COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, DISTRICT COUNCIL 84	:	
v.	:	Case No. PERA-C-20-141-W
CITY OF PITTSBURGH	:	

FINAL ORDER

The City of Pittsburgh (City) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on January 4, 2023, challenging a Proposed Decision and Order (PDO) issued on December 15, 2022.[1] In the PDO, the Board's Hearing Examiner concluded that the City violated Section 1201(a)(1) and (8) of the Public Employe Relations Act (PERA) when it failed to comply with a grievance arbitration award issued on March 3, 2020, concerning the discharge of Richard Rogow. Pursuant to an extension of time granted by the Board Secretary, the American Federation of State, County and Municipal Employees, District Council 84 (AFSCME) filed a response and brief in opposition to the exceptions on February 24, 2023.

The facts of this case are summarized as follows. AFSCME is the exclusive bargaining representative of a unit consisting of City employes, including investigators in the City's Commission on Human Relations. (FF 3). The City and AFSCME were parties to a collective bargaining agreement (CBA) effective January 1, 2015, to December 13, 2019. (FF 4). On July 23, 2018, Richard Rogow, an investigator with the City's Commission on Human Relations, was suspended by the City for five days, and subsequently terminated. (FF 5). AFSCME filed a grievance challenging Mr. Rogow's termination, which ultimately went to arbitration. (FF 6). Thereafter, on March 3, 2020, the arbitrator issued a decision sustaining the grievance, in part, and directing the City to reinstate Mr. Rogow with the next payroll period, which began on March 14, 2020. (FF 7, 8). Nevertheless, the City did not reinstate Mr. Rogow, or otherwise implement any of the arbitration award.[2] (FF 9).

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[1] The City's exceptions are deemed timely because they were received by the Board by email after the close of business on January 4, 2023. 34 Pa. Code § 95.42 ("[w]hen … an order of the Board requires the filing of … exception[s] … the document shall be received by the Board … before the close of business of the last day of the time limit, if any, for the filing. Exceptions to this requirement will be at the discretion of the Board"); 34 Pa. Code § 91.5 (Board's Rules and Regulations "are to be liberally construed").

[2] As of the time of the hearing, the City had not implemented any portion of the arbitration award. (FF 13).

On June 11, 2020, the City filed an appeal of the arbitration award with the Allegheny County Court of Common Pleas. (FF 10).[3] On December 2, 2021, the Court of Common Pleas issued a decision denying the City's appeal and affirming the arbitration award. (FF 11). The City did not appeal the Court's decision. (FF 12).

AFSCME filed its Charge of Unfair Practices with the Board on July 2, 2020, alleging that the City violated Section 1201(a)(1) and (8) of PERA by refusing to reinstate Mr. Rogow to the position of investigator with the City Human Relations Commission, or an equivalent position with full seniority. On August 25, 2020, the Secretary of the Board issued a Complaint and Notice of Hearing. On September 14, 2020, the City filed an answer to the Specification of Charges. On March 24, 2022, an Amended Charge of Unfair Practices was filed after which, an Amended Complaint and Notice of Hearing was issued by the Secretary on March 30, 2022.

A hearing was held before the Board's Hearing Examiner on July 18, 2022. At the hearing, the parties submitted joint stipulations of fact in addition to presenting testimony and exhibits. Both AFSCME and the City filed post-hearing briefs.

In the PDO, the Hearing Examiner set forth the relevant standard to be employed in determining whether an employer has violated Section 1201(a)(1) and (8) of PERA by failing to comply with the arbitration award, noting that the union has the burden of proving that an award exists, it is final and binding, and that the employer failed or refused to properly implement the award. State System of Higher Education v. PLRB, 528 A.2d 278 (Pa. Cmwlth. 1987). The Hearing Examiner then went on to conclude that the City violated PERA by refusing to put Mr. Rogow back to work as of the first pay period after the award was issued. In this regard, the Hearing Examiner stated, as follows:

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

(PDO at 3). The Hearing Examiner further concluded that:

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

[3] Before the Court of Common Pleas, AFSCME argued that the City's appeal of the March 3, 2020, arbitration award was untimely.

(PDO at 4). Accordingly, the Hearing Examiner directed the City, *inter alia*, to immediately and fully comply with the arbitration award by reinstating Mr. Rogow and make him whole for all lost wages and benefits he would have earned from March 14, 2020, until the date of his reinstatement, with interest.

In its exceptions, the City presents several arguments. First, the City claims that AFSCME's unfair practice charge should be dismissed as *void ab initio* because AFSCME filed its charge with the Board prematurely while the arbitrator's award was on appeal in the Court of Common Pleas. Therefore, argues the City, the charge was not yet viable, and as such, should have been dismissed by the Board.

In its Charge filed on July 2, 2020, AFSCME alleged that the City's appeal of the March 3, 2020, arbitration award was untimely filed on June 11, 2020. Therefore, AFSCME asserted that the arbitration award was final and binding as no timely appeal had been filed by the City. Furthermore, this issue is wholly without merit because AFSCME properly amended its Charge on March 24, 2022, to reflect the City's continued failure to implement the arbitration award in spite of the fact that the Allegheny County Court of Common Pleas had affirmed the award. Pa.R.A.P. 1736(a)(2)(there is no automatic supersedeas of an arbitration award that has been affirmed by the court of common pleas); Fraternal Order of Police, Lodge 5 v. City of Philadelphia, 39 PPER 9 (Final Order, 2008). Pursuant to the Board's rules and regulations, a complaint may be amended at the discretion of the Board in such manner as the Board may deem proper before the issuance of a final decision and order. 34 Pa. Code § 95.32(a). The Board exercised its discretion in permitting AFSCME's amendment of the initial Charge and Amended Complaint on March 30, 2022, to reflect the City's failure to reinstate Mr. Rogow after the March 3, 2020, arbitration award was affirmed by the Court of Common Pleas on December 21, 2021. As such, the City is not entitled to dismissal of the Charge or Complaint on this issue.

Next, the City argues that the Hearing Examiner erred in concluding that the City violated Section 1201(a)(1) and (8) of PERA because the arbitration award should not be deemed binding in that the arbitrator did not have subject matter jurisdiction over this matter. It is well-established by the Board and the courts of this Commonwealth that parties cannot collaterally attack arbitration awards in unfair practice enforcement proceedings before the Board. PLRB v. Commonwealth, 387 A.2d 475 (Pa. Cmwlth. 1978). Questions regarding the legality of an arbitration award must be addressed only on appeal of the award. Id.

Although the City cites to antiquated, non-labor cases dealing generally with subject matter jurisdiction in the civil courts for the proposition that "it is never too late to attach a judgment or decree for want of jurisdiction," In re Simpson's Estate, 98 A. 35 (Pa. 1916), this is not the law regarding decisions issued by a grievance arbitrator pursuant to PERA. "The Board and the courts have been absolutely, unequivocally . . . consistent in holding arbitrability is for the arbitrator to decide." Palmerton Area Education Association PSEA/NEA v. Palmerton Area School District, 41 PPER 153 (Proposed Decision and Order, 2010) (citing PLRB v. Bald Eagle Area School District, 451 A.2d 671 (Pa. 1982)).

Furthermore, when a party fails to appeal an arbitration award, that party waives the right to contest the legality of the arbitration award.

Borough of Lewistown v. PLRB, 735 A.2d 1240 (Pa. 1999). As this Board has previously stated:

> 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. . . . The Board's policy in this regard is consistent with 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.

City of Scranton, 42 PPER 19, at 17 (Final Order 2011). As such, the City's attempt to collaterally attack the arbitration award in this enforcement action must be rejected. The award is indeed final and binding as a result of the Allegheny County Court of Common Pleas' December 2, 2021, order denying the City relief and affirming the March 3, 2020 arbitration award. Therefore, the City is in violation of Section 1201(a)(1) and (8) of PERA for failing to implement the arbitration award.

Thirdly, the City contends, for the first time, that the arbitration award is not final and binding because it was not sent a copy of the Court of Common Pleas' decision within 30 days, and thus, it could not file a timely appeal. (City's Brief, 3-5). Initially, it is noted that the City has waived this argument by failing to make it before the Hearing Examiner. AFSCME v. PLRB, 514 A.2d 255 (Pa. Cmwlth. 1986); Bucks County Schools, Intermediate Unit No. 22 v. PLRB, 466 A.2d 262 (Pa. Cmwlth. 1983); Teamsters Local 776 v. Susquehanna Township School District, 45 PPER 95 (Final Order, 2014). Furthermore, even if it had not been waived, there is absolutely no evidence, much less substantial evidence, in the record to support the City's claim in this regard. Moreover, the City's own failure to take action to seek appellate review on a *nunc pro tunc* basis does not, and would not, in any way impact the "final and binding" nature of the arbitration award following the affirmance of the award by the Court of Common Pleas. *See* City of Philadelphia, *supra*.

Finally, the City claims that the Hearing Examiner's award of six percent interest on the outstanding back pay owed to Mr. Rogow from March 14, 2020, to the present was erroneous because interest is not specifically authorized by PERA, and such a "penalty deprives the public at large of the benefit of those funds for the public good." (City's Brief at 6). This claim is completely devoid of merit. Further, not only does the City fail to offer any citation to legal authority for its argument regarding the imposition of interest, but it ignores a plethora of precedent on this issue.

The Board recognizes that although PERA does not contain express authority to award interest on back pay awards, interest is remedial in nature to compensate for the loss of the use of that money over time. City of Philadelphia, *supra*. Both this Board and the National Labor Relations Board have issued back pay awards which include interest in situations where wages are wrongfully withheld due to the substantial delay of the employer, citing for example, AFSCME, Council 88 v. City of Reading, 19 PPER ¶19218 (Proposed Decision and Order, 1988), 20 PPER ¶20069 (Final Order, 1989), *aff'd sub nom.*, City of Reading v. PLRB, 568 A.2d 715 (Pa. Cmwlth. 1980).

In FOP, Flood City Lodge No. 86 v. City of Johnstown, 22 PPER ¶22224 (Final Order, 1991), the payment at issue was delayed for more than a year, and the Board found that to be a "substantial basis for awarding interest," holding that "the purposes of the Act would best be served by requiring the employer to pay interest." 22 PPER at 517. Likewise, here, the record shows that the City has delayed paying Mr. Rogow for a period of three years starting on March 14, 2020. This is a substantial basis upon which to award interest, and therefore, the Hearing Examiner did not err in doing so.

After a thorough review of the exceptions and all matters of record, the Hearing Examiner did not err in concluding that the City violated Section 1201(a)(1) and (8) of PERA by refusing to implement the provisions of the arbitration award, including the reinstatement of Mr. Rogow's employment with the City. Accordingly, the Board shall dismiss the exceptions and make the Proposed Decision and Order final.

ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employe Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed by the City of Pittsburgh are hereby dismissed, and the December 15, 2022, Proposed Decision and Order be and the same is hereby made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, James M. Darby, Chairman, and Albert Mezzaroba, Member this twenty-first day of March, 2023. 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 GARY MASINO DID NOT PARTICIPATE IN THE CONSIDERATION OR DECISION OF THIS CASE.

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AFFIDAVIT OF COMPLIANCE

The City of Pittsburgh hereby certifies that it has ceased and desisted from its violation of Section 1201(a)(1) and (8) of the Public Employe Relations Act; that it has reinstated Richard Rogow and made him whole for all lost wages and benefits he would have received from March 14, 2020 to the date of reinstatement, with 6% interest; that it has posted a copy of the Final Order and Proposed Decision and Order as directed therein; and that it has served an executed copy of this affidavit on AFSCME 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