

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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

PROPOSED DECISION AND ORDER

On May 26, 2023, the Fraternal Order of Police, Fort Pitt Lodge No. 1 (Union or FOP) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (PLRB or Board) against the City of Pittsburgh (City or Employer) alleging that the City violated Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA), as read *in pari materia* with Act 111, when the City failed to implement an arbitration award which ordered the City to return Officer Aaron Fetty to work "as soon as practical" and make him whole after he was terminated from employment in September 2022.

On July 21, 2023, 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 October 13, 2023, in Pittsburgh, as the time and place of hearing.

The hearing was necessary and held on October 13, 2023, in Pittsburgh, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The Union submitted a post-hearing brief on November 23, 2023. The City submitted a post-hearing brief on December 22, 2023. The Union filed a Motion to Submit a Reply Brief on December 22, 2023. The City filed a response on January 10, 2024. The Hearing Examiner denied the Union's Motion to Submit a Reply Brief on January 29, 2024. The Hearing Examiner, based on all matters of record, makes the following:

FINDINGS OF FACT

1. The City is a public employer and political subdivision under Act 111 as read *in pari materia* with the PLRA. (N.T. 7; Joint Exhibit 25 ¶ 2).

2. The Union is a labor organization under Act 111 as read *in pari materia* with the PLRA. The Union is the exclusive bargaining unit representative of City of Pittsburgh police officers. (N.T. 7; Joint Exhibit 25 ¶ 1).

3. The parties were subject to a collective bargaining agreement (CBA) with the effective dates of January 1, 2019, through December 31, 2022. The parties entered into a Tentative Agreement on March 7, 2023. (Joint Exhibit 2, 3, 25 ¶ 5).

4. On November 28, 2022, Arbitrator Ralph Colflesh issued an award (Colflesh Award or Award) over a dispute between the parties over the discipline of Police Officer Aaron Fetty. The Colflesh Award states in relevant part:

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

. . . .

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

AWARD

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

(Joint Exhibit 4, 25 ¶ 6) (internal citations omitted) (emphasis added).

5. On December 29, 2022, the City filed an appeal of the Colflesh Award in the Court of Common Pleas of Allegheny County. (Joint Exhibit 5, 25 ¶ 7).

6. On April 20, 2023, Judge Hertzberg of the Allegheny County Court of Common Pleas issued an order affirming the Colflesh Award. (Joint Exhibit 11, 25 ¶ 13).

7. On May 19, 2023, the City filed an appeal of the Court of Common Pleas decision to the Commonwealth Court. (Joint Exhibit 15, 25 ¶ 17).

8. On July 17, 2023, Judge Hertzberg issued an opinion supporting his April 20, 2023, order affirming the Colflesh Award. (Joint Exhibit 21, 25 ¶ 23).

9. The City did not file a motion for a stay of the Colflesh Award. (N.T. 14).

10. As of the date of the hearing, the City had not returned Fetty to work in any capacity. (N.T. 20, 37).

11. Stephen Vinansky is a Commander in the Bureau of Police. He was at the time of the hearing the Commander of Zone Four. In 2021, he was the Commander of Zone Five. As Commander, his duties included overseeing the police officers assigned to the Zone. His duties included playing one part of the discipline process. (N.T. 42-43).

12. In 2021, Vinansky was the Commander at Zone Five when Fetty was assigned to Zone 5. (N.T. 43-44).

13. In July 2021, Vinansky learned that OMI [the City's Office of Municipal Investigations] was investigating an allegation that Fetty had committed a sexual assault against a female Police Officer while both were off-duty at a bar in Lawrenceville, PA. The female Police Officer also worked in Zone Five. Vinansky testified that he learned of the alleged incident approximately two weeks after the alleged incident happened. (N.T. 45-49).

14. In response to this alleged incident, in September 2021, the City and Fetty agreed to a three-day suspension for Fetty for the allegation he committed indecent sexual assault towards a fellow officer off-duty. Fetty also agreed to a last chance agreement. (N.T. 59, 65).

15. Fetty was thereafter reassigned From Zone Five to Zone One where he returned to work. Vinansky testified there were no complaints made against Fetty while he worked in Zone One. (N.T. 59-61).

16. Vinansky testified that he has the following concerns about returning Fetty to work: staff morale; the safety of Fetty while working with the public as the alleged incident was reported in the media; how Fetty would respond (as a police officer) to an incident of alleged sexual violence; how a victim or alleged victim of sexual violence would respond if Fetty worked on their case; and, in general about Fetty's integrity being questioned if he were returned to work and made calls for service as a police officer. (N.T. 49-57).

17. Krysia Kubiak, Esq., is the Solicitor and Chief Legal Officer of the City. Kubiak testified that the City's interpretation of the Colflesh Award is that there is no certain date which he has to be returned to work and that the City is to determine when it is practical to return him to work. (N.T. 10-21).

18. Kubiak testified that the City believes the issue of returning Fetty to work is complicated by the fact that the Family Court order issued against Fetty caused "complications on where to bring Mr. Fetty back to." Kubiak testified that the City was worried about liability for the City if it placed Fetty back on patrol, which was Fetty's position when he was terminated. (N.T. 15-18).

19. Kubiak testified that it was her determination that it was not practical to return Fetty to work at the time of the hearing. (N.T. 18).

DISCUSSION

The Union charges that the City committed an unfair labor practice when it failed to comply with the Colflesh 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); Fraternal Order of Police Lodge #5 v. City of Philadelphia, 34 PPER 22 (Final Order, 2003).

In 1987, Rule 1736 of the Rules of Appellate Procedure was amended to eliminate the automatic *supersedeas* or stay for political subdivisions on appeals from the common pleas court which has affirmed an arbitration award in a grievance. Pa.R.A.P. 1736. Thus, once an arbitration award has been affirmed by a common pleas court, the award becomes enforceable and the aggrieved employer has been stripped of its ability to delay compliance with the award by seeking further redress in subsequent appeals. City of Philadelphia, 32 PPER ¶ 32102 (Order Directing Remand to Secretary for Further Proceedings, 2001); City of Pittsburgh, PERA-C-20-141-W (Final Order, 2023).

Parties cannot collaterally attack arbitration awards in unfair labor practice enforcement proceedings before the PLRB. City of Pittsburgh, PERA-C-20-141-W (Final Order, 2023); PLRB v. Commonwealth, 387 A.2d 475 (Pa. Cmwlth. 1978).

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 construing the arbitrator's decision, the Board is limited to a review of the four corners of the award. Fraternal Order of Police Lodge #5 v. City of Philadelphia, 34 PPER 22 (Final Order, 2003).

In this matter, the record is clear that the Colflesh Award exists, that it is final and binding, and that the City has not complied. The fact that the Colflesh Award exists is not contested. With respect to whether it is final and binding, the record shows that the Allegheny County Court of Common Pleas affirmed the Colflesh Award on April 20, 2023. This is the date the Colflesh Award became final and binding pursuant to Pennsylvania law. The fact that the City has not put Fetty back to work or paid him any back pay is not contested. What is contested in this case is whether the City's

refusal to put Ferry back to work or comply with the Award in any way is a refusal to implement the award.

The City relies on the language in the Award which states "The City shall reinstate him to his pre-termination paygrade and duty **as soon as practical**. . . ." (emphasis added). In the City's opening statement at the hearing, counsel for the City argued:

This language as soon as practical does not say that he must be returned immediately. This language as soon as practical does not even mean that the City must return him to work within one month or . . . two months. In fact, as soon as practical, which was the language of the arbitration panel, does not give a timetable for when to reinstate Mr. Fetty. In its complaint, the FOP has claimed that the City has not returned Mr. Fetty to work, and the City is not disputing that it has not returned Mr. Fetty to work. However, there are certain affirmative defenses for why the City has not taken the action of returning him to work. Specifically, the [arbitration] award does not direct the City to act within a specific timetable. Simply, it states to return him to work as soon as practical.

So what we have here, Mr. Examiner, is the FOP is asking you to interpret what as soon as practical means. However, the FOP had an opportunity to seek clarity from the arbitrator, which it did not, including seeking clarity from one of the attorneys that sits on their own firm as to what as soon as practical meant. And therefore that term in the agreement remains undefined. . . .

[T]he evidence will establish that it is not practical to return Mr. Fetty back to work based on the conduct or his misconduct. And the City will respectfully request that this [Hearing Examiner] find that the City did not repudiate the contract, [and] that it is actually in compliance.

(N.T. 37-39).

The City then supported this argument with testimony from Kubiak and Vinansky who both testified in support of the idea that returning Fetty to work was impractical.

The Union argues in its Brief at 14:

[T]he City, citing the Award language, contends that it is not "practical" to reinstate Fetty at this time. Kubiak testified that the Award provides only that the City can determine when it is practical to reinstate Fetty. This is a misrepresentation of the Award. The Award provides that Fetty shall be reinstated when practical, not when practical "as determined by the City." That would provide the City boundless power to determine when it will or will not abide by an

arbitrator's decision. Moreover, the language of the Award requires [that] Fetty be reinstated to City employment "as soon as practical," not "whenever" practical for the City. The significant time that has passed since the April 20, 2023 Award is clear to show that the City repudiates the Award.

I agree with the Union. The important facts on this issue are that the City put Fetty back to work in Zone One in September 2021, and he worked there until September 2022. The record shows that he worked in Zone One without any issue. Fetty worked in Zone One after December 30, 2021, when Fetty's accuser filed an emergency motion for Sexual Violence Abuse Order based on the same set of June 2021 allegations for which Officer Fetty was disciplined earlier in the year. He worked in Zone One after the Family Court issued a temporary restraining order on December 31, 2021. And he worked in Zone One after the Family Court issued a Final Order for Protection of Victims of Sexual Violence on March 23, 2022, against Fetty. Other than the general concerns of Vinansky and Kubiak, there is no evidence of record that shows that any of these incidents made it impractical for Fetty to work in Zone One. Indeed, Vinansky testified that there were no complaints about Fetty when he worked in Zone One for approximately one year until he was terminated in September 2022. The record shows that it is practical for Fetty to work in Zone One.¹

Therefore, I do not find the City's argument that it is impractical to return Fetty to work to be persuasive.

In its Brief at pages 6-10, the City turns to technical arguments of interpretation based on the Award's alleged ambiguity. The Board has held "[i]f the language of an arbitration award is ambiguous and [the Board] therefore is not able to state with any assurance that the award has not been complied with, a charge alleging noncompliance must be dismissed because the charging party has the burden of proving noncompliance." Pennsylvania Department of Labor & Industry, 17 PPER ¶ 17177 (Final Order, 1986); see also AFSCME Local 197 v. City of Philadelphia, Office of Housing & Community Development, 24 PPER ¶ 24052 (Final Order, 1993) ("[I]f upon review of the award as a whole the Board is unable to discern the intent of the arbitrator and the award is therefore ambiguous, the Board will dismiss an unfair practice charge alleging non-compliance with the award.")

I do not agree with the City that the Award is ambiguous. The Award is specific enough to determine if the City has complied and the City has unambiguously refused to comply with the Award. As the City points out, ambiguity exists where there is more than one reasonable interpretation of an arbitration award. However, I do not find that the City's interpretations of the Award to be reasonable. Based on the record as a whole, and relying on the information in the four corners of the Award, I find that the Award's language is clear. The Award uses the word "soon" in "as soon as practical". Soon means in a short amount of time, shortly, or in the near future. Contrary to the City's arguments, the Award does not say "when the City determines it to be practical" and I find such interpretations to be unreasonable. The City's interpretation that the Award "does not give a

¹ Fetty worked for approximately one year in Zone One under a last chance agreement. The record indicates that when the City returns Fetty to work, he will still be under a last chance agreement for a significant period of time.

timetable" for returning Fetty to work is completely unreasonable. The fact that the Colflesh Award used the word "soon" means that Fetty shall be returned to work as quickly as possible. The City's interpretation that it has indefinite discretion is a complete misreading of the Award.

The word "practical" in "as soon as practical" is also clear in the context of the Award. There is no ambiguity. As discussed above, Fetty had already been returned to work and had worked without issue (under a last chance agreement) during all of the events which preceded his termination. It is clearly practical, possible, viable, workable, and feasible to return him to work since he already worked without issue for substantial periods of time in the same conditions the City now claims are impractical. The City's claims of impracticality have no significant support in the record and I am not persuaded by them. Therefore, the City's interpretation that it is not practical to return Fetty to work is unreasonable and not evidence of any ambiguity in the Award.

Taken together, the phrase "as soon as practical" has clear meaning within the context of the Award: the Award directs the City to put Fetty back to work as quickly as possible. At the time of the hearing, which was over ten months from the date of the Award, the City had not done so and had shown no intention to do so. Thus, the City has unambiguously failed or refused to properly implement the Award.

This Proposed Decision and Order will order the City to return Fetty to work immediately. The date of this Proposed Decision and Order will be over fourteen months from the issuance of the Colflesh Award. The City shall also fully comply with the additional language of the Colflesh Award including, but not limited to, back-pay from the beginning of Fetty's suspension in September 2022 to the day he is returned to work, while accounting for offsets, if any exist, with six percent *per annum* interest calculated from when Fetty was suspended and terminated in September 2022.

CONCLUSIONS

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

1. The City is a public employer and political subdivision under Act 111 as read *in pari materia* with the PLRA.
2. The Union is a labor organization under Act 111 as read *in pari materia* with the PLRA.
3. The Board has jurisdiction over the parties hereto.
4. The City has committed unfair labor practices in violation of Section 6(1) (a) and (e) of the PLRA and 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 City shall:

1. Cease and desist from interfering with, 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 employe representative which is the exclusive representative of employes 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 the PLRA and Act 111:

(a) Immediately comply with the Colflesh Award including, but not limited to, by immediately reinstating Fetty and making him whole pursuant to the Colflesh Award with six percent *per annum* interest.

(b) 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;

(c) 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

(d) 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 with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty days of the date hereof, this decision and order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this first day of February, 2024.

PENNSYLVANIA LABOR RELATIONS BOARD

Stephen A. Helmerich, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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

AFFIDAVIT OF COMPLIANCE

The City of Pittsburgh hereby certifies that it has ceased and desisted from its violations of Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act; that it has complied with the Proposed Decision and Order as directed therein; that it immediately complied with the Colflesh Award including, but not limited to, by immediately reinstating Fetty and making him whole pursuant to the Colflesh Award with six percent *per annum* interest; 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

Title

Date

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

Signature of Notary Public