

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

E.B. JERMYN LODGE NO. 2 :
FRATERNAL ORDER OF POLICE :
 :
v. : Case No. PF-C-05-101-E
 :
CITY OF SCRANTON :

FINAL ORDER

On October 1, 2007, the E.B. Jermyn Lodge No. 2 of the Fraternal Order of Police (FOP) filed a motion for compliance and/or sanctions with the Pennsylvania Labor Relations Board (Board) asserting that the City of Scranton (City) failed to comply with the Board's January 23, 2007 Final Order. The Board directed the matter to a Hearing Examiner, who conducted a hearing on January 23, 2008. After the Hearing Examiner granted several continuance requests by the parties, a second day of hearing was held on February 20, 2009. The FOP and the City filed post-hearing briefs in May 2009 and July 2009, respectively. The Hearing Examiner issued a Proposed Decision and Order (PDO) on June 7, 2010. On June 25, 2010, the City filed timely exceptions to the PDO with the Board,¹ and with an extension of time, filed a brief in support of the exceptions on July 13, 2010.² On August 3, 2010, the FOP filed a brief in response to the exceptions. After a thorough review of the exceptions and all matters of record, the Board makes the following:

AMENDED FINDINGS OF FACT

7. On May 11, 2003, the FOP initiated a grievance under the parties' contractual grievance arbitration procedure alleging that the City eliminated a number of contractually-required SIT positions. On September 13, 2004, Arbitrator Light found that "[o]n February 17, 2003, the Mayor eliminated seven SIT clerks and refused to fill the existing vacancy in the Detective Bureau." (Joint Exhibit 2 at 13-14; Light Award at 9).

12. That on July 15, 2005, the FOP filed a charge of unfair labor practices, alleging that the City failed and refused to comply with the Light Award.

13. That on October 30, 2006, the Hearing Examiner found that the City had failed to comply with the provisions of the Award and, accordingly, had violated Sections 6(1)(a) and (e) of the PLRA. In the October 30, 2006 PDO the Hearing Examiner found as fact as follows:

On September 13, 2004, Arbitrator Light issued his award in which he found that the City's "complete failure" to employ the designated number of additional SIT clerical employees specifically described in Paragraph X of the SIT Agreement violates the agreement and does not violate the City's obligations under Act 47. Accordingly, he sustained the grievance of the Union challenging that conduct on the part of the City.

The Hearing Examiner's remedy directed the City to "[i]mmediately comply with each and every provision of Arbitrator Light's Award dated September 13, 2004." City of Scranton, 37 PPER 150 (Proposed Decision and Order, 2006).

22. On August 17, 2007, the City hired six SIT clerks: one in Records Administration, one for the Deputy Chief/Captain, and four Desk Clerks. (N.T. 49-50).

DISCUSSION

¹ On June 28, 2010, the City filed a "Supplemental Exception". The City's Supplemental Exception is timely as well, as the twentieth day following issuance of the June 7, 2010 PDO was a Sunday. 34 Pa. Code. §95.100(b).

² By letter dated July 13, 2010, the City requested oral argument on the exceptions pending before the Board. Upon review, the City's request is denied. The issues raised by the City have been thoroughly addressed by the parties in their briefs on the exceptions.

The facts of this case relate back to a September 13, 2004 grievance arbitration award, and are summarized as follows. The City and the FOP have been parties to a series of collective bargaining agreements. The January 1, 1996 through December 31, 2002 contract contained an agreement referred to as the Strategic Implementation Team ("SIT") Agreement. This SIT Agreement provided for the civilianization of certain police functions, and states as follows:

CIVILIANIZATION OF POLICE DEPARTMENT FUNCTIONS

FOP agrees that designated bargaining unit work historically performed by Police officers may be performed by civilian employees to be employed by the City.

With the exception of the civilians working directly for the Chief of Police and Deputy Chief, all Civilians will be under direct command of the Administrative Support Lieutenant.

With the exception of the civilians working directly for the Chief of Police and Deputy Chief, civilian clericals will work in "pool" concept without specific task dedication.

To the extent necessary, additional civilians will be equipped with office equipment and other necessary supplied (sic) from fund, in accordance with the Recovery Plan developed by the PEL and will be phased into operation on a regular periodic basis over the course of the 1995, 1996 and 1997 fiscal years.

Civilians will work two shifts structured to meet the needs of the officers and detectives that they will serve.

Distribution of additional civilian employees within the Police Department as compared to existing complement:

	CURRENT	PROPOSE	ADD
1. Civilian Information Spec.	0	1	1
2. Clerk/Typist Detective-Days	1	1	0
3. Clerk/Typist Detective-Evening	0	1	1
4. Records/Administration	4	6	2
5. Training	0	1	1
6. Deputy Chief	0	1	1
7. Desk (2 for 2 shifts)	0	4	4
8. Grant Writer	0	1	1
TOTAL	5	16	11

On May 11, 2003, the FOP initiated a grievance under the parties' contractual grievance arbitration procedure alleging that the City eliminated a number of contractually-required SIT Clerk positions. On September 13, 2004, Arbitrator Robert Light issued an arbitration award in AAA Case No. 14 390 00644 03 sustaining the grievance filed by the FOP over the failure of the City to abide by the terms of the parties' SIT Agreement. Arbitrator Light specifically found that "[o]n February 17, 2003, the Mayor eliminated seven SIT clerks and refused to fill the existing vacancy in the Detective Bureau." (Light Award at 9). In his award, Arbitrator Light issued the following remedy:

The City violated the Collective Bargaining Agreement by failing to maintain the number of Clerks specifically provided in Paragraph XI(G) of the SIT Agreement. As the appropriate remedy:

1. The City's complete failure to employ the designated number of additional SIT clerical employees specifically described in Paragraph X(F)(sic) of the SIT Agreement violates that agreement and does not violate the City's obligations under Act 47. The grievance of Lodge No. 2 of the Fraternal Order of Police challenging that failure is granted.

2. In order to remedy the violations of Paragraph X are [sic] herein before stated, the City of Scranton is hereby directed to immediately take the following action:

A. Immediately employ not less than the additional SIT clerical positions of one "Clerk/Typist Detective-Evening" (Article XI, section G(3)), two additional SIT Clerks in "Records Administration" (Article XI, Section G(4)), one SIT Clerk for "Deputy Chief/Captain" (Article XI, Section G(6)), and four Additional SIT Clerks for the "Desk" (Article XI, Section G(7)) to perform the functions described in Paragraph X of the SIT Agreement to equip those employees with office space and equipment to perform the functions within the Police Department envisioned by the SIT Agreement; and

B. Until such time as the underlying contractual language is modified to otherwise provide, the City shall continue to employ the number of additional SIT Clerks as provided in the SIT Agreement and completely equip those employees with office space and equipment to perform the functions within the Police Department envisioned by the SIT Agreement; and

C. Make the FOP whole for the failure to continuously employ the eleven additional SIT clerical employees described in Article XI(G) of the SIT Agreement by paying to the members of the FOP bargaining unit who were on payroll at any time on and after February 14, 2003 (the date of the grievance) the full cash value of the wages and fringe benefits that would have been paid to the eleven additional SIT clericals that the City failed to employ during the duration of the January 1, 1999 contract.

D. In making those payments, the following conditions shall apply:

1. For purposes of computing the back pay it shall be assumed that each clerical thus employed was compensated at the then-prevailing arithmetic average of all SIT clerical classifications with the City.

2. The back payment due under this Order shall include not only the wage computed in accordance with (B) above, but also the full City cost of health insurance at the family level and the cash value of all other fringe benefits payable under the collective bargaining agreement between the City and IAM Lodge No. 2462.

3. The back pay shall be computed from the date that the City failed to employ the full complement of eleven additional SIT clerks starting with the duration of the agreement (January 1, 1999) until the appropriate number of clerical employees are actually on the payroll and shall include interest computed in accordance with Article XX(9) of the collective bargaining agreement between the City and FOP.

4. The back pay shall be distributed to FOP bargaining unit members who were on payroll with the city at any time on or after February 14, 2003 (including those on temporary work-related disability during that period) until such time as the city actually employs the appropriate number of clerical employees required by the SIT agreement. Each full month of service shall equal one unit. Each member's entitlement to the back pay shall be determined by dividing the total amount payable by the total number of units and then multiplying that members units by the result.

5. The City's failure to constantly employ the additional clerical employees as explicitly required by Paragraph XI of the SIT Agreement, as amended on May 14, 1999, is hereby declared to be in bad faith as provided by Article XX, Section (9) of the parties' collective bargaining agreement. Accordingly, the City is further directed to pay the FOP for reasonable attorneys' fees to be presented to the City within thirty days of the parties' receipt of this Award. To the extent that the fees are

not paid within thirty days after the date of such presentation, they shall thereafter bear interest in a [manner] to be computed with Article XX, Section 9 of the collective bargaining agreement."

The City filed a petition to vacate the Light Award in the Court of Common Pleas of Lackawanna County. This petition was denied, and the award was confirmed by the Court on June 22, 2005. Following the affirmance of the award by the Court of Common Pleas, the FOP filed a charge of unfair labor practices with the Board on July 15, 2005, alleging that the City failed and refused to comply with the Light Award in violation of Section 6(1)(a) and (e) of the PLRA.

While the unfair practice charge was pending before the Board, the City took a subsequent appeal of the award to the Commonwealth Court. On July 20, 2006, the Commonwealth Court, in a unanimous en banc decision, affirmed the decision of the Court of Common Pleas. City of Scranton v. E.B. Jermyn Lodge No. 2 of the Fraternal Order of Police, 903 A. 2d 129 (Pa. Cmwlth. 2006), *petition for allowance of appeal denied*, 591 Pa. 717, 919 A. 2d 959 (2007).

After the Commonwealth Court decision, the Board Hearing Examiner issued a Proposed Decision and Order on October 30, 2006. In the 2006 PDO, the Hearing Examiner concluded that the City violated Sections 6(1)(a) and (e) of the PLRA because the City had made no attempt at compliance with the Light Award. The Hearing Examiner found as follows:

On September 13, 2004, Arbitrator Light issued his award in which he found that the City's "complete failure" to employ the designated number of additional SIT clerical employees specifically described in Paragraph X of the SIT Agreement violates the agreement and does not violate the City's obligations under Act 47. Accordingly, he sustained the grievance of the Union challenging that conduct on the part of the City.

In remedying the unfair labor practice, the Hearing Examiner directed the City to "[i]mmediately comply with each and every provision of Arbitrator Light's Award dated September 13, 2004." City of Scranton, 37 PPER 150 (Proposed Decision and Order, 2006).

The City filed exceptions to the 2006 PDO. Upon review of those exceptions the Board issued a Final Order on January 23, 2007, affirming the findings and conclusions in the PDO. The City did not appeal the Final Order to the Commonwealth Court.

In June, 2007, because the City had still failed to take any steps toward compliance with the Light Award, counsel for the FOP contacted the Board to seek enforcement of its Final Order. After correspondence between the Board, the City, and the FOP in late June 2007, on August 13, 2007, the City hired six individuals to fill the following SIT Clerk positions: one in Records/Administration; one for the Deputy Chief/Captain; and four Desk Clerks.

Thereafter, in March, 2008, the City paid bargaining unit employees represented by the FOP backpay as required by the Award in the amount of \$954,261.02. The City arrived at that sum as follows:

SIT Salary	\$	23,946.35
No.of Positions		6
Annual Amt	\$	143,678.10

Salary Computation:

Positions Vacant

January 15, 2003 to August 13, 2007

2003	\$	137,691.51
2004		143,678.10
2005		143,678.10
2006		143,678.10

2007		<u>101,771.99</u>
Total Salary	\$	<u>670,497.80</u>
Bonus		
\$500 Paid in Dec. 2003	\$	3,000.00
\$600 Paid in Dec. 2004		3,600.00
\$800 Paid in Dec. 2005		4,800.00
\$900 Paid in Dec. 2006		<u>5,400.00</u>
Total Bonus	\$	<u>16,800.00</u>
Longevity		
2%	\$	2,753.83
2%		2,873.56
2%		4,310.34
2%		4,310.34
2%		<u>4,070.88</u>
Total Longevity	\$	<u>18,318.96</u>
GRAND TOTAL SALARY	\$	<u>705,616.76</u>

Healthcare Family Computation:

Family Coverage-Monthly Buyout Annual Amount

Healthcare-2003	\$	17,247.93
Healthcare-2004		17,997.84
Healthcare-2005		17,997.84
Healthcare-2006		17,997.84
Healthcare-2007		<u>12,748.47</u>
Total Healthcare	\$	<u>83,989.92</u>
TOTAL AWARD	\$	<u>789,606.68</u>
SIT Wages & Benefit Award	\$	789,606.68
Interest Rate		4.05%
No. of Days Owed		1,878
Amount of Interest	\$	<u>164,654.34</u>
TOTAL AWARD	\$	<u>954,261.02</u>

The FOP filed a Motion for Compliance proceedings with the Board on October 1, 2007. After two days of hearing on January 23, 2008 and February 20, 2009, and the filing of post-hearing briefs, the Hearing Examiner issued the June 7, 2010 PDO, in which he found that the City failed to comply with the Light Arbitration Award because it only hired six SIT Clerks. Additionally, the Hearing Examiner further noted that the City had not employed a SIT Clerk in the evenings in the Detective Unit since 1999, had immediately transferred one of the Records/Administration Clerks to the Chief's office in August of 2007, and since 2008 had directed the SIT Clerk in charge of grant writing to cease writing grants. The Hearing Examiner also found that the City failed to use the full cost of health care at the family level in its computation of monies due, that the City did not include overtime in back wages, and that the City improperly computed interest due under the Light Award. To comply with the arbitration award, the Hearing Examiner directed the City to hire three additional SIT Clerks, and to make a payment to the bargaining unit employees of \$1,722,537.85, minus the \$954,261.02 it has already paid the FOP. The Hearing Examiner further directed the City to recalculate the interest payment due under the Light Award, and directed an additional 6% interest on the amount due and owing for the City's failure to comply with the Board's Final Order.

The City filed timely exceptions to the Hearing Examiner's determination. In reviewing the exceptions and the facts of this case, it is well-established that an arbitration award

may not be collaterally attacked in an action for enforcement before the Board. Borough of Lewistown v. PLRB, 558 Pa. 141, 735 A.2d 1240 (1999). Moreover, issues that are not preserved by the filing of exceptions with the Board, or on appeal of the Board's Final Order, are waived. Township of Upper Saucon v. PLRB, 620 A.2d 71 (Pa. Cmwlth. 1993).

In this regard, in its exceptions, the City challenges certain aspects of the propriety of the Light Award. The City argues in its exceptions that the Light Award cannot be enforced because of the City's status as a distressed municipality under Act 47. The City also asserts in its present exceptions that Arbitrator Light's award imposes improper punitive damages contrary to the Pennsylvania Supreme Court's holding in City of Philadelphia, Office of Housing and Community Development v. AFSCME, Local Union No. 1971, 583 Pa. 121, 876 A.2d 375 (Pa. 2005). However, these contentions were fully addressed and denied in the direct appeal of the award, City of Scranton v. E. B. Jermyn Lodge No. 2 of the Fraternal Order of Police, *supra.*, and cannot be relitigated here.

The City also asserts on exceptions that the Light Award is ambiguous because it refers to a nonexistent January 1, 1999 agreement. Again, this claim would have been appropriate in a determination on whether the City committed an unfair labor practice by failing to comply with the arbitrator's award. Indeed, where the Board is simply unable to determine the arbitrator's intended relief, the Board will dismiss an unfair practice charge alleging non-compliance with those provisions of the award. Fraternal Order of Transit Police v. Southeastern Pennsylvania Transportation Authority (SEPTA), 29 PPER ¶29038 (Final Order, 1998). However, this claim was not raised by the City as a defense in the Board proceedings leading to the 2007 Final Order. As such, this exception also raises a collateral attack to the merits of the Light Award, and accordingly must be dismissed as well.

As noted above, the present proceeding involves the City's compliance with the Board's Final Order of January 23, 2007. In this regard, the Board directed the City to "[i]mmediately comply with each and every provision of Arbitrator Light's Award dated September 13, 2004." Thus, given the Board's directive to comply with the Light Award, it is necessary to reexamine the award in the context of this proceeding to determine the intended relief. Where it may be necessary to review the Light Award, we must keep in mind the following key principles.

In reviewing grievance arbitration awards, the Board appropriately performs a very limited interpretive role. AFSCME, Local 1971 v. City of Philadelphia, Officer of Housing and Community Development, 24 PPER ¶24052 (Final Order, 1993) (*citing State System of Higher Education v. PLRB*, 528 A.2d 278 (Pa. Cmwlth. 1987)). However, if the Board is unable to ascertain the intent of the arbitrator, the Board cannot add to or fill gaps or holes in the award. *Id.*; SEPTA, *supra.* The Board confines its review strictly to the four corners of the arbitrator's decision to determine the intended relief. *Id.*; City of Philadelphia, 30 PPER ¶30179 (Final Order, 1999).

Contrary to this limited review, the City argues that the Hearing Examiner erred in refusing to allow the City to introduce the transcript of the proceedings before Arbitrator Light into evidence in this compliance hearing. The proffered excerpt from the arbitration proceeding consisted of a statement by the FOP attorney at the close of the hearing suggesting that there were six SIT Clerk positions at issue, and that the FOP was not contesting the assignment of the "Clerk/Typist Detective - Evening" to the day shift. However, in a compliance proceeding, such as this, the Board does not relitigate the facts presented before the arbitrator and is constrained by what the arbitrator found as fact. Thus, as properly observed by the Hearing Examiner, the Board strictly adheres to the four corners of the award, allowing no extraneous evidence or testimony to discern the arbitrator's intent. Pittsburgh Parking Authority, 39 PPER 34 (Proposed Decision and Order, 2008); East Hempfield Township, 38 PPER 118 (Proposed Decision and Order, 2007). The Board's policy in this regard is consistent with the case law cited above recognizing that good faith bargaining requires that disputes concerning a grievance arbitration award should be raised in the first instance in a direct appeal of the award. Finality of grievance awards is not fostered by allowing belated, collateral attacks of the award on enforcement. Accordingly, the Hearing Examiner did not err in denying admission of the arbitration transcript in this compliance proceeding.

The remainder of the City's exceptions pertain to whether its reinstatement of six SIT Clerks on August 13, 2007, and the backpay payment made in March 2008, comport with the

Light Award. The City asserts that the Board's Order directing compliance with the Light Award only required the City to employ the total number of sixteen SIT Clerks necessary to fulfill its obligation under the SIT Agreement. The sixteen positions set forth in the SIT Agreement include: 1 Civilian Information Specialist; 1 Clerk/Typist Detective - Days; 1 Clerk/Typist Detective - Evening; 6 in Records/Administration; 1 for Training; 1 for the Deputy Chief/Captain; 4 Desk Clerks (2 per shift); and 1 Grant Writer.

While the City did reinstate six SIT Clerks positions (four Desk Clerks, one in Records/Administration, and a Clerk for the Deputy Chief/Captain), the question remains whether the City was required by the Light Award to employ an additional SIT Clerk in Records/Administration, and to employ a SIT Clerk/Typist assigned to the detectives on the evening shift. An additional issue is whether the City effectively failed to employ a SIT Clerk in Records/Administration by immediately transferring that Clerk to the Chief as of the commencement of that Clerk's employment on August 17, 2007. A third issue is whether the City failed to comply with the Light Award by directing the Grant Writer to cease writing grants in 2008.

With regard to the Records/Administration SIT Clerk positions, the City offered a chart (City Exhibit 10) allegedly showing that it had eliminated only one Records/Administration position in 2003 and employed five of the six Records/Administration SIT clerks until 2008 when it employed the full complement of six Records/Administration Clerks. The problem with the City's proofs here is that in 2004, Arbitrator Light found that the City eliminated seven SIT Clerk positions, which included two in Records/Administration.³ To the extent that the City is trying to claim that there were never two vacancies in the Records/Administration SIT Clerk positions, this argument must be rejected as a collateral attack on the Light Arbitration Award. Borough of Lewistown, supra.

Although we must reject the City's proffered evidence that it only eliminated one Records/Administration SIT Clerk position as contrary to the findings of Arbitrator Light, there is unrebutted evidence that all of the Records/Administration SIT Clerk positions, except for the position of the Clerk who was assigned to the Chief, were filled as of August 17, 2007.⁴ Thus, the City has established that one of the Records/Administration SIT Clerk positions found by Arbitrator Light to have been vacant on February 17, 2003, was filled by the City as of August 17, 2007.⁵

With respect to the other Records/Administration SIT Clerk position, the City argues that consistent with the Light Award, a SIT Clerk working in Records/Administration may be assigned to work in an administrative capacity for the Chief. Although generally an employer may have the managerial prerogative to assign employees to a particular bargaining unit position, it may not do so contrary to an express agreement. AFSCME, Council 13 v. State System of Higher Education (Edinboro University), 32 PPER (Final Order, 2001). Here, while the SIT Agreement recognizes that there can be a civilian clerk working directly for the Chief of Police, it also separately provides for another 6 Records/Administration SIT Clerks. Thus, the FOP correctly asserts that the clerical assistant to the Chief is not one of the Records/Administration SIT Clerk positions recognized by the SIT Agreement. Accordingly, we agree with the FOP and the Hearing Examiner that by immediately transferring one of the Records/ Administration SIT Clerks to the Chief on August 17, 2007, the City failed to employ one of the Record/Administration SIT Clerks directed by the Light Award.

The SIT agreement identified one "Clerk/Typist Detective - Days" and one "Clerk/Typist Detective - Evening". It is uncontested by the City that since 1999 it had continually employed two Clerk/Typist SIT Clerks for the Detectives, however, both were assigned to work the day shift. No SIT Clerk was ever assigned to the night shift in the

³ Thus, Arbitrator Light directed that the City employ two additional Records/Administration SIT Clerks.

⁴ The FOP offers no evidence to refute the City's evidence that as of August 17, 2007, the City employed at least five of the six Records/Administration SIT Clerks. The FOP's contention with respect to the sixth Records/Administration SIT Clerk, who had been transferred to the Chief's office, is discussed *infra*.

⁵ Accordingly, the relief directed in the PDO must be modified so that the City's backpay liability for one of the Records/Administration vacancies begins on February 17, 2003, but ends on August 17, 2007.

position of Clerk/Typist Detective - Evening" as set forth in the SIT Agreement. Indeed, the Light Award expressly noted the City's ongoing failure to employ one SIT Clerk for the detectives in the evenings, noting in the Award that the City "refused to fill the existing vacancy in the Detective Bureau." (Light Award at 9). The City's failure since 1999 to assign a "Clerk/Typist Detective - Evening" SIT Clerk to the evening shift, consistent with the SIT Agreement, violated its obligation under the Light Award.

As for the Grant Writer position, we note that this position was not at issue in the 2004 Light Award. Indeed, there is no dispute that the City employed a Grant Writer at least through 2008, both before and after the Light Award was issued. Accordingly, because the Grant Writer position was not at issue in the Light Award, we cannot find a failure to comply with the award with respect to the Grant Writer position. City of Philadelphia v. Fraternal Order of Police, Lodge No. 5, 777 A.2d 1206 (Pa. Cmwlth. 2001).

In sum, by failing to fill a Records/Administration SIT Clerk position between February 17, 2003 and August 17, 2007, by failing to employ a SIT Clerk for the detectives on the evening shift since 1999, and by transferring a Records/Administration SIT Clerk to a civilian clerical position under the Chief on August 17, 2007, the City failed to "employ the designated number of additional SIT clerical employees specifically described in ... the SIT Agreement." Accordingly, the City has failed to comply with the Board's Order, and the Light Award, with respect to employing the requisite number of SIT Clerks in the position of "Clerk/Typist Detective - Evening" and "Records/Administration".

The City next excepts to the Hearing Examiner's calculation of back pay due and owing under the Light Award. For purposes of calculating the back pay liability, the Light Award directed the City to include not only the wages, "but also the full City cost of health insurance at the family level ... payable under the collective bargaining agreement between the City and IAM Lodge No. 2462." The City claims that since 1999 it has been self-insured, and thus has not paid health insurance premiums at the family level. Instead, the City's testimony indicates that in calculating its back pay liability under the Light Award, the City included \$2,999.00 annually, per each eliminated SIT clerk position, which is the amount it pays employees to opt-out of family health care coverage through the City.

The FOP disagreed with the City's claim that it could not ascertain a full cost for family health insurance, and points to the division of copays under the City's collective bargaining agreement for the clerical employees. Notably, the only collective bargaining agreement entered into evidence between the City and IAM Lodge No. 2462 expired December 31, 2002. For the period since 2003, the FOP and Hearing Examiner applied the following methodology to determine a full cost of health insurance to be applied to the City's back pay liability. Under the FOP's (and Hearing Examiner's) calculation, the amount that the City paid annually to reimburse employee health care claims for the clerical employees is divided by the number of employees in the IAM Lodge No. 2462 bargaining unit to achieve the City's full cost of health insurance per employee for that year.⁶

The flaw in the FOP and Hearing Examiner's calculation is that it results in a per employee health care cost, not the "full cost of health insurance at the family level" that is directed by the Light Award. On the other hand, the City offered testimony, without contradiction, that it does provide a buy-out option at different levels, one of which is the family level, for employees who opt out of the City's health care plan. Where the award is ambiguous, the Board cannot fill gaps or omissions in order to find a failure to comply with the award. City of Philadelphia, Officer of Housing and Community Development, supra; SEPTA, supra. Given the wording of the Light Award that the City is to include the non-existent "full cost of health insurance at the family level" and the impossibility, on this record, of ascertaining an appropriate actual cost of family level health insurance, we believe the City's use of the family level opt-out payment satisfies compliance with the Light Award.⁷

⁶ For example, in 2004 the City paid \$402,905.68 in health care costs for clerical employees. Dividing that sum by the 63 clerical employees in the IAM Lodge No. 2462 bargaining unit, results in a per employee cost of \$6395.33.

⁷ To the extent backpay is due under this Order for the positions of two Records/Administration SIT Clerks and one Clerk/Typist Detective - Evening SIT Clerk positions, the City may utilize the annual health care opt-out payment at the family level as the "full cost of health insurance at the family level" directed by the Light Award.

The City further excepts to the Hearing Examiner's inclusion of overtime as wages for the calculation of back pay. Upon review, we note that Arbitrator Light did not direct that overtime be included. Indeed, the Award directed that the wages of the SIT Clerks be computed based on the "the then-prevailing arithmetic average of all SIT clerical classifications." While the Operating Budget may reflect overtime compensation paid to the clerical unit employees, the record is devoid of any evidence as to what, if any, overtime, was paid specifically to SIT Clerk employees during this time. Accordingly, because the Light Award is silent as to the inclusion of overtime, and there is no record evidence of overtime payment to the SIT Clerks, we find that the City did not fail to comply by not including overtime in its back pay calculation.

There is also an issue raised by the FOP concerning the City's calculation of interest on the back pay. The Light Award directs that the back pay amount "include interest computed in accordance with Article XX(9) of the collective bargaining agreement between the City and FOP." Article XX(9) of the parties' collective bargaining agreement provides that

Furthermore, should the Arbitrator direct a financial remedy, such remedy shall commence to run from the date of the violation and shall bear an interest rate from that date equal to the six (6) month United States treasury bill rate, adjusted for each calendar quarter that such remedy is payable, as was in effect from the date that the violation occurred until that payment is made.

The City simply averaged the U.S. Treasury Bill rates between 2003 and 2007 to arrive at an interest rate of 4.05%, and applied that rate to the total amount of its back pay liability for the duration of the period for which back pay was due. The City concedes that it erred, and that the contractual method of adjusting the interest rate based on the 6-month U.S. Treasury Bill is correct.

Finally, the City has filed an exception to the Hearing Examiner's award of an additional 6% interest on the amount of back pay outstanding. We note that the June 7, 2010 PDO concerned a fact hearing on the City's compliance with the Board's January 23, 2007 Final Order. The 2007 Final Order did not direct the payment of interest as a remedial remedy for the unfair labor practice, and accordingly no new remedy may be imposed now on compliance with that order. Accordingly, the Hearing Examiner's imposition of additional 6% interest is vacated.

After a thorough review of the exceptions and all matters of record, the Board finds that the City's August 17, 2007 re-employment of certain SIT Clerk positions, and March 2008 payment of \$954,261.02 to the FOP bargaining unit employees, is partial compliance with the Light Award and the Board's Final Order of January 23, 2007. However, since 1999, the City has failed to employ the one SIT Clerk in the position of "Clerk/Typist Detective - Evening" as required by the Light Award. Additionally, since August 17, 2007 the City has failed to employ one SIT Clerk in Records/Administration. Accordingly, the City will be required to employ one SIT Clerk for the Detectives on the evening shift and one SIT Clerk for Records/Administration. In addition, the FOP bargaining unit employees are still owed back pay for vacancies in three SIT Clerk positions. The City's back pay liability for the "Clerk/Typist Detective - Evening" position shall run from 1999, and from August 17, 2007 for one "Records/Administration" position, and shall be ongoing until these positions are filled. In addition, we are constrained by the Light Award, and the record evidence, to find that the FOP bargaining unit is also owed backpay under the Award for one vacant Records/Administration SIT Clerk position for the period of time from February 17, 2003 to August 17, 2007. Back pay for these positions shall be calculated in accordance with this Order, based on the "then-prevailing arithmetic average of all SIT clerical classifications", not including overtime, but shall include any annual bonus and longevity increases, and post-2002 shall include the City's then annual buyout for health insurance at the family level, and include interest calculated in accordance with Article XX(9) of the collective bargaining agreement.

Accordingly, the FOP's motion for compliance and/or sanctions is granted in part and denied in part, and the City's exceptions to the Proposed Decision and Order of June

7, 2010 shall be sustained in part and denied in part. The Hearing Examiner's Conclusion that the City is not in compliance with the Board's Final Order of January 23, 2007 and the Light Award is sustained. However, the Order on pages 18 and 19 of the PDO is vacated, and supplanted with the remedy as set forth herein.

ORDER

In view of the foregoing and in order to effectuate the policies of Act 111 and the Pennsylvania Labor Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the Order on pages 18 and 19 of the June 7, 2010 PDO is vacated and set aside. The exceptions filed by the City of Scranton are hereby sustained in part and denied in part. The FOP's motion for compliance is granted in part, and denied in part.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

That the City has partially complied with the Light Award, and Board's Final Order of January 23, 2007, by the payment of \$954,261.02 in March 2008 to the FOP bargaining unit employees. To fully comply with the Board's Final Order, and the Light Award directing the City to employ the requisite number of SIT Clerks under the SIT Agreement, and make an appropriate payment to the FOP bargaining unit, the City shall:

1. Immediately employ one SIT Clerk for Records/Administration, as required by the Light Award.
2. Immediately employ one Clerk/Typist Detective - Evening SIT Clerk on the evening shift, as required by the Light Award.
3. Pay the FOP an additional sum, as directed by the Light Award and consistent with the discussion above, for one Records/Administration SIT Clerk position for the period of February 17, 2003 to August 17, 2007, and for one Clerk/Typist Detective - Evening SIT Clerk position for the period since 1999, and for the one Records/Administration SIT Clerk position since August 17, 2007, until the City employs SIT Clerks in those positions.
4. Post a copy of this 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
5. Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this order by completion and filing of the attached affidavit of compliance.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, and Anne E. Covey, Member, this fifteenth day of February, 2011. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within order.

MEMBER JAMES M. DARBY DID NOT PARTICIPATE IN THE CONSIDERATION OR DECISION IN THIS CASE.

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

E.B. JERMYN LODGE NO. 2 OF THE
FRATERNAL ORDER OF POLICE

v.

CITY OF SCRANTON

:
:
:
: Case No. PF-C-05-101-E
:
:

AFFIDAVIT OF COMPLIANCE

The City of Scranton (City) hereby certifies that it has ceased and desisted from its violations of Sections 6(1)(a) and (e) of the PLRA and Act 111; that it has complied with Arbitrator Light's Award dated September 13, 2004, as directed in the January 23, 2007 and February 15, 2011 Final Orders of the Board; that it has posted a copy of the Final Orders as directed; 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