

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE LODGE 5 :
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 :
 v. : Case No. PF-C-14-6-E
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 CITY OF PHILADELPHIA :

PROPOSED DECISION AND ORDER

On January 17, 2014, the Fraternal Order of Police Lodge 5 (FOP or Union) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) against the City of Philadelphia (City or Employer), alleging that the City violated Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA) as read with Act 111 by failing to comply with the provisions of a grievance settlement within a reasonable amount of time.

On February 10, 2014, 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 June 5, 2014, in Harrisburg as the time and place of hearing, if necessary. Although the hearing was originally scheduled to be heard by Thomas P. Leonard, Esquire, a duly designated Hearing Examiner of the Board, the hearing was subsequently reassigned to the undersigned Hearing Examiner by the Chief Counsel, so that it could be consolidated with a number of other pending charges at the joint request of the parties.

The hearing was necessary and was held on June 5, 2014, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The parties made closing arguments on the record in lieu of submitting post-hearing briefs in support of their respective positions.

The Examiner, on the basis of the testimony presented at the hearing and from all other matters and documents of record, makes the following:

FINDINGS OF FACT

1. The City of Philadelphia is a public employer and political subdivision under Act 111 as read *in pari materia* with the PLRA. (N.T. 6-7)
2. The FOP is a labor organization under Act 111 as read *in pari materia* with the PLRA. (N.T. 6-7)
3. Police Officer Darryl Cathey, who was employed by the City and is a member of the bargaining unit represented by the FOP, was discharged on January 16, 2012. (N.T. 10-11; Joint Exhibit 2)
4. The FOP filed a grievance on behalf of Cathey, protesting his discharge from the City's Police Department, which resulted in a December 16, 2013 Settlement Agreement between the FOP and the City. (N.T. 11, 28-29; Joint Exhibit 2)
5. The Settlement Agreement provides, in pertinent part, as follows:
 - (1) The City agrees to reinstate Cathey to his position of Police Officer. Cathey will not be entitled to any back pay.
 - (2) Cathey's accrued leave shall be restored absent any payments made to Cathey by the City, and his longevity will be calculated as if the dismissal did not occur. The period between his dismissal and reinstatement shall be treated as an unpaid leave of absence.

(3) The grievant may, to the extent that he may be permitted by applicable rules and regulations, purchase at his own expense any pension-related benefit that would have accrued during the period between his termination and reinstatement.

(4) In consideration of the foregoing, the FOP and Cathey agree to withdraw the grievance and demand for arbitration in this matter.

(Joint Exhibit 2).

6. The City did not reinstate Cathey until February 18, 2014, at which time he was placed on the City's payroll. Cathey did not receive any back pay, but rather was paid prospectively from February 18, 2014. (N.T. 11, 29-31)
7. Shortly after January 1, 2014, FOP Vice President John McGrody communicated his concerns to the City that there was only about a two-week window for Cathey to be reinstated; otherwise, Cathey would lose his Municipal Police Officers Education and Training Commission (MPOETC) certification. If an individual does not have a valid MPOETC certification, he or she cannot legally be employed as a City police officer. McGrody advised the City that Cathey had to be reinstated prior to his two-year separation date of January 16 or 17, 2014 to avoid a problem with his MPOETC certification. (N.T. 31, 38-40, 43)
8. When Cathey was eventually reinstated on February 18, 2014, his MPOETC status was decertified. At the time of the hearing, Cathey was assigned to the twelfth police district working restricted duty status as a clerk in the operation room and receiving the same rate of pay he had prior to his discharge. (N.T. 44, 59-62)

DISCUSSION

In its charge, the FOP alleged that the City violated Section 6(1)(a) and (e) of the PLRA by failing to comply with the provisions of the Settlement Agreement, despite the passage of a reasonable amount of time. The City, meanwhile, contends that it did comply with the provisions of the Settlement Agreement in a reasonable amount of time, given that it was approximately two months. The City points out that there were a number of obstacles to reinstatement here, including an alleged ambiguity in the Agreement along with a necessary medical examination.

As a general matter, an employer's refusal to comply with a grievance settlement at a lower stage in the grievance procedure is an unfair practice. **Fraternal Order of Police, Lodge 5 v. City of Philadelphia**, 43 PPER 123 (Proposed Decision and Order, 2010) *citing* **Moshannon Valley School District v. PLRB**, 597 A.2d 229 (Pa. Cmwlth. 1991); **Zelienople Borough**, 27 PPER ¶ 27024 (Final Order, 1995); **New Eagle Borough**, 25 PPER ¶ 25026 (Proposed Decision and Order, 1994). Eventual compliance, determined to be untimely, also violates the PLRA. **City of Philadelphia, supra, citing Fraternal Order of Police, Lodge 5 v. City of Philadelphia**, 38 PPER 72 (Proposed Decision and Order, 2007).

The Board's criteria for determining whether an employer has timely complied with a grievance arbitration award is equally applicable to the determination of whether an employer has timely complied with a settlement agreement. **City of Philadelphia**, 43 PPER 123 (Proposed Decision and Order, 2007). In determining timeliness, the Board will consider such factors as: (1) the nature and complexity of the compliance required under the agreement; (2) the length of time before compliance occurred; (3) the employer's ability to comply with the agreement; (4) the steps taken by the employer toward compliance; and (5) the employer's explanation or lack thereof for the delay. *Id. citing City of Philadelphia*, 19 PPER ¶ 19069 (Final Order, 1988); **Commonwealth of Pennsylvania (Department of Community Affairs)**, 19 PPER ¶ 19165 (Proposed Decision and Order, 1998); **Commonwealth of Pennsylvania (Office of Administration)**, 17 PPER ¶ 17151 (Proposed Decision and Order, 1986).

In this case, the Settlement Agreement was executed on December 16, 2013. However, the City did not comply by reinstating Cathey until February 18, 2014, which was approximately two months later. This delay was unreasonable in light of the simple terms of the Settlement Agreement. Indeed, the City was only required to reinstate Cathey to his position of Police Officer. Cathey was not entitled to any back pay. Although the City maintains that there were obstacles to reinstatement here, I find this argument unpersuasive. The City presented no evidence establishing how or why Cathey's reinstatement was held up due to a purported necessary medical evaluation. Nor did the City indicate how or why the alleged ambiguity in the Settlement Agreement prevented Cathey's reinstatement. The City presented testimony regarding a purported ambiguity surrounding how a 30-day suspension was going to be treated, (N.T. 70), but it was not clear how or why this precluded an earlier reinstatement. In fact, the Settlement Agreement says nothing whatsoever regarding a 30-day suspension; it simply mandates that Cathey be reinstated without back pay. As a result, the City has committed unfair labor practices in violation of the PLRA.

Next, the FOP contends that the City should, to the extent possible, recertify Cathey with regard to his MPOETC status. Specifically, the FOP argues that but for the City's delay, Cathey would have been placed back on the payroll within two years of his separation date. The City, on the other hand, submits that the MPOETC certification is a state requirement, over which the City has no authority or ability to waive, and that it was not the City's responsibility.

The record shows that the parties executed the Settlement Agreement on December 16, 2013 and that FOP Vice President McGrody alerted the City regarding Cathey's MPOETC certification issue in early January 2014. The record also shows that McGrody advised the City that Cathey had to be reinstated prior to January 16 or 17, 2014 to avoid a decertification of his MPOETC status. Despite the simple terms of the Settlement Agreement requiring only Cathey's reinstatement as a Police Officer and the FOP's notice of the MPOETC certification issue, the City still did not reinstate Cathey until February 18, 2014. As a result, the FOP is correct in stating that but for the City's delay, Cathey would have been placed back on the payroll prior to his decertification. To be sure, Cathey still held a valid MPOETC certification as of December 16, 2013, the effective date of the Settlement Agreement and well into January 2014. As such, it was because of the City's improper discharge of Cathey and resistance to reinstating him following the December 16, 2013 Settlement Agreement, which caused his decertification. See **Pocono Mountain Education Support Professionals, PSEA/NEA v. Pocono Mountain School District**, 45 PPER 80 (Final Order, 2014) citing **City of Beaver Falls v. Beaver Falls Police Ass'n**, 77 A.3d 75 (Pa. Cmwlth. 2013). Therefore, the City will be directed to pay any and all of Cathey's out of pocket expenses incurred as a result of his MPOETC decertification.

Finally, the City contends that even if it did violate the PLRA, any award of back pay should be limited to back pay going forward from 30 days following execution of the Settlement Agreement, as the City believes that is a reasonable period for compliance. However, the Board's practice in cases involving an unreasonable delay is to award payment from the date of the award or settlement until compliance. **Fraternal Order of Police, Lodge 5 v. City of Philadelphia**, 41 PPER 122 (Proposed Decision and Order, 2010); **Fraternal Order of Police, Lodge 5 v. City of Philadelphia**, 41 PPER 125 (Proposed Decision and Order, 2010). Accordingly, the City will be directed to pay Cathey his regular wages from December 16, 2013 until February 18, 2014, plus six (6%) percent per annum interest on the amount.

CONCLUSIONS

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

1. The City of Philadelphia is a public employer and political subdivision under Act 111 as read *in pari materia* with the PLRA.

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

ORDER

In view of the foregoing and in order to effectuate the policies of the PLRA and Act 111, the Examiner

HEREBY ORDERS AND DIRECTS

that the City shall

1. Cease and desist from interfering with, restraining or coercing employes in the exercise of the rights guaranteed in the PLRA and Act 111;
2. Cease and desist from refusing to bargain with the representatives of its employes;
3. Take the following affirmative action:
 - (a) Immediately pay Cathey his regular wages from December 16, 2013 until February 18, 2014, plus six (6%) percent per annum interest on the amount, and to comply with all other tenets of the Settlement Agreement;
 - (b) Immediately make whole Cathey for any and all expenses incurred as a result of his MPOETC decertification and for any lost wages which may have resulted therefrom, if any;
 - (c) 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;
 - (d) 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
 - (e) Serve a copy of the attached Affidavit of Compliance upon the Union.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

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

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this eleventh day of July, 2014.

PENNSYLVANIA LABOR RELATIONS BOARD

John Pozniak, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF POLICE LODGE 5

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v.

Case No. PF-C-14-6-E

CITY OF PHILADELPHIA

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; that it has complied with the Proposed Decision and Order as directed therein; 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/Date

Title

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

Signature of Notary Public