

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

UTILITY WORKERS UNION OF AMERICA, :
AFL-CIO LOCAL 433 :
 : CASE NO. PERA-C-23-108-W
 v. :
 :
 THE CITY OF MCKEESPORT AND THE :
 MUNICIPAL AUTHORITY OF THE CITY OF :
 MCKEESPORT :

PROPOSED DECISION AND ORDER

On May 4, 2023, Utility Workers Union of America, AFL-CIO Local 433 (UWA or Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the City of McKeesport (City) and the Municipal Authority of the City of McKeesport (Authority) violated Section 1201(a)(1), (5) and (8) of the Public Employe Relations Act (PERA or Act) by failing to comply with an arbitration award.

On June 13, 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 August 25, 2023, in Pittsburgh, as the time and place of hearing.

The hearing was continued once and held on November 3, 2023, in Pittsburgh, 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. The Union filed its post-hearing brief on January 16, 2024. The City and Authority filed a post-hearing brief on February 13, 2024.

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

FINDINGS OF FACT

1. The City of McKeesport and the Municipal Authority of the City of McKeesport are public employers within the meaning of Section 301(1) of PERA. (N.T. 13).
2. The Union is an employe organization within the meaning of Section 301(3) of PERA. The Union was the certified representative of the Authority's sewage production and sewage maintenance employes. The Authority provided sewage service to McKeesport. (N.T. 13; Union Exhibit 1).
3. The Union and the Authority were subject to a collective bargaining agreement (CBA) with the effective dates of January 1, 2017, through December 31, 2017. This was the last CBA between the parties prior to the sale of the Authority to Pennsylvania American Water Company (PAWC). (N.T. 18; Union Exhibit 1).

4. On December 18, 2017, the City sold the assets of the Authority to PAWC. PAWC is not a public employer. (N.T. 16).

5. Prior to the completion of the sale of the assets of the Authority to PAWC, the Union and the City disputed the payment of earned vacation and sick time for the bargaining-unit members. Specifically, the Union believed that vacation and sick time should have been paid to the bargaining-unit members upon the completion of the sale of the assets of the Authority to PAWC. The Union filed a grievance over the issue. (N.T. 16-17).

6. The Union's grievance was filed on December 7, 2017. After delays, on February 23, 2021, Arbitrator Bernard Fabian issued an Award (Fabian Award) in favor of the Union over the grievance issued of the failure to pay earned vacation and sick pay. The Fabian Award states in relevant part:

SPECIFIC BACKGROUND

. . .

On December 15, 2017, all [Union] employees were advised by letter that their employment would terminate with the Authority on December 18, 2017. . . .

. . .

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

. . .

DISCUSSION AND OPINION

This arbitration decision only deals with the grievance that was filed by [the Union] on December 7, 2017 under the CBA between the Authority and UWA [with the effective dates of] January 1, 2017 through December 31, 2017. . . .

Having found that the grievance is arbitrable, we must look at the specifics of the grievance. Anyone involved knew for certainty that the sale was going to happen. The question was when and what earned benefits would flow to

the employees as a result of such sale. Counsel for [the Union] was asking the Authority's Solicitor what was going to be their position of the payment of benefits, namely vacation and sick time. He, however, was not getting a response. The grievance, therefore, was filed but was not recognized as a grievance by the Authority, not answered and generally left in limbo.

. . .

However, grievances filed before an entity ceases to exist or [is] sold, etc., can still be processed through the grievance procedure. The remaining Party or successor for such a sale is responsible for the processing of the grievance. . . . Moreover, the City has recognized that they are responsible for the demise of the Authority and any liabilities accruing therefore.

As has been previously stated on many occasions, the [Union] was not a party to the asset sale agreement, but they were aware of it. In fact, negotiations for a CBA with the PAWC and the [Union] were in process and had been successfully concluded.

Historically, the CBA between the Parties, the Authority and [the Union], had been in effect for over 40 years. At the time the negotiations for the first CBA occurred, the Parties agreed on no vacation or sick entitlement for the first year of work. They also set January of the new year as the date to trigger the vesting or accrual of the previous year's work for vacation and sick time. . . . Over the years, the same scheme continued in effect for all successor CBA's. It is safe to say that the Parties did not envision when they were in those initial negotiations that the Authority would ever cease to exist, be sold or what would happen to employees.

The position that the vacation and sick benefits earned during the year but [did not vest or accrue] until January of the next year is what the City argues. Given the factual situation, this is form without substance. The basic concept of the vacation and sick benefits since the CBA inception has been that the benefits earned in the prior year worked, were eligible to be taken the following year. This compact was broken by the sale of the assets and the closing of the Authority by the City. The benefits, vacation and sick time are then due at that time. They had been previously earned through all but the last 13 days of the year.

The Authority has paid for prior work earned, earned vacation, and sick pay and such were paid for retirements, quits, discharges, etc., although the City challenged the testimony of the [Union Steward] for not having exhibits to prove this claim. But the claim and his testimony are credible Moreover, the testimony later in the hearing that the Authority's Solicitor confirmed that, when terminated, employees were paid out any back vacation and sick benefits.

Also, as stated in the CBA, the January 1 date of the new year is the "triggering" event for entitlement of earned vacation and sick pay from the prior year's work. But also, in my opinion, a triggering event must also be the sale of the Authority, the termination of employment for the employees and the dissolution of the prior controlling CBA.

Although the [Union] was not a party to the ASA, it was continually asking about the earned benefits that would flow to employees upon the sales' consummation. The December 18, 2017 date is controlling the ASA, but in my opinion, it is no accident that it is two weeks prior to the January 1 date. The January 1 date being the triggering date in prior years for vacation and sick benefits to accrue and vest for the prior year's work effort. If the sale date had been days later, there would not be dispute as to the validity of the [Union]'s grievance or claim. A 20-year employee, under the City's argument would have received vacation pay for 19 years of service and not the 20 years that he actually worked for lack of a 14 day total of the entire year. Such argument and claim cannot be upheld.

. . . [The City claims] that PAWC paid for the vacation and sick benefits in 2018. But, that is part of a separate CBA between the PAWC and [the Union] and not part of this grievance.

Moreover, it was testified to at the hearing that the concept of earning vacation/sick benefits was changed in the new agreement between [the Union] and the PAWC. In any event, that did not abrogate the City from making employees whole for what they earned under the previous vacation/sick scheme that was in the CBA with the Authority.

Therefore, it is my opinion that the demise of the Authority and its CBA did trigger the eligibility for the employees to have their prior year of work service credited and vested for

vacation eligibility and sick pay benefits. Such a triggering event did occur on December 18, 2017, and the employees, therefore, became eligible for same as if it was in fact 13 days later on January 1 [2018].

Therefore, the City as the surviving entity is responsible for the liability of the Authority and is required to make the employees whole for earned vacation and sick benefits that they earned for the work year of 2017.

AWARD

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

(N.T. 18; Union Exhibit 2).

7. The City unsuccessfully appealed the Fabian Award and, eventually, exhausted its appeals. The Union demanded that the City comply with the Fabian Award. (N.T. 19-22).

8. As of the date of the hearing, the City has not complied at all with the Fabian Award. (N.T. 19, 25).

9. David DeNardo worked for the Authority for over 35 years. He was employed by the Authority at the end of 2017 when the Authority was sold to PAWC. He was a member of the Union and was serving as Vice President of the Union at the end of 2017. He had been Vice President for over 27 years. (N.T. 15-16, 43).

10. At the end of 2017, DeNardo requested and received from the Authority a document called Vacation Seniority List. This document shows how much vacation time bargaining-unit members had earned in 2017 for 2018. That is, it is the amount of vacation time they would have accrued on January 1, 2018, based on their years of service. Per the CBA, no unused vacation can be carried over from one year to the next. Vacation is computed on the basis of a forty-hour work week of five eight-hour days. (N.T. 26-29; Union Exhibit 1, Union Exhibit 4).

11. At the end of 2017, DeNardo requested and received from the Authority a spreadsheet with bargaining-unit members' used and unused sick time from 2017. This spreadsheet shows how many sick days an employe had used in 2017, the date on which the particular sick day was used, and a total of "banked" sick days rolled over from the previous year. Employes could carryover up to five sick days per year and employes could never have more than fifteen sick days in the bank. (That is, while an employe's bank could be as much as 15 days, they can only add five unused sick days to the bank per year.) If the employe had more than fifteen sick days in the bank, the Authority would pay the employe for up to five of those sick days per year. Any amount over this five would expire. Employees receive ten sick days per year and would have received ten new sick days on January 1, 2018. The spreadsheet contains "X"s in some entries instead of dates. These "X"s

refer to sick days used but no particular date was recorded. (N.T. 29-35, 53-54, 57-58, 59-72; Union Exhibit 1 pages 15-16).

12. DeNardo received paystubs for the bargaining unit members from the Authority. The pay stubs produced at the hearing are from the end of 2017 and are the last full statements before the sale of the Authority. The hourly rates in each stub reflect base rates of pay and also supplemental and incentive rates. When employees are paid sick or vacation time, they are paid their base rate. (N.T. 35-43, 61-62).

13. Almost all bargaining-unit members became employees of PAWC on the transfer of the Authority to PAWC. A few bargaining-unit members did not join PAWC or retired. The Union represented the bargaining-unit members with PAWC and negotiated a CBA with PAWC (PAWC CBA) that took effect December 19, 2017. (N.T. 44, 75-77; Union Exhibit 2).

DISCUSSION

The Union charges that the City committed an unfair practice when it failed to comply with the Fabian Award.¹ 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).

It is not contested that the Fabian Award exists.

The City argues at pages 5-6 in its Brief that, generally, there is no unfair practice in this matter because the Fabian Award is not "final" since there is a genuine dispute over the calculation of damages.² However, the record shows that the City appealed the Fabian Award and by the time of the hearing had completely exhausted all appeals. The City produced no evidence of a stay or supersedeas. The Fabian Award is final. City of Philadelphia, 32 PPER ¶ 32102 (Order Directing Remand to Secretary for Further Proceedings, 2001). A

¹The charge also includes the Municipal Authority of the City of McKeesport as a respondent in addition to the City. The record shows that for all intents and purposes the Municipal Authority of the City of McKeesport is defunct and that the City has accepted successor liability. For the purposes of clear exposition, this Proposed Decision and Order will focus on the City. However, this Proposed Decision and Order applies both to the City of McKeesport and the Municipal Authority of the City of McKeesport, to the extent it still exists, and the Authority is included with the City in the Conclusions below.

²The City also argues at pages 6-7 of its Brief that the proper forum for this dispute is before an arbitrator and that the Union is attempting to bypass the mandatory arbitration process. This argument has been raised by parties to unfair practice proceedings and has been rejected by the Board. Palmerton Area School District, 33 PPER ¶ 33163 (Final Order, 2002); Plum Borough Education Association v. Plum Borough School District, 54 PPER ¶ 60 (Proposed Decision and Order, 2023).

dispute over damages or remedy does not suspend the finality of an award.

The Union put on persuasive and credible evidence that the City has never complied with the award. The City did not produce any evidence that it has ever complied with the award. Therefore, the Fabian Award exists, is final, and the City has not complied. The City has committed an unfair practice by violating Section 1201(a) (1), (5) and (8) of the Act.

Moving to the remedy in this matter, the Fabian Award found that the City has the duty to "[make the] employees whole for what they earned under the previous vacation/sick scheme that was in the CBA with the Authority". The Fabian Award then orders the City to "make the employees whole for earned vacation and sick benefits that they earned for the work year of 2017" and to pay the bargaining-unit members "their earned vacation pay and sick benefits for the year and service for 2017".

The Union argues in its Brief at page 6:

[U]nder the Fabian Award, the Union's members are entitled to payment for the value of the following vacation/sick time: (1) all vacation time they would have received in 2018 but for the sale of the Authority (their 2018 annual allotment of vacation time earned through work in 2017), (2) all sick time they would have received in 2018 but for the sale of the Authority (their 2018 annual allotment of sick time earned through work in 2017 + number of unused sick days from 2017 + number of sick days in the sick bank).

(Internal citations omitted.)

An expert witness was used by the Union for a calculation of damages owed by the City to bargaining-unit members. I do not rely on the expert witness of the Union because I do not need the expert witness's opinion to understand the issues in this matter. Pa.R.E. 702(b). The calculation of wages and benefits owed in a remedy is well within the expertise of the Hearing Examiners of the Board.

Against the Union's argument, the City argues in its Brief at pages 11-12 that the damages to the bargaining-unit members are illusory and that they have already been "made whole" through interim earnings from PAWC. The Employer also argues at pages 8-11 that, generally, the evidence provided by the Union at the hearing with respect to vacation and sick time is unreliable and insufficient to show damages.

With respect to the City's argument that the bargaining-unit members have already been made whole by interim earnings, the record shows that bargaining-unit members earned vacation and sick time throughout the year to be used the next year. They accrued benefits by working through the year and were owed the benefits once earned. Earned and unused vacation and sick time benefits were paid out to bargaining-unit members when they retired, left employment, or were

terminated by the Authority. As the Fabian Award found, the Authority terminated the employment of the bargaining-unit members and the City, as successor to the Authority, owes the bargaining-unit members what they earned in 2017 as if they were terminated on January 1, 2018. The City has not provided sufficient evidence to conclude that the PAWC CBA recognized and paid for the benefits that were earned in 2017.³ Therefore, I find it would be improper to offset the benefits the bargaining-unit members earned in 2017 by any vacation or sick days they may have earned in 2018 or any other time.

With respect to the City's argument that the evidence provided is unreliable, I find that the Union provided credible evidence and testimony that is sufficient for me to determine the contractual vacation and sick days bargaining-unit members earned in 2017 for use in 2018. The Union also provided credible testimony and evidence sufficient for me to determine the bargaining-unit members contractual rate of pay that can be used to determine a dollar value for any vacation or sick day.

I have thoroughly gone through the record and calculated the damages owed using the numbers provided in Findings of Fact #10-12 above and such calculations are put forth below.⁴ Thus, relying on my calculations based on the Fabian Award and the record in the matter, I conclude that the City owes the following to bargaining-unit members:

³Specifically, I do not find the testimony at N.T. 76-77 to be sufficient evidence to conclude that the City is entitled to interim earnings offsets. I find that this testimony at most shows that the bargaining-unit members bargained for sick days and vacation days with PAWC. There is no evidence in the record to show how these sick and vacation days accrued and if PAWC recognized and paid for the sick and vacation days the bargaining-unit members earned in 2017.

⁴I calculated sick days earned as follows. First, every bargaining-unit member earned ten sick days for reaching January 1, 2018 (per the Fabian Award). Second, using Union Exhibit 5, I credited each bargaining-unit member for any days listed in the far right "Banked Sick Days" column. Finally, I added up to five unused sick days for 2017, again using Union Exhibit 5. For some bargaining-unit members this would bring them above the fifteen-day limit of banked sick days, however the record shows the Authority would pay for up to five additional carried-over days (with any additional above this expiring). This would give a maximum total of thirty earned sick days per bargaining-unit member as of January 1, 2018, owed by the City per the Fabian Award.

Last Name	2017 Earned Vacation Days ⁵	2017 Earned Sick Days ⁶	2017 Base Hourly Rate ⁷	Total Owed (before interest) ⁸
Alfer	15	16	\$25.32	\$6,279.36
Anderson	20	13	\$25.32	\$6,684.48
Bosnak	15	20	\$25.32	\$7,089.60
Brancato	20	11	\$27.68	\$6,864.64
Chaverini	20	15	\$28.54	\$7,991.20
Clemente	30	18	\$29.05	\$11,155.20
Denardo	30	18	\$29.05	\$11,155.20
Duffy	20	20	\$28.54	\$9,132.80
Ernst	15	11	\$27.68	\$5,757.44
Frederick	15	10	\$26.23	\$5,246.00
Garanski	15	13	\$20.46	\$4,583.04
Gillie	15	22	\$29.56	\$8,749.76
Hammerstrom	25	15	\$27.19	\$8,700.80
Hampton	15	12	\$20.46	\$4,419.36
Kaminsky	20	22	\$26.23	\$8,813.28
Mallas	15	10	\$25.32	\$5,064.00
Martin	15	12	\$27.68	\$5,978.88
McCall	15	10	\$26.23	\$5,246.00
Moorfield	20	10	\$23.15	\$5,556.00
Morrissey	10	30	\$27.68	\$8,857.60
Nesbit	15	10	\$21.20	\$4,240.00
Pollock	20	30	\$27.68	\$11,072.00
Shermetti	15	10	\$31.03	\$6,206.00
Smith	15	10	\$20.46	\$4,092.00
Steele	15	17	\$20.46	\$5,237.76
Stein	25	30	\$27.68	\$12,179.20
Swartz	15	12	\$29.56	\$6,384.96
Tedesco	10	20	\$27.68	\$6,643.20
Toth	20	20	\$26.23	\$8,393.60
Wassel	15	10	\$23.15	\$4,630.00
Wright	15	10	\$23.15	\$4,630.00

Therefore, in order to comply with the Fabian Award, the City must immediately pay the bargaining-unit members the amounts listed above. The City shall also pay the bargaining-unit members 6% interest *per annum* on any amount owed to them calculated from December 18, 2017, to the date of payment. This will make the bargaining-unit members whole per the Fabian Award.

CONCLUSIONS

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

⁵ Finding of Fact # 10.

⁶ Finding of Fact # 11.

⁷ Finding of Fact # 12. Where multiple regular or base rates were listed on a paystub, I use the lowest hourly rate listed unless the pay stub noted a new base rate.

⁸ This total is calculated by: (number of vacation days + number of sick days) * 8 (hours per working day) * base hourly rate = Total Owed.

1. The City of McKeesport and the Municipal Authority of the City of McKeesport are public employers within the meaning of Section 301(1) of PERA.

2. The Union 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 McKeesport and the Municipal Authority of the City of McKeesport have committed unfair practices in violation of Section 1201(a) (1), (5) and (8) of PERA.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the City of McKeesport and the Municipal Authority of the City of McKeesport 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 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. Cease and desist from refusing to comply with the provisions of an arbitration award deemed binding under section 903 of Article IX.

4. Take the following affirmative action:

(a) Immediately make the bargaining-unit members whole by paying them the amounts listed in the discussion section of this Proposed Decision and Order together with 6% interest *per annum* calculated from December 18, 2017, to the date of payment;

(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 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 twenty-sixth day of March, 2024.

PENNSYLVANIA LABOR RELATIONS BOARD

/s/ Stephen A. Helmerich
STEPHEN A. HELMERICH, Hearing Examiner

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AFFIDAVIT OF COMPLIANCE

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