

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FOP LODGE 5

v.

CITY OF PHILADELPHIA

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Case No. PF-C-15-37-E

PROPOSED DECISION AND ORDER

On May 11, 2015, 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), (c), and (e) of the Pennsylvania Labor Relations Act (PLRA), as read with Act 111, by failing to comply with an April 3, 2015 arbitration award. On June 5, 2015, the Secretary of the Board issued a Complaint and Notice of Hearing, designating October 23, 2015, in Harrisburg, as the time and place of hearing, if necessary.

The hearing was necessary and was held before the undersigned Hearing Examiner of the Board as scheduled on October 23, 2015, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The Board received the notes of testimony on November 12, 2015. The parties each filed a post-hearing brief in support of their respective position on or about February 26, 2016.

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. 3)
2. The FOP is a labor organization under Act 111 as read *in pari materia* with the PLRA. (N.T. 3)
3. On November 22, 2010 the FOP filed a grievance alleging that the City was restricting take-home vehicle rights in violation of the collective bargaining agreement (CBA) and requesting that all bargaining unit members directly and indirectly affected by each and every aspect of such violation be made whole in all respects. The parties were unable to resolve the grievance, and as a result, the matter eventually proceeded to arbitration on November 20, 2014 after several continuances. (N.T. 21, 26-27; Union Exhibit 3)¹
4. On April 3, 2015, Arbitrator Robert Light issued an Opinion and Award, sustaining the FOP's grievance. Specifically, the Award in relevant part provided as follows:
 - A. The City's unilateral modification of the Take Home Policy to restrict the use of the City-provided vehicles to the City's border is in violation of Article II(A) of the collective bargaining agreement. The City was, and is, required by virtue of the Recognition Clause to bargain with the Fraternal Order of Police with respect to the modification of any such term and condition.

¹ The dispute came about following the issuance of an interest arbitration award in 2009, which eliminated a residency requirement for bargaining unit members. On August 12, 2010, the City attempted to modify a longstanding take-home vehicle policy by requiring employees, who elect to move outside of the City boundaries, to leave the vehicles at a City facility closest to the employee's home for the daily commute and on non-working days. (N.T. 18-20; Union Exhibit 3)

- B. For the foregoing reasons, the grievance of the Fraternal Order of Police challenging the City's unilateral modification of the Take Home Policy is granted.
- C. The City is directed to immediately take the following action:
1. Issue a notice advising bargaining unit members that the City will immediately cease and desist from attempting to enforce the City's unilateral modification of the Take Home Policy.
 2. Advise members of the bargaining unit that they may take the vehicle to their residence as defined by the collective bargaining agreement.
 3. Make whole all affected bargaining unit members by the payment of the IRS approved cents per mile for each mile that each affected bargaining (sic) member was required to drive as a result of the unilateral modification by the City of the Take Home Policy.
- D. The Arbitrator shall retain jurisdiction over this matter for the sole and exclusive purpose of resolving any disputes that may arise with respect to the implementation of the remedy.

(Union Exhibit 3)

5. The City did not appeal the April 3, 2015 Award. (N.T. 44)
6. Since the issuance of the Light Award, the City has complied with the Award as it relates to commanders or individuals holding the rank of captain or higher by making those individuals whole with regard to payment and rescinding the restrictions on their take home vehicles. The City has not made any payments to individuals who hold a rank below captain, nor has the City permitted individuals below the rank of captain to take home vehicles if they elect to live outside the City boundaries. (N.T. 30-33)²

DISCUSSION

In its charge, the FOP alleged that the City violated Section 6(1)(a), (c), and (e) of the PLRA³ by failing to comply with the April 3, 2015 Light Award. The FOP maintains that the Arbitrator sustained the grievance and awarded relief to the entire bargaining unit. The City, for its part, contends that the Award only addresses the commanders or individuals with a rank of captain or higher, and that it has complied with the same by making those individuals whole. The City asserts that the Award does not address any individuals who hold a rank below captain, and therefore, the charge should be dismissed.

It is well settled that the failure to comply with the terms of a grievance arbitration award occurs only after exhaustion of appellate rights and the expiration of a reasonable or expressly provided time period for compliance. **Fraternal Order of Police, Lodge 5 v. City of Philadelphia**, 41 PPER 142 (Proposed Decision and Order, 2010) *citing Commonwealth of Pennsylvania*, 8 PPER ¶ 233 (Nisi Decision and Order, 1977). Eventual compliance, determined to be untimely, violates the PLRA. **Fraternal Order of Police Lodge 5 v. City of Philadelphia**, 41 PPER 123 (Proposed Decision and Order, 2010) *citing Fraternal Order of Police, Lodge 5 v. City of Philadelphia*, 38 PPER 72 (Proposed Decision and Order, 2007).

² The record shows that commanders, who are identified as having the rank of captain or above, have a contractual right to a take home vehicle since they receive no overtime and very little compensatory time. The record also shows that individuals below the rank of captain are provided with take home vehicles in certain instances, which are specific to their assignment, and only when a commander of that individual's unit deems it necessary. These individuals typically have jobs that require a quick response time such as members of the bomb squad, SWAT units, highway patrol, and some individuals in the internal affairs unit. (N.T. 19, 36, 43; Union Exhibit 3)

³ Section 6(1) of the PLRA provides that "[i]t shall be an unfair labor practice for an employer (a) To interfere with, restrain or coerce employes in the exercise of the rights guaranteed in this act... (c) By discrimination in regard to hire or tenure of employment, or any term or condition of employment to encourage or discourage membership in any labor organization... (e) To refuse to bargain collectively with the representatives of his employes, subject to the provisions of section seven (a) of this act." 43 P.S. § 211.6.

In cases where refusal to comply with an arbitration award is alleged, the Board's inquiry is limited to first determining if an award exists, second if the appeal procedure available to the aggrieved party has been exhausted, and third if the party has failed to comply with the provisions of the arbitrator's decision. **PSSU v. Commonwealth of Pennsylvania**, 17 PPER ¶ 17154 (Final Order, 1986). The burden of proof is on the charging party to show by substantial and legally credible evidence that the respondent has not complied with the arbitration award. *Id.* citing **St. Joseph's Hospital v. PLRB**, 323 A.2d 106 (Pa. 1977). The Board may not review the merits of the award or substitute its judgment for that of the arbitrator. *Id.* citing **City of Duquesne**, 5 PPER 117 (Final Order, 1974). If, upon review of the award as a whole, the Board is unable to discern the intent of the arbitrator and the award is therefore ambiguous, the Board will dismiss an unfair practice charge alleging noncompliance with the award. **AFSCME Local 197 v. City of Philadelphia, Office of Housing & Community Development**, 24 PPER ¶ 24052 (Final Order, 1993).

In this case, the FOP has sustained its burden of proving that the City violated the PLRA by failing to comply with the April 3, 2015 Light Award. First of all, there is no dispute that an award exists and that the appeal procedure available to the aggrieved party has been exhausted. Indeed, Arbitrator Light issued his Award sustaining the grievance on April 3, 2015 and the City has not taken an appeal. Likewise, the record shows that the City has failed to comply with the provisions of the arbitrator's decision by refusing to rescind the August 2010 take home vehicle policy as it relates to individuals holding a rank below captain and making those individuals whole by payment of the appropriate IRS mileage rate.

The City contends that it has complied with the Award because the Award is somehow limited to commanders or individuals holding a rank of captain or higher. However, this argument is without merit. There is absolutely no evidence whatsoever that the Award is limited to commanders and that it does not include individuals below the rank of captain. To the contrary, the Arbitrator specifically directed the City to immediately "[i]ssue a notice advising **bargaining unit members** that the City will immediately cease and desist from attempting to enforce the City's unilateral modification of the Take Home Policy; [a]dvise **members of the bargaining unit** that they may take the vehicle to their residence as defined by the collective bargaining agreement; and [m]ake whole **all affected bargaining unit members** by the payment of the IRS approved cents per mile for each mile that **each affected bargaining** (sic) **member** was required to drive as a result of the unilateral modification by the City of the Take Home Policy." (Union Exhibit 3) (emphasis added). As such, the Arbitrator made no distinction or limitation whatsoever between commanders and those individuals below the rank of captain in fashioning his Award. Instead, the Arbitrator repeatedly and expressly directed the City to provide broad relief to all affected bargaining unit members, which is clear and unequivocal as to his intent.

This is supported by the fact that the FOP adduced evidence regarding the individuals below the rank of captain during the arbitration proceedings. (N.T. 23-27).⁴ This is also supported by the fact that the Award expressly addressed members of the bargaining unit who are below the rank of captain and who are provided with take home vehicles. (See Union Exhibit 3, p. 3). This is further supported by the fact that the City, in its brief to the Arbitrator, specifically requested alternative relief to the extent the grievance was sustained, that it be specifically limited to commanders or those holding a rank of captain or higher, which relief the Arbitrator declined to award. (See Union Exhibit 2, p. 7). Thus, this issue was squarely before the Arbitrator during the arbitration hearing and in the post-hearing submissions by the parties. As such, the City has committed unfair labor practices in violation of Section 6(1)(a) and (e) of the PLRA by failing to comply with the April 3, 2015 Light Award.⁵

⁴ To the extent the City may be arguing, expressly or implicitly, that the Arbitrator erred in some fashion by relying on allegedly incompetent evidence, it is well settled that the Light Award is final and not subject to collateral attack in this proceeding, as the City did not appeal the Award. **Office of Housing & Community Development**, 24 PPER ¶ 24052 (Final Order, 1993).

⁵ There is no evidence to support a finding that the City violated Section 6(1)(c) of the PLRA. Therefore, this portion of the charge will be dismissed.

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.
5. The City of Philadelphia has not committed unfair labor practices in violation of Section 6(1)(c) 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 comply with the April 3, 2015 Light Award by applying its terms and relief to all members of the bargaining unit who enjoyed the take-home vehicle privilege, including both commanders and those individuals below the rank of captain, and to pay six (6%) percent per annum interest on any amounts due and owing as a result thereof, and to comply with all other directives of the Award;
 - (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 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 29th day of February,
2016.

PENNSYLVANIA LABOR RELATIONS BOARD

John Pozniak, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FOP LODGE 5

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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; that it has complied with the Proposed Decision and Order as directed therein; that it has immediately complied with the April 3, 2015 Light Award by applying its terms and relief to all members of the bargaining unit, who enjoyed the take-home vehicle privilege, including both commanders and those individuals below the rank of captain; that it has paid six (6%) percent per annum interest on any amounts due and owing as a result thereof, and complied with all other directives of the Award; 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