

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AFSCME DISTRICT COUNCIL 47
LOCAL 2187, AFL-CIO

v.

CITY OF PHILADELPHIA

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CASE NO. PERA-C-16-353-E

PROPOSED DECISION AND ORDER

On December 13, 2016, as amended January 6, 2017, AFSCME District Council 47, Local 2187 (Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the City of Philadelphia (City) violated Section 1201(a)(1), (5) and (8) of the Public Employe Relations Act (PERA or Act). The Union specifically alleged that the City failed to abide by a grievance arbitration award by declining to reinstate Forrest Murphy to his position until September 19, 2016, by failing to pay Mr. Murphy for the time period between August 16, 2016, and September 19, 2016, and by failing to pay backpay to Mr. Murphy from the date of his discharge on June 12, 2012, to August 16, 2016.

On February 8, 2017, the Secretary of the Board issued a complaint and notice of hearing, directing that a hearing be held on May 15, 2017, in Harrisburg. After five granted continuance requests, the hearing was ultimately scheduled for and held on July 9, 2018, in Harrisburg. During the hearing on that date, both parties were afforded a full and fair opportunity to present testimonial and documentary evidence and to cross-examine witnesses. On December 7, 2018, the Union submitted its post-hearing brief. The City filed its post-hearing brief on January 11, 2019.

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

FINDINGS OF FACT

1. The City is a public employer within the meaning of Section 301(1) of PERA. (N.T. 7)
2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 7)
3. The parties stipulated and agreed that Forrest Murphy was discharged from his employment with the City of Philadelphia's Department of Public Health (DPH) on August 14, 2012. (N.T. 8)
4. The parties stipulated and agreed that Arbitrator Jared Kasher issued an arbitration award (Murphy Award or Award) on May 31, 2016, and therein concluded that the City lacked just cause to discharge Mr. Murphy. Arbitrator Kasher ordered the City to reinstate Mr. Murphy with back pay and "to the extent that the Grievant [Mr.

Murphy] has received any source of income, the City shall receive a credit for all sums paid." (N.T. 8; Joint Exhibit 1)

5. The parties stipulated and agreed that the Award became final on August 16, 2016, after the resolution of a procedural issue. On September 19, 2016, the City reinstated Mr. Murphy. (N.T. 8)

6. The parties stipulated and agreed that, on December 27, 2016, Karen Hyers, the Human Resources Manager for DPH, emailed Mr. Murphy, Union President Bob Coyle and Union representative Dave Mora informing them that, in order to process Mr. Murphy's backpay, the City was requiring Mr. Murphy to provide the following documents: (1) an employe earnings affidavit; (2) A Social Security request for earnings; (3) copies of Mr. Murphy's 1040 Form for each year since his dismissal, including the year of his dismissal (2012-2016); (4) if he was married, copies of the W-2 forms for each of those years; and (5) IRS Form 1722.¹ (N.T. 9, 24; Respondent Exhibit 1)

7. The parties stipulated and agreed that, as of February 7, 2017, Mr. Murphy had provided the following documents to DPH: (1) W-2 Forms for 2013, 2014, 2016; (2) an IRS letter dated January 30, 2017, for the 2013 tax year; and (3) an employe earnings affidavit. (N.T. 9-10)

8. In a February 7, 2017 email addressed to Mr. Mora and copied to Mr. Murphy, Ms. Hyers stated the following:

Please be advised that I have provided Charles Growells, our Payroll Supervisor, with the following documents related to Mr. Murphy:

W-2's for 2013, 2014, 2015 and 2016;

IRS letter dated 01-30-2017 (6 pages and attached);

Employee's Earning Affidavit which does NOT include Unemployment Compensation received;

Unemployment letter dated 03/02/2016

Our payroll unit, with the assistance of Central Finance, will process Mr. Murphy's back payment. Should we require any additional information, we will promptly notify you.

(Respondent Exhibit 2)

9. In a February 8, 2017 email, Ms. Hyers informed Mr. Murphy and the Union as follows: "In reviewing the documents that were faxed to me yesterday, we discovered that IRS 1040 only covered 2013. We still need an IRS 1040 for the years 2014, 2015 and 2016. Additionally, we have not received IRS Form 1722. Please supply us with all of this information as soon as possible in order to complete your retro calculation." This email does not mention Social Security request for earnings or Social Security earnings. (Respondent Exhibit 2)

10. The parties stipulated and agreed that, on July 11, 2017, Jonathan Walters, Esquire, Counsel for the Union, mailed Mr. Murphy's

¹ The four-month delay between August 16, 2016 and December 27, 2016 is not contested in this case.

2015 and 2016 1040 Forms to Cara Leheny, Esquire, the Deputy City Solicitor. (N.T. 10)

11. The parties stipulated and agreed that, on August 18, 2017, Joseph Randall, Esquire, Counsel for the City, informed Mr. Walters that Mr. Murphy had yet to submit his Social Security earnings. (N.T. 10)

12. The parties stipulated and agreed that, on November 20, 2017, Mr. Randall received Mr. Murphy's Social Security earnings report and forwarded them to DPH. (N.T. 10-11, 26-27)

13. The City prepared a backpay check payable to Mr. Murphy on November 30, 2017. At this time, the City had not explained how it arrived at the backpay amount on the check. (Respondent Exhibits 4 & 5)

14. The parties stipulated and agreed that, on December 6, 2017, Ms. Hyers notified Mr. Murphy and Mr. Mora that Mr. Murphy's check was ready and that, on December 18, 2017, Mr. Murphy picked up his check. (N.T. 11; Respondent Exhibit 5)

15. On December 11, 2017, Ms. Hyers provided the calculation break-down from Central Finance of Mr. Murphy's backpay. (N.T. 28; Respondent Exhibit 5)

16. The City required Mr. Murphy to provide a Social Security statement or report of his earnings for "further" verification of his earnings for the backpay period. (N.T. 36, 88-91)

17. When calculating backpay resulting from arbitration awards, the City follows a document from 1997 called: "Procedures for Implementation of Arbitration Awards Requiring Reinstatement of a Separated Employee or Retroactive Wages (Backpay Procedures Document)." (N.T. 64; Respondent Exhibit 8)

18. Attachment B of the Backpay Procedures Document lists the documents that the City requires from reinstated employees so the City can deduct from the backpay amount a credit for interim earnings. One of the listed documents is a Social Security Request for Earnings. The City has applied the Backpay Procedures Document to union employees in the City since at least 2001 and prior. (N.T. 64, 80; Respondent Exhibit 8, Attachment B)

19. When an award is issued, it is directed to the Operating Department which contacts the employee and requests outside earnings verifications. The Operating Department calculates the payment, based on prior salary and interim salary increases, and includes the calculation on a form and attaches the outside earnings verification documents, which is then forwarded to Central Finance. The Operating Department does not calculate the offsets; Central Finance calculates the offsets. (N.T. 74-76, 85)

20. The Central Finance staff then verifies the Operating Department's calculations and also verifies the employee's Social Security earnings. The package is directed to the Controller's Office where the package is confirmed or denied. With authorization from the Controller's Office, the package is forwarded to the Treasurer's Office, which issues a check and forwards it to the Operating Department. (N.T. 76)

21. The Operating Department contacts the employee to retrieve the check and sign a form acknowledging receipt. (N.T. 77)

22. The Social Security Earnings statement is used in two ways: (1) it is required by the City; and (2) verifies the outside interim earnings amount to deduct from retroactive payment to the employe. (N.T. 81, 88-91)

23. There can be discrepancies between an employe's tax return, the employe's earnings affidavit and the employe's Social Security Earnings report. The City requires official documents to substantiate the information provided on the employe's earnings affidavit. If an employe has not provided a tax document for a given year, the City will calculate the offsets based on the Social Security earnings report. The City requires both the Social Security earnings report and tax returns unless there is valid explanation for missing tax documents. (N.T. 81-83)

24. Valerie Hayes has been the Director of Payroll for the City in Central Finance since 2003. Ms. Hayes testified that the City does not need all the documents listed in Attachment B of the Backpay Procedures Document to calculate the offsets, but the City simply requires all of those documents. (N.T. 69-70, 88-89)

25. The City has a contact at Social Security. The Social Security contact verifies the employe's outside earnings during the backpay period. The contact matches the Social Security earnings with the earnings reflected on the documentation that the City already has and verifies the accuracy of those numbers. (N.T. 90-91)

26. Central Finance accepts the earnings for an employe that are provided by Social Security without regard to whether earnings were under-reported or over-reported. The City relies on the actual amount an employe has earned as reflected on the employe's Social Security statement. In the hierarchy of documents required by the City, if there is a discrepancy in earnings reported between the documents, the City will rely on the Social Security statement for verification. (N.T. 91-92, 102-104)

27. The Murphy Award reinstating Mr. Murphy with backpay does not expressly require that Mr. Murphy produce all the documents required of him by the City. The Backpay Procedures Document is based on a sample grievance arbitration award which provided that a grievant is required to provide any and all records the City may reasonably require; the Murphy Award does not require the production of such documents. (N.T. 97-98; Joint Exhibit 1)

28. On January 9, 2018, Ms. Hyers emailed Mr. Murphy informing him that the City issued another check to him in the amount of \$1,212.47 as a refund of overpaid FICA taxes miscalculated in determining his backpay. (Respondent Exhibit 7)

DISCUSSION

The Union argues that the City had all the information that it needed by July 11, 2017, except Mr. Murphy's Social Security statement, and refused to give Mr. Murphy his check until December 6, 2017. (Union's Post-hearing Brief at 3). The Union further contends that the City's position, that Mr. Murphy's backpay was not due until he provided his Social Security statement, is in error for two reasons. The Union maintains first that the requirement that Mr. Murphy provide a Social Security Request for Earnings before receiving his backpay is

an internal requirement that was not negotiated with the City, and the requirement was not adequately explained or justified when other official documents provided the same information. The Union also argues that, even if the policy requiring Social Security verification of earnings was valid, the Murphy Award did not require it. (Union's Post-hearing Brief at 4).

The Union also contends that the City's witness, Ms. Hayes, testified that the City requires an official document to determine interim earnings and backpay offsets. She further acknowledged that a tax return is an official document and that both a tax return and the Social Security statement are not needed for the calculation. Since Mr. Murphy provided his tax return documents and income affidavit, there was no reason to delay calculating his backpay and there is no other reason for requiring a Social Security statement. (Union's Post-hearing Brief at 5).

Requiring the Social Security statement was not only redundant, but it was unnecessary, argues the Union. (Union's Post-hearing Brief at 6-7). In this regard, the Union argues that the City relies on the Social Security report of earnings when there is a discrepancy between Social Security and tax returns, W-2s and the earnings affidavit so it is unnecessary to even request the tax documents and affidavit. (Union's Post-hearing Brief at 6) Moreover, the Union contends that the City does not request or perform an audit of the Social Security records and there have been known circumstances where tax returns are more accurate than Social Security, which has been known to over or under report income. (Union's Post-hearing Brief at 6).

The City argues that the charge must be dismissed because the City did comply with the Murphy Award's direction to take credit for all sums paid from any source of income. (City's Post-hearing Brief at 9). This required the City to verify Mr. Murphy's interim earnings during the backpay period with his Social Security statement, tax returns, W-2s and earnings affidavit. (City's Post-hearing Brief at 9). The City posits that, if the examiner cannot conclude with assurance that the Murphy Award precluded the use of the Social Security earnings statement, then the Award is ambiguous about the manner in which backpay is to be calculated, the City was not precluded from utilizing that method of calculating backpay, and the charge must be dismissed. (City's Post-hearing Brief at 9).

The City contends that the record clearly shows that it has utilized its Backpay Procedures Document and required a Social Security earnings report from reinstated union employees since at least 2001, it has been a past practice for many years, and the Union was or should have been aware of it. (City's Post-hearing Brief at 10). The fact that the Murphy Award does not specify the manner by which the City is to calculate backpay and determine the appropriate credit taken by the City for earned interim earnings precludes a finding that the City failed to comply with the Award by requiring the Social Security earnings report from Mr. Murphy. (City's Post-hearing Brief at 11). Interim earnings verification was simply required for the City to calculate the backpay to comply with the Award's directive that the City take credit for interim earnings and in order to be approved by the City's Controller and Treasurer. (City's Post-hearing Brief at 12).

The Union filed the initial charge in this case on December 13, 2016 and the amended charge on January 6, 2017. Since the charge was filed and amended, the City paid Mr. Murphy his backpay. The Union maintains that the City's delays in rendering final payment and not making it available until December 6, 2017, constitutes a failure to comply with the Award. The Union seeks five months interest for those delays.

Where an employer complies with a final and binding arbitration award in an unreasonable amount of time, the employer commits an unfair practice under the Act. AFSCME, Local 159 v. City of Philadelphia, 19 PPER ¶ 19069 (Final Order, 1988); Fraternal Order of Police, Lodge 5 v. City of Philadelphia, 41 PPER 121 (Proposed Decision and Order, 2010). In determining timeliness, 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; (4) the steps taken by the employer toward compliance; and (5) the employer's explanation or lack thereof for the delay. Fraternal Order of Police, Lodge 5, supra.

In AFSCME, Local 159, supra, the Board stated as follows:

An employer should not and cannot avoid its obligation to implement an award by unnecessary and unreasonable delay in complying with an award short of announced refusal or defiance of the award. Thus, in the instant case, AFSCME did not need to show that the City's failure to implement the interest arbitration award was an intentional refusal to do so. Instead, AFSCME must show that the City's delay in implementation was unreasonable.

AFSCME, Local 159, 19 PPER at 185. The Board, in AFSCME, Local 159, further cited Commonwealth Court authority and stated that inaction in implementing an award constitutes a refusal to bargain in good faith. Id. The Board will not examine the employer's intentions concerning implementation of an award, but will rather examine whether a more than reasonable period of time expired before implementation. Id.

In the AFSCME, Local 159 case, the City justified its delay in implementing an interest award because "it is required by its home rule charter to go through an extensive process before the award may be implemented. This process includes the drafting of regulations, a public hearing, and approval by various administrative bodies." Id. at 186. The Board, however, concluded that, because the City took five months to initiate the formal processes, it did not take appropriate steps within its ability to implement the award in a reasonable or expeditious period of time. Id.

The same result obtains in this case. By July 11, 2017, Mr. Murphy through Union legal counsel had submitted all the documents required by the City except for his Social Security earnings. The City received Mr. Murphy's Social Security earnings on November 20, 2017, and issued a check dated November 30, 2017. The Award provides that the City is entitled to offsets for Mr. Murphy's interim earnings. Indeed, the City is entitled to verify interim earnings. The question is whether the City's conduct during the verification process in this case caused unreasonable delays.

The record shows that the City waited four months after the Award became final, on August 16, 2016, before informing Mr. Murphy that he needed to submit a series of documents verifying his interim earnings. On December 27, 2016, the City required that Mr. Murphy provide the City with five different forms of official documentation to prove the amount of his interim earnings for 2012, 2013, 2014, 2015 and 2016. On February 7, 2017, Mr. Murphy and Mr. Mora faxed over a package of documents in an attempt to comply with the City's documents request. On February 8, 2017, Ms. Hyers informed them that there were missing documents, but she did not mention that Mr. Murphy still needed to provide a Social Security earnings statement. Moreover, the February 8, 2017 email implies that, if Mr. Murphy supplemented his submission with only the documents requested therein, not including Social Security earnings documents, the City would "complete [his] retro calculation." Between February 7, 2017, and July 11, 2017, Mr. Murphy had submitted W-2s, tax forms, earnings affidavit, and unemployment letter dated 3/2/16. On August 18, 2017, six months after the City informed Mr. Murphy of missing documents, the City's legal counsel finally informed the Union's attorney that Mr. Murphy still had to submit his Social Security earnings. Mr. Murphy supplied that document on November 20, 2017.

The City's witness testified that if there are any discrepancies among the five different types of documentation, they rely on the Social Security earnings report. In AFSMCE, Local 159, the Board did not attempt to determine whether the time consuming administrative process mandated by the City's home rule charter was unreasonable or itself caused unreasonable delays. The Board simply concluded therein that the City failed to expeditiously and reasonably engage in the process in a timely manner. Similarly, this examiner does not herein determine whether the City can unilaterally require one or five or twenty different forms of official documentation to establish a reinstated employe's interim earnings or whether exalting Social Security earnings reports instead of, or in addition to, other official documents is reasonable.

In this case, unlike in AFSCME, Local 159, the City was not bound by its home rule charter to follow a certain time-consuming process, and it was certainly not mandated to do so by Arbitrator Kasher. The City had all the verified numbers that it needed by July 11, 2017, to calculate Mr. Murphy's backpay and implement the Award. Regardless of the City's intentions here and its self-imposed requirements, it had the ability to determine Mr. Murphy's interim earnings in July when it possessed his W-2s, tax returns and earnings affidavit. Without evaluating the reasonableness of the City's Backpay Procedures Policy, the City had an obligation to comply with the Award when able, which in this case was when it already had in its possession multiple types of redundant documents verifying Mr. Murphy's interim earnings as of July 11, 2017. Moreover, the City did not expeditiously follow its own process. It waited four months before initiating a demand for any documents and then it waited another six months, after informing Mr. Murphy of missing documents, that he needed to submit Social Security earnings. These delays have no relationship to the Backpay Procedures Policy itself; The City simply did not reasonably engage in the process, as in AFSCME, Local 159, supra.

The Award implicitly imposes a requirement on Mr. Murphy that he verify his interim earnings. However, the manner in which the City dragged out its own process for verification when it had the means, ability and information required for compliance caused unreasonable delays in implementing the Award. This case is not about whether the City was expressly precluded by the Award from requiring Social Security earnings or whether the Award is ambiguous regarding backpay calculations. The City had the means to timely comply with the Award, and the parties were not disputing the interpretation of the Award. Indeed, the Union is not disputing the use of Social Security earnings to calculate backpay. The Union has only contested the City's delay with respect to the manner in which it required Mr. Murphy's Social Security earnings after having multiple official documents verifying his earnings and after not having requested them in February 2017, when Ms. Hyers requested other outstanding documents.

A weighted, determinative factor here is that the City had the ability to calculate Mr. Murphy's backpay and comply with the Award in July 2017, and it did not inform Mr. Murphy on February 8, 2017, that it wanted a Social Security earnings statement or request while it was requesting other documents from him. Instead, the City waited another six months, until August 16, 2017, to inform him that his Social Security earnings statement remained unsubmitted. Therefore, paying Mr. Murphy in December 2017, was an unreasonable amount of delay. In this regard, Mr. Murphy is entitled to interest, at the rate of 6% per annum, from July 11, 2017, until December 6, 2017 on his backpay and FICA tax refund.

CONCLUSIONS

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

1. The City is a public employer within the meaning of Section 301(1) of PERA.
2. The Union is an employe organization within the meaning of Section 301(3) of PERA.
3. The Board has jurisdiction over the parties hereto.
4. The City of Philadelphia has committed unfair practices in violation of Section 1201(a)(1), (5) and (8) of PERA.

ORDER

In view of the foregoing and in order to effectuate the policies of PERA, the 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 Article IV of the Act;

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. Cease and desist from refusing to comply with the provisions of an arbitration award deemed binding under Section 903 of Article IX of PERA.

4. Take the following affirmative action:

(a) Immediately pay Forrest Murphy six percent per annum interest on his net backpay amount of \$49,738.55 plus his \$1212.47 FICA tax refund for the period from July 11, 2017 through December 6, 2017;

(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 employees 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 eighteenth day of January 2019.

PENNSYLVANIA LABOR RELATIONS BOARD

Jack E. Marino, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AFSCME DISTRICT COUNCIL 47 :
LOCAL 2187, AFL-CIO :
v. : CASE NO. PERA-C-16-353-E
CITY OF PHILADELPHIA :

AFFIDAVIT OF COMPLIANCE

The City of Philadelphia hereby certifies that it has ceased and desisted from its violations of Section 1201(a)(1), (5) and (8) of PERA; that it has paid Forrest Murphy six percent per annum interest on his net backpay amount of \$49,738.55 plus his FICA tax refund for the period from July 11, 2017 through December 6, 2017; 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