

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE :
LODGE NO. 5 :
 :
v. : CASE NO. PF-C-24-35-E
 :
CITY OF PHILADELPHIA :

PROPOSED DECISION AND ORDER

On April 23, 2024, the Fraternal Order of Police, Lodge No. 5 (Union or FOP) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) alleging that the City of Philadelphia (City) violated Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA), as read with Act 111. The Union specifically alleges that the City refused to comply with a final and binding Act 111 grievance arbitration award reinstating and making whole Officer James Saxton. The Union alleges that, although the City has reinstated Officer Saxton, it has not timely issued his backpay.

On May 15, 2024, the Secretary of the Board issued a Complaint and Notice of Hearing designating a hearing date of Friday, September 27, 2024, in Harrisburg. The parties subsequently agreed to conduct the hearing via Microsoft Teams video. During the video hearing on that date, both parties were afforded a full and fair opportunity to present documents and testimony and to cross-examine witnesses. Both parties presented oral closing arguments at the end of the hearing in lieu of filing written post-hearing briefs.

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

FINDINGS OF FACT

1. The City is a public employer and political subdivision within the meaning of Act 111, as read with the PLRA. (N.T. 6)

2. The Union is a labor organization within the meaning of Act 111, as read with the PLRA. (N.T. 6)

3. James Saxton is a police officer with the City's Police Department (Department). The City terminated Officer Saxton, in April 2021, upon his arrest. The day of his termination, the FOP filed a grievance on his behalf. (N.T. 11, 18-19; JX-1; JX-2)

4. On March 27, 2023, the parties entered into a Memorandum of Agreement (MOA), which gives the City 90 days from the date that all required documents are received from the affected FOP member to pay backpay and other financial damages arising from an arbitration award or settlement agreement. The parties also agreed that no delay damages will accrue before the 91st day. The MOA further provides that the City will better staff its Finance and Human Resources Teams to better process awards and settlements. (N.T. 28-30; JX-3)

5. On October 5, 2023, Arbitrator Tim Brown issued an Award wherein he concluded that the City failed to meet its burden of establishing just cause for Officer Saxton's discharge. Arbitrator Brown stated that he was not persuaded that Saxton's arrest demonstrated that he engaged in the conduct of which he was accused and that his arrest was an insufficient basis to establish just cause for termination. Arbitrator Brown also concluded that the City failed to demonstrate that Officer Saxton engaged in the conduct alleged or that he engaged in any crime. Arbitrator Brown rescinded the discharge, and he ordered the City to reinstate Officer Saxton, expunge his disciplinary record, and make Officer Saxton whole for lost wages, overtime, benefits, and seniority. (N.T. 12, 25; JX-1)

6. In October 2023, upon receiving the Brown Award, Captain Gregory Malkowski sent the Award to the Department's financial personnel with an implementation memo. (N.T. 27)

7. Officer Saxton was reinstated in November 2023. The City and the MOA require successful grievants to produce financial documents to determine offsets for interim earnings and unemployment compensation during the backpay period. (N.T. 12-13)

8. Officer Saxton compiled his financial documents in anticipation of the Award, and his documents were ready when the Award was issued. The Police Financial Unit requires an appointment with the grievant to present the documents in person. Officer Saxton could not obtain an appointment for 2 months after the Brown Award. (N.T. 14-15)

9. On December 22, 2023, Officer Saxton physically provided his financial documentation to Melissa Lumpkin at the Department's Financial Unit, and the documents were notarized. Unemployment Compensation constituted the only interim earnings received by Officer Saxton. (N.T. 19-21)

10. The City generally makes in person appointments for presenting documentation 2-3 months after arbitration awards. Personnel in the Department's Financial Unit typically do not answer phones to set up appointments and have ignored emails further delaying payments. (N.T. 30-31)

11. At some point, the City disputed the backpay period positing that the Arbitrator signaled that Officer Saxton was not entitled to backpay for the period of time that he was facing criminal charges. (N.T. 14-15)

12. The parties mutually agreed to return to Arbitrator Brown to clarify the backpay period. On March 12, 2024, Arbitrator Brown issued a Supplemental Award wherein he explicitly defined the backpay period, for purposes of making Officer Saxton whole, to run from the date of his termination to the date of his reinstatement and not from the later date of his acquittal to the date of his reinstatement. Arbitrator Brown also explained that the City was attempting to relitigate just cause by offering additional, new reasons for terminating Officer Saxton. (N.T. 15-16, 26; JX-2)

13. The City did not appeal the October 5, 2023 Award or the March 12, 2024 Supplemental Award. As of the date of the hearing on September 27, 2024, the City had not paid Officer Saxton any amount of backpay. The City does not issue partial backpay payments when it disputes the amount of backpay owed. (N.T. 16-17)

DISCUSSION

Where the refusal to comply with an arbitration award is alleged, the Board's inquiry is limited to determining whether an award exists; whether the appeal period has expired; and whether 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 Brown Award exists. The Brown Award became final and binding when the appeal period lapsed without appeal. Indeed, the City now agrees that it owes backpay to Officer Saxton from the date of his termination until the date of his reinstatement. The City has also represented on the record that the backpay calculation is not in dispute at this time. The City even agrees that some interest should be awarded on the backpay because of the delay in paying Officer Saxton. The parties, however, disagree over when the interest period should begin to run. The City contends that, under the MOA, the City does not have to start paying Officer Saxton until the 91st day after the Supplemental Brown Award dated March 12, 2024, which resolved the backpay dispute and triggered the 90-day period. The FOP contends that the 90-day period began when Officer Saxton presented his documentation to Miss Lumpkin on December 22, 2023.

In Fraternal Order of Police, Lodge 5 v. City of Philadelphia, 27 PPER 27202 (Final Order, 1996), the Board stated: "to determine whether a particular lapse of time is a reasonable period for compliance with an arbitration award, the Board will consider such factors as (1) the nature and complexity of the compliance required under the award, (2) the length of time before compliance occurred, (3) the employer's ability to comply with the award including legitimate obstacles to compliance, (4) steps taken by the employer toward compliance, and (5) the employer's explanation or lack thereof for the delay." Id. at 463. The question thus becomes whether the City's dispute with the Union over whether Officer Saxton's backpay period began with his termination or his acquittal, under the terms of the Brown Award, constituted a legitimate explanation, obstacle to compliance, or interference with the City's ability to comply, justifying a delay of over 9 months.

There is no fair or reasonable reading of the Brown Award that justified the City's position that Arbitrator Brown in any way "signaled" that Officer Saxton may not be entitled to backpay for the time of his pending charges. Indeed, the City relied on other arbitration awards during the second arbitration, which Arbitrator Brown rejected, for the proposition that the pending charges against Officer Saxton reduced his make-whole remedy. The City's delay tactics in paying Officer Saxton were as unjust and unfair as was its termination of Officer Saxton, as noted by Arbitrator Brown.

The unreasonableness of the City's position, that the backpay period began with acquittal, is made obvious by the language in the original Award. Arbitrator Brown stated that he was not persuaded that Saxton's arrest demonstrated that he engaged in the conduct of which he was accused and that his arrest was an insufficient basis to establish just cause for termination. Arbitrator Brown ultimately concluded that the City lacked just cause for dismissal, which occurred upon Officer Saxton's arrest. He ordered that Officer Saxton's discharge be rescinded and that his record be expunged. In this context, the October 5, 2023 Award does not even suggest that the Arbitrator considered the backpay period to begin after acquittal thereby

reducing his make-whole remedy. Arbitrator Brown knew that Saxton's termination coincided with his arrest and charges. Arbitrator Brown remedied the discharge with make whole, rescission, and expungement, which by definition all flow from the date of discharge. As noted by Arbitrator Brown in his Supplemental Award, "make whole" is a term of art that means placing the grievant in the same position that he/she would have been in had the grievant not been unlawfully terminated. If Officer Saxton had not been unlawfully terminated, the pending charges would not have affected his ability to continuing working as a police officer. If the City allowed him to continue working, his income and his benefits would not have been affected, unless or until there would have been a conviction, which never occurred. Any award that would reduce a backpay period to begin after acquittal, in contravention to the meaning of traditional make whole, would certainly have to explicitly state as much, and the Brown Award does not.

Thus, the 90-day grace period for the City to pay Officer Saxton his backpay began to run from December 22, 2023, when he met with Ms. Lumpkin in the Financial Unit and had his financial documents notarized. The MOA does not provide the City with any extensions on the 90-day grace period for disputing a backpay calculation or for any other reason. Were it not for the MOA, under Board law, even the 90-day grace period would be an unreasonable amount of time, and the Board would award interest back to October 5, 2023. Fraternal Order of Police, Lodge 5 v. City of Philadelphia, 41 PPER 134 (PDO, 2010). The October 5, 2023 Award could not be more clear. The City unreasonably contested the backpay period in an attempt to relitigate just cause, not to justifiably seek clarification of the remedy.^{1 2}

Accordingly, the City has violated Section 6(1)(a) and (e) of the PLRA by failing to comply with the Brown Award within a reasonable time. The City has also violated the negotiated MOA, by failing to issue backpay to Officer Saxton within 90 days from the financial document exchange and by failing to honor its promise to have sufficient Financial and Human Resources staff to timely process awards and settlement agreements.

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 a political subdivision within the meaning of the PLRA as read in pari materia with Act 111.

¹ The City argued before Arbitrator Brown that Officer Saxton could not maintain his Municipal Police Officer Certification and testify as a police officer while charges were pending against him for untruthfulness, and thus he is not entitled to backpay for the period of pending charges. However, Arbitrator Brown found this position to be legally false. It is an officer's separation from municipal employment or conviction for untruthfulness that threatens the officer's certification and his inability to testify, not an arrest or pending charges alone. The City's unlawful termination of Officer Saxton rendered him unable to work as a police officer, not his arrest or the pending charges.

² Arbitrator Brown noted in his Supplemental Award that the City raised new arguments that were not raised in the original arbitration proceeding in an attempt to relitigate whether the City had just cause for termination.

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 City has violated Section 6(1) (a) and (e) 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 City 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 pay Officer Saxton all backpay and make him whole for any and all lost wages (including wage increases received by bargaining unit members during the period and interest during the period), overtime, out-of-pocket medical expenses, longevity pay, seniority, holiday pay, lost accrued vacation and sick time, as well as pension contributions from the date of his April 2021 termination until the date of his November 2023 reinstatement;

(b) Immediately pay Officer Saxton interest at the rate of 6% per annum on any and all outstanding backpay including the value of benefits, wages, overtime, and lost accrued leave. This interest period runs from the 91st day after December 22, 2023, i.e., March 22, 2024, until the date that the City issues all make-whole relief to Officer Saxton;

(c) Cease and desist from delaying appointments with successful grievants to present in person their financial documents and from refusing to answer phone calls and emails regarding the processing of appointments and compliance with awards and agreements in violation of the MOA;

(d) 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

(e) 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 ninth day of October, 2024.

PENNSYLVANIA LABOR RELATIONS BOARD

/S/Jack E. Marino

JACK E. MARINO
Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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AFFIDAVIT OF COMPLIANCE

The City of Philadelphia hereby certifies that it has ceased and desisted from its 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 paid all backpay and make whole relief to Officer Saxton as directed in the order herein for the period of time between the date of his termination in April 2021 until the date of his reinstatement in November 2023; that it has paid Officer Saxton interest at the rate of six percent per annum on the backpay owed from December 22, 2023 until the date of actual payment; that it has ceased delaying appointments with successful grievants to present in person their financial documents and ceased refusing to answer phone calls and emails regarding the processing of appointments and compliance in violation of the MOA; that it has posted a copy of the proposed decision and order in the manner prescribed therein; and that it has served a 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