public union law is wrong. Questions over the legality of an arbitration award are appropriately

addressed on appeal. The proper forum to appeal the Court of Common Pleas order is the Commonwealth Court. The PLRB is not the court of appeal for a decision and order from the Court of Common Pleas in Allegheny County regarding enforcement of an arbitration arising out of a collective bargaining agreement. When the City chose not to appeal to the Commonwealth Court, the Shoop Award became final. Parties cannot thereafter collaterally attack arbitration awards in unfair labor practice enforcement proceedings before the Board.

Based on the above, I find that the City has violated Section 1201(a)(1) and (8) of PERA. The City must immediately and fully comply with the Shoop Award, immediately reinstate Rogrow, and immediately make him whole.

CONCLUSIONS

The Hearing Examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds:

1. The City of Pittsburgh is a public employer within the meaning of Section 301(1) of PERA.

2. AFSCME is an employe organization within the meaning of Section 301(3) of PERA.

3. The Board has jurisdiction over the parties hereto.

4. The City of Pittsburgh has committed unfair practices in violation of Section 1201(a)(1) and (8) of PERA.

ORDER

In view of the foregoing and in order to effectuate the policies of PERA, the Hearing Examiner

HEREBY ORDERS AND DIRECTS

that the City of Pittsburgh shall:

1. Cease and desist from interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of the Act.

2. Cease and desist from refusing to comply with the provisions of an arbitration award deemed binding under section 903.

3. Take the following affirmative action:

(a) Immediately and fully comply with the Shoop Award, immediately reinstate Rogrow, and immediately make him whole for all lost wages and benefits he would have earned as an investigator with the City Human Relations Commission from March 14, 2020, until the date of his reinstatement, including but not limited to wage increases received by the bargaining unit during the backpay period and any other lost benefits, medical and dental payments and co-payments or accoutrements and terms and conditions of employment enjoyed by full-

time employes, including any differentials in holiday pay, overtime and the accrual of sick and vacation time, as well as pension contributions during the backpay period;

(b) Immediately pay Rogow interest at the rate of six percent per annum on the outstanding backpay owed to him;

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

(d) 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; and

(e) Serve a copy of the attached Affidavit of Compliance upon the Union.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed pursuant to 34 Pa. Code § 95.98(a) within twenty (20) days of the date hereof, this decision and order shall become and be absolute and final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this fifteenth day of December, 2022.

PENNSYLVANIA LABOR RELATIONS BOARD

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STEPHEN A. HELMERICH, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, DISTRICT COUNCIL 13	:	
v.	:	CASE NO. PERA-C-20-141-W
CITY OF PITTSBURGH	:	

AFFIDAVIT OF COMPLIANCE

The City of Pittsburgh hereby certifies that it has ceased and desisted from its violation of Section 1201(a)(1) and (8) of the Public Employe Relations Act; that it has complied with the Proposed Decision and Order as directed therein; that it has immediately and fully complied with the Shoop Award, that it has immediately reinstated Rogrow, and that it has immediately made him whole for all lost wages and benefits he would have earned as an investigator with the City Human Relations Commission from March 14, 2020, until the date of his reinstatement, including but not limited to wage increases received by the bargaining unit during the backpay period and any other lost benefits, medical and dental payments and co-payments or accoutrements and terms and conditions of employment enjoyed by full-time employes, including any differentials in holiday pay, overtime and the accrual of sick and vacation time, as well as pension contributions during the backpay period; that it has immediately paid Rogow interest at the rate of six percent *per annum* on the outstanding backpay owed to him; that it has posted a copy of the Proposed Decision and 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